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WHITE PAPER

September 2020

European Court of Justice Ruling on Daily Registration of Working Time—One Year Later

The European Court of Justice ("ECJ") issued a landmark ruling in 2019 that obligated EU Member States to require employers to establish an objective, reliable, and accessible system for recording the hours worked each day by employees (i.e., a daily working time registry). Following the ECJ decision, EU countries that did not already require employers to record daily working time needed to adopt or modify legislation or otherwise account for the decision. Our June 2019 *White Paper* discussed the ECJ Decision and its impacts on EU Member States.

More than one year on, this *White Paper* updates our previous examination of the ECJ decision and discusses the steps EU Member States have taken to implement the ECJ decision, whether through legislation or court decisions. It makes clear that employers in the EU should be particularly cautious to ensure their compliance with legal requirements to monitor employees' daily working time. Such requirements can prove difficult to implement in practice, particularly given rapidly evolving work practices and the current COVID-19 crisis, whereby most EU Member States encourage or even obligate companies to implement remote work.

BACKGROUND

On May 14, 2019, the Grand Chamber of the European Court of Justice ("ECJ") issued a landmark Judgment that all EU Members States must require employers to register the daily working time of their employees (ECJ Judgment, Case C-55/18—Deutsche Bank S.A.E.). The ECJ Judgment resolved a controversial legal debate that originated in Spain five years ago.

In short, the Grand Chamber of the ECJ declared: "The Member States must require employers to set up an objective, reliable, and accessible system enabling the duration of time worked each day by each worker to be measured." Further details on this Judgment are provided in our *White Paper* of June 2019.

At the time of the ECJ Judgment, EU Member States fell into three categories with respect to legislative compliance: (i) those Member States that already were complying with the ECJ's Judgment (e.g., Spain, France, and the Netherlands); (ii) those Member States that were not already complying (e.g., Germany, United Kingdom, and Italy); and (iii) those Member States where it was unclear if they were already complying (e.g., Belgium).

IMPACT OF THE ECJ DECISION ONE YEAR LATER: CONSEQUENCES FOR EMPLOYER NON-COMPLIANCE

The ECJ Judgment has been addressed in legal decisions in various EU Member States, with many courts highlighting the serious consequences faced by employers who fail to record their employees' working time properly.

In Belgium: There has been no legislation modifying Belgian laws on working time registration. The courts, however, must interpret Belgian law in accordance with European case law. To that end, a May 22, 2020, Brussels Labor Court of Appeal ruling in an overtime dispute explicitly referenced the principles of the ECJ Judgment, finding that the employer lacked an "objective, reliable, and accessible system" for time registration. Consequently, even though the employee provided no evidence of her overtime hours worked, the court ordered the employer to pay the alleged overtime. Belgian Labor Courts and Tribunals likely will rely upon this precedent in future decisions, so it is important for Belgian employers to put time registration systems in place, including for remote workers, if they have not done so already.

In France: Employers were required to monitor and record their employees' working time before the ECJ Judgement. Under French law, employers must register employee working time daily unless the employees (i) all work the same collective schedule; or (ii) are subject to a flat-rate pay agreement covering days worked. In a March 18, 2020, decision (RG n° 18-10.919), the French Supreme Court expressly relied upon the ECJ Judgement in clarifying the burden of proof on overtime claims. When a dispute over overtime hours arises, the employee first submits evidence of the allegedly unpaid hours worked, then the employer offers its evidence in response. In its March 18th decision, the French Supreme Court reaffirmed this approach, but clarified that (i) employees and employers equally share the burden of proof in overtime cases; and (ii) judges must review the evidence provided by both parties equally in deciding the case.

In Germany: There is (still) no statute mandating that employers record all employee working time. Under the German Working Time Act, employers must record only those hours worked that exceed an employee's regular working time, an obligation which falls short of the far-reaching ECJ Judgment. It is unlikely that the Working Time Act could be interpreted in conformity with the EU Working Time Directive in the way the Working Time Directive was interpreted by the ECJ Judgment. Nevertheless, a first instance labor court held on February 20, 2020, that, in view of the EU Charter of Fundamental Rights, an employer is required to provide objective, reliable, and accessible records of employee working time in accordance with the EU Working Time Directive, and that a failure to do so results in the burden of proof shifting to the employer on claims for unpaid wages. While it is questionable whether other courts will reach the same decision as this first instance labor court, practically this means that an employer has some risk of liability on a claim for unpaid wages if its employee's hours worked are in dispute and it cannot provide records that establish the employee's actual working time.

In Great Britain: It is unlikely that national laws (specifically, the Working Time Regulations 1998 ("WTR")) comply with the requirements of the Working Time Directive or the ECJ Judgment. According to the WTR, employers are only required to keep

"adequate records" to show compliance with (i) the 48-hour limit on the average week (unless the employee has opted out); and (ii) the protections for night workers. There is currently no specific obligation to keep a daily registry of working hours. In light of the ECJ Judgment, notwithstanding the UK's withdrawal from the EU, there is a risk that courts and tribunals may challenge Great Britain's approach in the future. (EU law continues to apply until December 31, 2020, and, following that, if there is an inconsistency between an EU directive and UK domestic legislation that implemented that directive before exit day (as is the case here), it is understood that the inconsistency should be resolved in favor of the directive). However, the WTR do not allow individual workers to make a claim for an employer's failure to keep adequate records—rather, it is a criminal offence enforced by the Health and Safety Executive (HSE). Currently, HSE's guidance does not reflect the requirements of the ECJ Judgment. It will therefore be interesting to see if the HSE changes its guidance. In the meantime, employers may wish to consider maintaining a system for measuring daily working hours.

In Italy: The Italian parliament has not reacted to the ECJ decision thus far, probably because Italian employers are already obligated to register employees working on a weekly or monthly basis and the majority of employers have tools to keep track of working time (e.g. badges, software on devices, etc.). In addition, according to local laws, some categories of workers (e.g. managers, "smart workers" working partially from home, etc.) are specifically exempted from recording their working time. At minimum, however, employers should consider implementing tools or methods to track their employees' presence at work on a daily basis, bearing in mind that "monitoring of employees' activities" is strictly regulated under local laws and statutes. In the absence of local rule changes, the risk that local Judges will decide claims alleging unpaid wages and overtime consistently with the ECJ decision cannot be ruled out.

In The Netherlands: The ECJ decision had no direct impact on legislation and regulations because Dutch law already requires employers to keep a clear and reliable written registration of working hours and breaks for each employee, including overtime and accrued and untaken holidays. With the exception of certain specific sectors (e.g. transport, shipping, aviation, and mining) or requirements in a collective labor agreement (if applicable), there is no prescribed form of such written registration. In a recent overtime case, the Subdistrict Court in Alkmaar explicitly referred to the ECJ decision to emphasize the employer's obligation to set up an objective, reliable, and accessible time registration system to measure the hours worked each day by each worker, which also supports the burden of proof of the employee. *A contrario*: even though the employee initially bears the burden of proof on overtime claims, the claim is deemed true if the employer is unable to provide a clear and reliable record to serve as counter-evidence. Indeed, the Subdistrict Court in Groningen stated that not having clear and reliable written records, including information on (un)taken days' holiday, supports the employee's allegations.

In Spain: A new employment regulation was passed (Royal Decree-law 8/2019, of March 8) pursuant to which employers must recorded employees' hours worked each day, including the specific time each employee starts and stops work. The form of time recording must be negotiated with the Workers Legal Representatives or, in their absence, the employees. Employers must preserve monthly summaries of working time records for four years, and make those records available to employees, Workers Legal Representatives, and the Spanish Labor and Social Security Inspection. Failure to comply is a serious infringement and may result in fines. Also, if the employer is non-compliant, the burden of proof on an employee's overtime claim may shift to the employer to prove that the overtime *did not* occur.

PRACTICAL GUIDANCE FOR EU EMPLOYERS

Our June 2019 White Paper offered practical guidance to assist employers in complying with the terms of the ECJ Judgment, including a discussion of the benefits and drawbacks of various practices used by U.S. employers (that are obligated by law to monitor working time) such as:

- Electronic registration;
- Track and trace systems;
- The use of policies and guidelines;
- Training;
- Disconnection rules; and
- Periodic audits.

During the COVID-19 pandemic, most EU Member States encourage (and/or mandate) companies to implement and promote remote work by employees. In this context, employers' obligation to record employee working time is more complex given the employees' physical absence from the workplace

and broader freedom to organize the workday at home. The following recommendations are designed to address this additional complexity:

- **Implement Clear Policies and Guidelines Regarding Overtime**: Applicable policies should make clear that employees must get approval from their manager before working overtime. This may include completing a specific form/daily time-sheet each time an employee performs overtime. Employees, however, should nevertheless be paid for overtime performed without authorization, consistent with applicable law. There should also be no retaliation against employees raising overtime issues or complaints with the employer via Human Resources or otherwise.

- **Conduct Training on Employer Policies and Applicable Regulations:** Managers must know and understand the employer's policies and applicable regulations such that they (i) recognize the key issues that give rise to employee complaints; (ii) understand the costs at stake for failure to comply; and (iii) can be effective in overseeing employee working time, workload, and compliance with internal rules and external regulations.

- **Perform Periodic audits:** Companies should regularly conduct audits to verify the accuracy and effectiveness of their systems and policies for registering employee working time. If performed correctly, such audits will assist employers in detecting non-compliant practices and limiting the risks of costly overtime litigation.

Employers must ensure that all mandatory legal and contractual obligations and restrictions in each country are followed prior to implementing any of these measures.

CONCLUSION

In the year following the ECJ decision, courts in various EU Member States have acknowledged employers' obligation to establish an "objective, reliable, and accessible" system for recording employees' hours worked. Several of those decisions made clear that, when evaluating an employee's claim for overtime and/or other unpaid wages, an employer's failure to properly maintain time records could result in the court either sustaining the employee's claim or shifting the burden of proof to the employer to prove the employee did not work the allegedly unpaid hours.

EU employers can implement various tools and methods to ensure compliance with requirements for monitoring working time, but these may require modification and enhancement in view of the strong growth in remote work due to the COVID-19 crisis. Further, employers in the EU should continue to remain alert to new and regularly evolving legal requirements related to working time, particularly any new or modified monitoring requirements. Even if national legislation is not adopted or modified, courts have repeatedly interpreted, referenced, and implemented EU case law in their decisions.

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