LEGAL UPDATE
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Bring your own device - risks for employers

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Due to the Covid-19 pandemic and the Corona Occupational Health and Safety Regulation (Corona-ArbSchV) enacted by the Federal Ministry of Labour and Social Affairs (BMAS), many companies have faced major challenges over the past few weeks and months in order to enable their staff to work from home. A particular problem in this regard was to obtain the necessary hardware quickly. More than a few companies have fallen back on the BYOD model (bring your own device), i.e. using employee's private devices as work equipment.

Basic principle: Employer's obligation to provide equipment

In principle, the employee is only obligated to perform the work agreed in the employment contract and it is a matter for the employer to provide the work equipment required for this (cf. BAG, 12 March 2013– 9 AZR 455/11). The parties to the employment contract may agree to deviate from this so that the employee is obligated/authorised to use private devices, such private laptops, smartphones and even their homes, as work equipment. The advantages are obvious. In addition to increased flexibility and accessibility, BYOD is generally also associated with cost savings for the employer as they do not have to invest in new devices. These advantages result in a range of difficult legal questions which involve not insignificant liability risks for the employer.

Employee's right to reimbursement of expenses

When using private equipment for business purposes the employee has the right to reimbursement of expenses in analogous application of Section 670 German Civil Code (Bürgerliches Gesetzbuch, BGB). This states that the employee may demand the reimbursement of expenses that they incurred in the interests of the employer and reasonably considered to have been necessary in the circumstances. It is not always so easy to determine the amount of the expenses to be reimbursed because the loss in value from using a laptop, smartphone, or rented accommodation is intangible. In practice this is achieved by using lump sum amounts, or the amounts reflect those applied in tax legislation.

If the condition of the used item deteriorates or it is destroyed when used for business purposes the employee may also have a right to request the repair of the damage or a replacement. This is even the case if the employee is at fault for the deterioration of the item. This fault does not preclude the claim for compensation but rather must be taken into account as contributory negligence reducing the amount of compensation. The employee benefits here from the principles of employee liability, put simply, the loss is apportioned between the two parties taking the employee's culpability into account (BAG, 23 November 2006 – 8 AZR 701/05). This frequently results in the employer alone bearing the damage.

The employer can attempt to prevent these risks through contractually waiving the employee's right to have expenses reimbursed or by satisfying these expenses with a lump sum amount. In these cases claims for compensation are excluded (BAG, 14 October 2003 – 9 AZR 657/02). According to the case law the right to bring a claim is also excluded if the employee is at least also acting in their own interests when incurring the expenses. This is the case, for example, where the employee uses private devices and their home for business purposes, even though they have a fully set up workstation in the office and the choice of working location is left up to the employee (BAG, 16 October 2007 - 9 AZR 170/07).

Occupational Health and safety

The question arises under occupational health and safety law whether the employer must also observe the specific regulations of the German Workplace Ordinance (Verordnung über Arbeitsstätten, ArbStättVO) in cases of BYOD. This question depends on whether this is a tele workstation as defined in Section 2 (7) ArbStättVO even if it is not exclusively company equipment that is used.
This is rejected by some because the wording of Section 2 (7) ArbStättVO states that the employer must completely provide and install the necessary work tools at the tele workstation. Others are of the opinion that the ArbStättVO should in contrast apply because the underlying EU Display Screen Equipment Directive 90/270/EEC does not make the definition of a tele workstation dependant on the origin of the equipment. Clarification of this legal issue at the highest level of the judicature or by the legislature is

still awaited. In practice it should be observed that even when working from home the general health and safety obligations of the German Occupational Health & Safety Act (Arbeitsschutzgesetz, ArbSchG) and Section 618 (1) BGB must be adhered to.

Working hours legislation

Using private equipment can also pose various legal problems from a working time point of view. The employer is responsible for ensuring the employee complies with an uninterrupted rest period of eleven hours (Section 5 Working Hours Act (Arbeitszeitgesetz, ArbZG). It is disputed whether the employer is obligated to prevent the constant availability of the employee or the voluntary reading and answering of work emails using private equipment after the end of the actual working hours because this is the only way to guarantee an uninterrupted rest period. A clear view has not yet taken shape in legal literature so that legislative action or clarification in case law is also required in this respect.

Data protection, licensing and fees

Particularly sensitive issues arise regarding obligations under data protection law. Without special precautions there is a risk that private and company data may not be adequately separated from each other and this will result in an uncontrolled storage or reproduction of the data. Although the employer can guard against these risks largely through technically facilitated physical separation of the data, for instance using a container app, a VPN tunnel or a Citrix environment, the responsible authorities are sceptical about the use of private devices.

It must also be taken into consideration that private devices frequently are a gateway for dangerous malware because untrustworthy apps are used or installed programs are not kept updated. A dedicated IT security policy is therefore essential. Even using software licences may constitute a liability risk. This is the case, for instance, because the use of company software is restricted to a certain number of devices or commercial use of (office) software installed on private devices is excluded. The employer may be liable here due to a breach of copyright law as per Section 99 German Copyright Act (Gesetz über Urheberrecht und verwandte Schutzrechte, UrhG).

Co-determination

Last but not least, the use of private equipment is subject to the Works Council's right of co-determination and therefore in general requires a collective agreement. Matters that are subject to the mandatory co-determination of the Works Council in accordance with Section 87 (1) no. 6 Works Council Act (Betriebsverfassungsgesetz, BetrVG (introduction and use of technical devices), Section 87 (1) no. 1 BetrVG (rules of operation and conduct of employees) and Section 87 (1) numbers 2 and 3 BetrVG (working hours) are particularly worth mentioning here.

Outlook

Many of the highlighted problem areas are not new, but they remain a topic of debate due to the hesitation of the legislature. In view of the legal uncertainty employers are advised to be cautious when implementing a BYOD model and in any case to find out more in advance about the existing financial risks and the design options for such model. The foundation of this is introducing detailed BYOD guidelines,

while bearing current case law and legislation in mind. Currently attention should be paid to the draft law on mobile working (Gesetz zur mobilen Arbeit – "MAG") dated 14 January 2021 produced by the BMAS. Here the legislature wants to produce a legal framework for mobile working that happens outside of the office and regardless of whether private or business equipment is used. The MAG draft envisages that the employer should be obligated to adhere to occupational health & safety regulations for mobile work/working from home, in particular to carry out risk assessments and to determine and document the necessary occupational health & safety measures. In addition, the employer is also to be obligated to record working times for mobile workers more thoroughly than under the current obligations.

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Rolf-Alexander Markgraf unter +49 40 500360-760 oder rmarkgraf@goerg.de. For further information about the author visit our website www.goerg.com.

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