

"Working Time in a Digitised Work Environment - Aspects of Flexibility,
Self-Determination and Employee Protection"

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Overview:

- I. Working time and digitalisation
- II. Employee's rights between flexibilisation and health protection
- III. Deliberations on necessary Reforms
- IV. Key Findings

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I. Working time and digitalisation

1. Digital revolution: Advantages and disadvantages

a) Advantages:

- Enabling employees to **take up work from anywhere** making use of smartphones and cloud-solutions.
- Better reconciliation of work and private life

b) Disadvantages:

- **Constant availability** jeopardises health and safety
- Japanese phenomenon of "*karoshi*"; 2015: 93 people died or attempted to commit suicide.
- **"Delimitation" of work** blurs the borders between work and leisure

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2. Constant availability and working time law

a) Legislation of working time in Europe and Germany

aa) European Working Time Directive (Dir. 2003/88/EG, short WTD) and German Working Time Act (Arbeitszeitgesetz, short ArbZG).

(1) Primary goal: protection of workers' health and safety.

(2) Distinction between **working time** and **rest periods**:

- **Limitation of the working day: eight hours**, § 3 sentence 1 ArbZG (Art 6 para. 2 lit. b WTD: weekly maximum 48 hours)
- Mandatory **rest period** of at least **eleven hours**, § 5 para. 1 ArbZG (Art 3 WTD: "minimum daily rest period of 11 consecutive hours per 24-hour period").

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Arbeitszeitgesetz (Working Time Act)**§ 3 Arbeitszeit der Arbeitnehmer**

Die werktägliche Arbeitszeit der Arbeitnehmer darf **acht Stunden** nicht überschreiten. ...

§ 5 Ruhezeit

(1) Die Arbeitnehmer müssen nach Beendigung der täglichen Arbeitszeit eine **ununterbrochene Ruhezeit** von mindestens **elf Stunden** haben.

.....

Working Time Directive 2003/88/EC (WTD)**Article 3 Daily rest**

Member States shall take the measures necessary to ensure that every worker is entitled to a **minimum daily rest period of 11 consecutive hours** per 24-hour period.

Article 6 Maximum weekly working time

Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:

...

(b) the **average working time** for each seven-day period, including overtime, does not exceed **48 hours**.

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bb) The rest period has to be granted "uninterruptedly" (Art. 3 WTD; § 5 I ArbZG):

(1) Consequences: An employee who communicates with his employer at 11:00 pm, by making a phone call or writing an e-mail, is barred from resuming his or her work earlier than 10:00 am.

(2) Derogations:

narrowly confined **deviations** from § 5 para. 1 ArbZG:

- for **certain industries** (eg. hospitals, broadcasting, livestock breeding), only for one hour, § 5 para. 2 and 3 ArbZG
- by **collective agreements** or company agreements according to § 7 para. 1 no. 3, para. 2 no. 1 and 2, para. 2a ArbZG
- by **exemptions, granted by the supervisory authority**, under certain conditions, § 15 para. 1 no. 3 and 4, para. 2 ArbZG.

With the exception of § 7 para. 2a ArbZG, all reductions are required to be balanced out within a specific or to-be-specified period.

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§ 5 ArbZG

(2) Die **Dauer der Ruhezeit** des Absatzes 1 kann in **Krankenhäusern** und anderen **Einrichtungen zur Behandlung, Pflege und Betreuung** von Personen, in **Gaststätten** und anderen Einrichtungen zur Bewirtung und Beherbergung, in **Verkehrsbetrieben**, beim **Rundfunk** sowie in der **Landwirtschaft** und in der **Tierhaltung** um bis zu **eine Stunde verkürzt** werden, wenn jede Verkürzung der Ruhezeit innerhalb eines Kalendermonats oder innerhalb von vier Wochen durch Verlängerung einer anderen Ruhezeit auf mindestens zwölf Stunden ausgeglichen wird.

(3) Abweichend von Absatz 1 können in Krankenhäusern und anderen Einrichtungen zur Behandlung, Pflege und Betreuung von Personen Kürzungen der Ruhezeit durch **Inanspruchnahmen während der Rufbereitschaft**, die nicht mehr als die Hälfte der Ruhezeit betragen, zu anderen Zeiten ausgeglichen werden.

§ 7 ArbZG Abweichende Regelungen

(1) In einem **Tarifvertrag** oder auf Grund eines Tarifvertrags in einer **Betriebs- oder Dienstvereinbarung** kann zugelassen werden,

3. abweichend von § 5 Abs. 1 die **Ruhezeit um bis zu zwei Stunden zu kürzen**, wenn die Art der Arbeit dies erfordert und die Kürzung der Ruhezeit innerhalb eines festzulegenden Ausgleichszeitraums ausgeglichen wird,...

(2) (... betr. Anpassungen bei Rufbereitschaft, in der Landwirtschaft, bei der Pflege und in der Verwaltung ...)

(2a) In einem Tarifvertrag oder auf Grund eines Tarifvertrags in einer Betriebs- oder Dienstvereinbarung kann abweichend von den §§ 3, 5 Abs. 1 und § 6 Abs. 2 zugelassen werden, die werktägliche Arbeitszeit auch ohne Ausgleich über acht Stunden zu verlängern, wenn in die Arbeitszeit regelmäßig und in erheblichem Umfang Arbeitsbereitschaft oder **Bereitschaftsdienst** fällt und durch besondere Regelungen sichergestellt wird, dass die **Gesundheit der Arbeitnehmer** nicht gefährdet wird.

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cc) Qualification of constant availability as working time?**(1) Principle distinction between on-call duty and stand-by duty****(a) On-call duty ("Bereitschaftsdienst"): working time**

Art. 2 no. 1 WTD: "working time means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice"

CJEU (NZA 2000, 1227, 1230 – SIMAP): employees are required to remain **apart from his or her family and social environment**.

(b) Stand-by duty (Rufbereitschaft): workers must be constantly available, but without being obliged to be present;

only the time spent on the **actual provision of services** = working time.

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(2) Jurisprudence:

(a) Medical on-call duty = working time (CJEU, NZA 2000, 1227, 1230 – SIMAP).

(b) CJEU, 21.2.2018 – C-518/15, NZA 2018, 293 Rn. 65 [Matzak]: if the worker (a volunteer firefighter) is obliged to spend **stand-by time** at his home, to be **available** there to his employer and to be **able to reach his place of work within 8 minutes**, the **stand-by time** must be regarded as ‘working time’.

(b) BAG (NZA 1992, 560; BAGE 95, 210): **stand-by duty and on-call duty are also distinguished** on the basis of the **time left to take up work**.

- If an **employee is severely restricted** in how he spent his time off work because he had to actually show up at his permanent workplace if called upon, his service is considered as **working time** (BAG NZA 1992, 560).
- Conversely, where an **employee** was required to carry a mobile phone, but **could perform tasks remotely**, the BAG found that this would constitute **stand-by duty** (BAGE 95, 210, 213 f.).

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(3) Constant availability: stand-by duty

- Constantly available **employees** generally **remain in their home environments**.
- Employees can devote themselves to **leisure activities** and only have to do work for the employer if necessary.

(4) Constant availability as own category between on-call duty and stand-by duty?

- Member states are **bound by the European Law definition** of working time.

b) Attribution of activities performed by employees to the employer?

If activities are a **reasonable and proportionate reaction to an employer's conduct**: active causation as well as **implied toleration** of off-duty work

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c) Consequences, in particular with regard to rest periods

§ 5 para.1 ArbZG and Art. 3 WTD require a „consecutive“ rest period.

Even short time activities, attributable to the employer, **interrupt the rest period**.

Consequence: rest period has **entirely re-granted** to the employee.

aa) Should **marginal activities** not be considered as interruption?

Ratio of § 5 ArbZG: health and safety are not seriously jeopardised by marginal activities

bb) Lack of legal clarity and certainty: how to determine whether answering an e-mail is still a “marginal activity”?

Impairment of recreation depends not only on the **duration** of the interruption, but on the circumstances; is the employee **faced with tasks that cause stress**?

cc) Employee's right to self-determination?

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II. Employee's rights between flexibilisation and health protection

1. Legal bases for the right to a limitation of working time:

a) Art. 31 Charter of Fundamental Rights (CFR) grants fair and just working conditions

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b) Art. 2 para. 2 German Constitution (Grundgesetz, GG) grants the right to physical integrity and **Art. 2 para. 1, 1 para.1 GG** the right to the **protection of privacy**, which is based on a general **right of personality** (“Allgemeines Persönlichkeitsrecht”)

These rights consequently call for a **limitation of maximum working hours**.

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CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (CFR)

Article 15 Freedom to choose an occupation and right to engage in work

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

Art. 31 Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her **health, safety and dignity**.
2. Every worker has the right to **limitation of maximum working hours**, to daily and weekly **rest periods** and to an annual period of paid leave.

Grundgesetz für die Bundesrepublik Deutschland

Art 2

(1) Jeder hat das Recht auf die freie Entfaltung seiner **Persönlichkeit**, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt.

(2) Jeder hat das Recht auf Leben und **körperliche Unversehrtheit**. ...

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c) Employers are obliged to respect these limitations in accordance to

- § 241 para. 2 and § 618 BGB and
- the protected role of fundamental rights.

aa) **Fundamental rights** do not only limit **public authorities, but also contracting parties** if the protection of the weaker party necessitates so.

When a party has **unilateral powers** – like an employer –, a need for protection is evident.

bb) The **German Federal Constitutional Court** emphasised in its case-law that individuals enjoy a **self-determined area of private life** into which they can retreat and remain unmolested (BVerfGE 35, 202, 220; 79, 256, 268).

On this basis, employees must in principle be granted a **"right to unavailability"** outside their working hours.

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d) Company agreements

- Company agreements are required to respect the **right of personality** (§ 75 BetrVG), i.e. the right to **unavailability**.

e) Agreements between employer and employee are subject to a **control** whether they constitute **unfair terms** (§ 310 para. 4 sent. 2 BGB)

- Terms that require employees to be **constantly available**, are in principle unfair.
- Terms should at least **limit availability** to cases of **urgent operational requirements** and set a **maximum number of days** on which workers are required to be available outside of work hours

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2. Right to Working Time Flexibility

- German working time law does not allow **flexible working time arrangements** for those workers who are interested in a healthy **work-life balance** and who want to reconcile work, leisure and family.
- **Example:** The law prohibits a mutual contractual agreement according to which parents are allowed
 - to **leave office early** in order to **pick up their children** from school,
 - to then **spend time with them**,
 - to afterwards dedicate another two hours to **work activities in the evening** and
 - to return to their workplace the **following morning**.

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a) **Mandatory Working Time Law and Protection from Oneself**

- Working time regulation law is **generally mandatory** (§ 7 ArbZG allows limited derogations, in particular by collective agreements).
- Ratio: protection of the weaker party; employees run the danger to **agree to unfair working conditions**.
- Employees are **not fully capable** of estimating the long-term medical consequences of sacrificing rest and recovery.

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b) **Disproportionality of Absolute Limitations to Private Autonomy**

aa) On the other hand, it seems **disproportionate**

- to prohibit even **rational and balanced arrangements** to flexibly allocate working time, or
- to only allow derogations by **collective agreements**.

bb) The **existing derogations** demonstrate that the protection of employees' health does not enjoy absolute precedence.

cc) These considerations cannot only be based on **German constitutional law**; the restrictions of the freedom of occupation entailed by the WTD must be measured against the **guarantee of Art 15 CFR**.

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III. Deliberations on necessary Reforms

1. Re-Thinking the "Rest Period"

- a) A **general reduction** of the rest period or piecing together a rest period over a reference period is **prohibited**.

Art 3 WTD, which requires a "*consecutive*" rest period, offers **no room for interpretation**.

- b) Result **unsatisfactory** for so-called "*knowledge workers*", who interrupt their work in the afternoon (in order to take care of their children) and resume work in the evening.

These workers **do not need another** – "*uninterrupted*" – **rest period of eleven hours**, if, in total, the entire rest period is granted and overexertion is ruled out.

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2. Specific Provisions for certain Groups of Employees

- a) **Art 17 WTD** allows derogations on account of the specific characteristics of the activity concerned, in particular for "**managing executives** or other persons with autonomous **decision-taking powers**".

German implementation does not exhaust the scope of the directive

- **§ 18 para. 1 no. 1 ArbZG**: only so-called "**executive employees**" (*leitende Angestellte*) are exempted from the application of the German Working Time Law.

- b) **Art 17 WTD** allows further derogations

Employees, whose **working hours are also not measured**, can also be exempted from protective regulations of the WTD.

Applicable to a number of "knowledge workers"; § 18 ArbZG consequently should be extended to that type of employees

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Article 17 WTD Derogations

1. With due regard for the general principles of the protection of the **safety and health** of workers, Member States may **derogate from Articles 3 to 6, 8 and 16** when, on account of the specific characteristics of the activity concerned, the **duration of the working time is not measured** and/or predetermined or can be determined by the workers themselves, **and particularly in the case of:**

(a) **managing executives** or other **persons with autonomous decision-taking powers ...**

Article 18 Derogations by collective agreements

Derogations may be made from Articles 3, 4, 5, 8 and 16 by means of **collective agreements**. The derogations shall be allowed on condition that **equivalent compensating rest periods** are granted to the workers concerned or, in exceptional cases where it is not possible for objective reasons to grant such periods, the workers concerned are afforded appropriate protection.

Member States may lay down rules:

(b) for the **extension of the provisions of collective agreements** or agreements concluded in conformity with this Article to **other workers** in accordance with national legislation and/or practice.

§ 18 ArbZG Nichtanwendung des Gesetzes

(1) Dieses Gesetz ist nicht anzuwenden auf

1. leitende Angestellte im Sinne des § 5 Abs. 3 des Betriebsverfassungsgesetzes sowie Chefärzte ...

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3. Flexibility Based on Collective Agreements

Art. 18 WTD allows derogations by **collective agreements on condition** that **equivalent compensating rest periods** are granted to the workers.

Compared with the directive the **options for divergent collective bargaining arrangements** offered by the ArbZG appear insufficient.

a) **§ 7 para.1 no. 3 ArbZG:** the possibility to **shorten rest periods to nine hours** requires that the **"nature of the work conducted"** demands a reduction of the rest period

Employees would attain more flexibility, if the reduction is allowed *"at the request of the worker"*.

b) Collective agreements should further allow **minor interruptions, which would** not lead to a new start of a rest period.

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IV. Key Findings

1. Times of constant availability can be assigned to the category of stand-by duty and are thus generally to be considered rest periods, which begin anew with each interruption. However, rest periods are only interrupted if an employee's activity is attributable to the employer. That is the case if an employee could, taking the overall circumstances of the contractually owed work into consideration, reasonably feel provoked to work.
2. Derogating from provisions of the ArbZG to the effect that rest periods do not have to be granted "uninterruptedly", is, in light of the current European framework, only possible if this is provided for in collective agreements. Greater flexibility can only be achieved if the German legislator makes use of the opening clause of Art 18 WTD and extends the opportunities of the social partners.
3. Employees have a "right to unavailability" outside their regular working hours. In the interest of balancing the interests of both employees and employers, statutory or collective regulations should be imposed that set clear limits to availability.
4. The protection of health pursued by Working Time Law is in conflict with workers' widespread desire for flexible working conditions.
5. Flexible working time models come into conflict with the mandatory nature of Working Time Law. However, the protection from oneself only requires a prohibition of inappropriate contractual conditions. Further restrictions are disproportionate.
6. The mandatory nature of rigid working time legislation should therefore not inhibit working time models that promote the reconciliation of family, leisure and work and at the same time do not jeopardise employees' health and safety.

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