

LEGAL UPDATE LABOUR AND EMPLOYMENT LAW

Köln, 18. October 2023

Ban on private mobile phone use in the workplace not subject to co-determination

Anna Huschka

Smartphones have long since been used for more than just making calls. They provide access to social media, streaming services and many other features on demand, therefore offering numerous ways to distract people. It can therefore be sensible for employers to completely ban the use of private mobile phones during working hours. In its judgment dated 17 October 2023 (1 ABR 24/22), the Federal Labour Court (Bundesarbeitsgericht, BAG) first dealt with this contentious issue of whether a general ban on private mobile phone use is subject to co-determination in accordance with [section 87 \(1\) no. 1 of the Works Constitution Act \(Betriebsverfassungsgesetz, BetrVG\)](#) and has provided legal certainty with its decision.

Facts of the matter

The employer is a manufacturing firm in the automotive supply industry with around 200 employees. In November 2021, the employer placed a written notice on a noticeboard informing its employees that mobile phones may not be used during working hours and if this ban was infringed there would be consequences under employment law. The Works Council referred to its right of co-determination under section 87 (1) no. 1 BetrVG and demanded that the employer repeal this ban without delay. After

the employer refused to do so, the Works Council initiated labour court proceedings.

Decision of the BAG

The BAG rejected the Works Council's appeal on a point of law, thus confirming the decisions of the lower courts. The Braunschweig Labour Court (Arbeitsgericht, ArbG) had already rejected the Works Council's application on 17 March 2022 (6 BV 15/21). This decision was then confirmed on 13 October 2022 by the Niedersachsen Regional Labour Court (Landesarbeitsgericht, LAG) (3 TaBV 24/22) and then most recently by the BAG. Even if the reason for the decision is not yet known, it has at least been determined that the BAG agreed with the decisions of the lower courts. The Works Council does not have the right to prevent the introduction of a ban on private mobile phone usage as it has no right of co-determination pursuant to section 87 (1) no. 1 BetrVG with regard to the decree that the private use of mobile phones during working hours is not permitted.

Pursuant to section 87 (1) no. 1 BetrVG, the Works Council has a right of co-determination in matters relating to the rules of operation and the conduct of employees in the establishment. The subject of the right of co-determination in this regard is the operational coexistence and

cooperation of employees. However, there are regulations and ordinances in place which directly specify work duties, i.e. the conduct of employees, that are not subject to co-determination. If a measure has an effect on organisational conduct and the conduct of employees at the same time, it comes down to which regulatory purpose takes precedence. The objective regulatory purpose is decisive here.

The court unanimously held that a ban on using smartphones during working hours for private purposes is not subject to co-determination, taking into account this general distinction between organisational conduct subject to co-determination and the conduct of employees which is not subject to co-determination. In accordance with the overriding regulatory purpose, the ordinance did not regulate behaviour that accompanied work, but rather the methods of carrying out the work. The subject of the measure was determining which activities employees should refrain from doing during working hours due to their negative impact on actual work performance. Employees who use their private mobile phones are often not able to perform their work. Looking at a phone, unlocking it and otherwise using it prevents employees from carrying out their work. It is also different to listening to the radio while working; [in 1986 the BAG ruled](#) that a ban on this was subject to co-determination. Listening to the radio can also be a passive activity and therefore does not necessarily hinder employees from carrying out their work. In addition, listening to the radio while working relates to the operational coexistence and cooperation of employees, as individual employees could be disturbed by the background noise. This would

be different to the private use of smartphones as their use could not disturb other employees in any way.

Whether the judges at the highest level have only agreed with the decisions of the lower court or also fully adopted the reasoning of the lower courts remains unclear at this time. The complete text of the decision, with reasoning, is expected in some weeks.

Practical guidance

Even if the judgment of the BAG is confirmed at the highest level of the judiciary, employers should not rashly introduce a general ban on the private use of mobile phones during working hours based on the fact that participation of the Works Council is not required. Such a ban is classed as an instruction under employment law in accordance with [section 106 of the German Industrial Code \(Gewerbeordnung, GewO\)](#) and therefore must be treated with reasonable discretion. So, for example, a ban on private use in hospitals to avoid interference with machinery such as x-ray machines, would be classed as reasonable discretion. Apart from specific cases like the ones outlined above, employers must always take the legitimate interests of employees into consideration before imposing such a ban. If no specific ban is in place then employees may use their mobile phones for private purposes during working hours to a reasonable extent without having to fear any consequences under employment law. Applicable case law has found that approximately 10-15 minutes per day is socially acceptable and must be tolerated by employers.

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 Ulrike Schmitt by email to ahuschka@goerg.de or by phone +49 221 33660-524. For further information about the author visit our website www.goerg.com.

Our Offices

GÖRG Partnerschaft von Rechtsanwälten mbB

BERLIN

Kantstr. 164, 10623 Berlin
Phone +49 30 884503-0
Fax +49 30 882715-0

HAMBURG

Alter Wall 20 - 22, 20457 Hamburg
Phone +49 40 500360-0
Fax +49 40 500360-99

FRANKFURT AM MAIN

Ulmenstr. 30, 60325 Frankfurt am Main
Phone +49 69 170000-17
Fax +49 69 170000-27

COLOGNE

Kennedyplatz 2, 50679 Cologne
Phone +49 221 33660-0
Fax +49 221 33660-80

MUNICH

Prinzregentenstr. 22, 80538 Munich
Phone +49 89 3090667-0
Fax +49 89 3090667-90