Legal Update
Labor Law

Works Council Activities Do Not Count As Working Time within the Meaning of the Working Hours Act (*Arbeitszeitgesetz* – ArbZG)

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Decision A decision of the Lower Saxony Higher Labor Court of 20 April 2015 (12 TaBV 76/14) involved a case in which an employer required a worker assigned to the late shift to complete his shift, which ended at 8:15 p.m., after attending a works council meeting lasting from 8:00 a.m. to 3:00 p.m. The works council considered this a violation of the provisions of the Working Hours Act (*Arbeitszeitgesetz* – ArbZG) that limit the number of hours an employee may work per day. After the action brought by the works council's was dismissed by the court of first instance, the Lower Saxony Higher Labor Court also ruled that the appeal of the works council was unfounded. The Lower Saxony Higher Labor Court expressly stated that time devoted to work for a works council does not qualify as working time within the meaning of the Working Hours Act. The court grounded its opinion in the fact that employers are the only ones who can be taken to account by regulatory authorities for failure to observe the provisions of the Working Hours Act. The provisions of the Working Hours Act governing fines and sanctions apply exclusively to employers, who cannot, however, in any way interfere with the right of works councils to organize their work as they see fit. It is also possible to argue that employers could ultimately find themselves held responsible for violations of the Working Hours Act that they could never have prevented due to the independence of works councils. However, § 37(2) of the Works Constitution Act (*Betriebsverfassungsgesetz* – BetrVG) does entitle members of works councils to paid time off if they cannot or it is unreasonable to expect them to work before or after a works council meeting. It will regularly be considered unreasonable to expect employees to work before or after a works council meeting if the total time taken up by the works council activities and actual working hours would exceed the maximum working time pursuant to § 3 of the Working Hours Act (8 or, under exceptional circumstances, 10 hours).

Implications for practice Despite the fact that the decision of the Lower Saxony Higher Labor Court makes it explicitly clear that time devoted to works council activities does not count as working hours within the meaning of the Working Hours Act, the Working Hours Act applies indirectly, in particular in the case of shift work. For example, employees are entitled to paid time off under § 37(2) of the Works Constitution Act if prevented from working or if it would be unreasonable to expect them to work. According to the decision of the Lower Saxony Higher Labor Court, this will regularly be the case, in particular if the total time devoted to works council activities and actual work on the same day exceeds 8 or, under exceptional circumstances, 10 hours. Employees cannot then be forced to work. For the avoidance of doubt, it must be mentioned that the matter addressed by the Lower Saxony Higher Labor Court concerns only the Working Hours Act, i.e., issues related to occupational safety and health. The question as to payment for 'works council overtime' is already resolved in § 37(3) of the Works Constitution Act.

The decision of the Lower Saxony Higher Labor Court is now under appeal, and clarification of the issue by the highest courts is pending.

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 Lena Jordan on +49 221 33660-544 or by email to ljordan@goerg.de. For further information about the author visit our website www.goerg.com.

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