

### The burden of producing evidence and the burden of proof in the overtime remuneration process

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In the process of remuneration for overtime the employee bears the burden of producing evidence and the burden of proof for the overtime worked. This has been confirmed by a recent judgment of the Federal Labour Court (Bundesarbeitsgericht, BAG) (cf. [BAG Press Release 4 May 2022 – 5 AZR 359/21](#) (German only)). Here the BAG held that recent jurisprudence of the Court of Justice of the European Union (CJEU) on recording working time does not result in a departure from this allocation of the burden of producing evidence and the burden of proof.

#### The BAG's judgment

In the case upon which the BAG's decision is based the employee documented their daily working hours using an electronic time recording system. The system only recorded start and finish times, but not breaks. After termination of the employment contract the employee requested payment for overtime in the amount of €5,222.67 gross as if they had worked the entire hours recorded without taking any breaks.

Like the Regional Labour Court (Landesarbeitsgericht, LAG), the BAG also rejected the claim and confirmed that the burden of producing evidence and the burden of proof in the overtime remuneration process is borne by the employee. This means that the employee has to produce evidence that they have worked overtime and that the employer had expressly or implicitly ordered, tolerated or retroactively approved this overtime. The BAG clarified that the employer having positive knowledge is not rendered unnecessary as a requirement for overtime to be deemed undertaken at the employer's request by the fact that the employer could

have obtained the positive knowledge from working time recordings that conformed with EU law. Indeed the obligation imposed by EU law to record working time solely serves the purpose of protecting the health & safety of employees and could therefore not be used in questions about overtime remuneration. Interference with the principles developed under national law on the allocation of the burden of

producing evidence and the burden of proof is not what is intended by the EU regulations.

#### Practical relevance of the decision

Even though the specific national implications of the Working Time Recording decision of the CJEU from 2019 (cf. [CJEU 14 May 2019 – C-55/18 – Newsletter 2/2019](#)) are still unclear – the CJEU obligated member states to encourage the introduction of an objective, reliable and accessible working time recording system – and an implementation by the German legislature is still pending, the BAG's decision has provided some legal certainty at least with regard to the overtime remuneration process. Even if employees continue to have to bear the burden of producing evidence and the burden of proof in the overtime remuneration process it could be worth taking a critical look at the drafting of employment contracts to pre-emptively avoid overtime remuneration processes. A lump sum compensation clause could be considered here, but according to the BAG the amount of overtime already paid for in the form of a lump sum added to the regular salary payments should be limited (a threshold of 10% of regular working hours is being discussed, provided income is below the contribution assessment ceiling for statutory pension insurance (2022 West: €84,600)).

## 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 Pia Pracht on +49 221 33660-524 or by email to ppracht@goerg.de. For further information about the author visit our website [www.goerg.com](http://www.goerg.com).

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