Topics in our issue:

Amendmends to the working hours law: the 12-hour working day "light"

Rarely has a change in current law caused quite so much political irritation as has the new working hours regulation. Yet in spite of the concerted outcry from critics, the amendments, effective as of 1 September 2018, are rather moderate. The new rules offer more flexibility at a lower risk of criminal liability.

First of all, a major aspect needs to be considered that was mostly ignored in the public debate: in the future, employees will not be forced to work 12 hours every day, nor will the 8-hour day be given up as the statutory normal daily working hours. Same as today, the normal working day must not exceed 8 hours and the normal working week must not be longer than 40 hours, as provided in Section 3 (1) of the Working Time Act ("AZG"). Regulations governing the normal working hours under various collective bargaining agreements, which frequently specify a reduction to 38.5 or even 38 hours, also remain unaffected.

Under the quite rigid structure of the AZG, any work beyond the normal working hours constitutes overtime. Overtime must be compensated by an allowance of 50% or more, depending on a relevant provision in the collective bargaining agreement, either in the form of money or by compensatory time-off. This has not changed either.

The AZG in its former form already provided for some flexible working hours models. Thus, in case of a long weekend ("short Friday"), employees may work up to 9 hours on some days without receiving an overtime allowance; up to 10 hours a day are permitted if a 4-day week is introduced. Some averaging and flexitime schemes allow up to 10 hours per day and more than 40 hours per week, provided that, when averaged, the normal weekly working hours are not exceeded.

Nevertheless, more than 10 hours of work per day have so far been permitted only in exceptional cases as defined by law or in an emergency, a situation that frequently caused problems for employers. If the daily or weekly limits were exceeded, employers were liable to pay substantial administrative fines even when employees were ready to work longer hours voluntarily.

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Decriminalisation by raising the limits

The new rules decriminalise employers inasmuch as the maximum permitted limits are generally raised to 12 hours per day and 60 hours per week. Consequently, employers no longer risk being fined when longer working hours are needed. Nevertheless, employees must not put in more than 20 hours of overtime per week; moreover, under the EU Working Time Directive (2003/88/EC) a weekly average of 48 working hours must not be exceeded across a reference period of 17 weeks even when there is need for more work.

Right to refuse without giving grounds

The new regulation does not mean that employees are forced to work up to 12 hours per day if so instructed by the employer. Under Section 7 (6) AZG, employees are free to refuse to do overtime without giving grounds for their refusal when such overtime increases their daily work beyond 10 hours or the working week beyond 50 hours. Employees must not be penalised for their refusal; if the employer gives notice, the employee can appeal within two weeks. This provides employees with an effective legal tool to ensure that the 12-hour day remains voluntary.

Choice for employees

Another safeguard for employees is the new Section 10 (4) AZG: For overtime in excess of 10 hours per day or 50 hours per week, employees have the choice of receiving monetary compensation or time-off.

Greater flexibility for flexitime

The extension of the normal daily work to 12 hours improves the flexibility offered by flexitime and has a positive effect for both sides. Flexitime means that employees themselves choose within given limits when to start and stop work. This choice allows them to work longer on some days and shorter on others, for as long as the normal weekly working hours are, on average, not exceeded.

With the new Section 4b AZG, flexitime workers still must not exceed the normal 10 working hours. Extending the daily period to up to 12 hours is, however, possible when the agreed flexitime scheme allows consuming a time credit over a whole day and does not exclude consuming it in connection with a weekly period of rest. It was also clarified that working hours imposed by the management which go beyond the 8-hour day or 40-hour week are deemed overtime. In this way, it is legally safeguarded – contrary to what is being alleged by some critics – that working for 12 hours per day without any additional payment is permissible solely when the flexitime employee him-/herself determines to do so.

New exemptions from the AZG

The new AZG exempts certain family members, executives and other employees "who have significant decision-making powers", always on condition that their entire working hours are, due to the work's special character, either not counted or not predetermined or are defined by the employees themselves in terms of duration and timing. It must be assumed that the new exemptions will cause some interpretative problems in actual practice.

Changes in the Rest Periods Act (ARG)

With the exception of extraordinary cases regulated by law, exemptions from the rest periods during weekends and public holidays were possible only on the basis of ordinances and collective bargaining agreements. Accordingly, they require very long lead times. The new Section 12b ARG permits exemptions on four weekends or public holidays per employee and year, subject to a company agreement, in order to enable enterprises to quickly respond to a temporary rush job. Operations which have no works council installed may use individual agreements, but employees may refuse, without giving any reasons, to do weekend or holiday work.

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The data protection officer in the company

The General Data Protection Regulation (GDPR) specifies when an enterprise needs to appoint a data protection officer (DPO). This officer acts as the first contact in all data security issues.

Under Article 37 GDPR, controllers and processors shall designate a data protection officer when their core activities consist of processing operations which, by virtue of their nature, their scope and/or their purposes, require regular and systematic monitoring of data subjects on a large scale; or processing is carried out of special categories of data ("sensitive data") or personal data relating to criminal convictions and offences.

The obligation to appoint a DPO applies without regard to the company's size or number of staff. A group of undertakings may appoint a single data protection officer provided that such person is easily accessible from each establishment.

Violations of the obligation to designate a DPO are punishable by a fine of up to EUR 10m or 2% of the enterprise's total global annual turnover.

Tasks of the DPO

The foremost task of a DPO is to act as an internal advisor and supervisor. Specifically, the DPO needs to inform and advise the controller or the processor and their employees of their obligations under the GDPR and national data protection regulations and to monitor compliance with such provisions. The DPO is, moreover, assigned an advisory and monitoring function as regards the data protection impact assessment. As an internal contact point, the DPO is required to cooperate with the supervisory authority.

Independent and not subject to instructions

According to Article 38 GDPR, enterprises must ensure that the DPO is involved in all issues which relate to the protection of personal data and must support the DPO in performing his or her tasks. In particular, they must make sure that the DPO does not receive any instructions regarding the exercise of those tasks; he or she must be able to perform his or her duties and tasks in complete independence.

Avoidance of conflicts of interests

The DPO may be a staff member of the enterprise or an external DPO working on the basis of a service contract. If the DPO is an employee of the enterprise who is required to perform other tasks and duties in addition to his or her function of DPO, the two spheres and resultant rights and duties must be separated. Although the DPO does not receive any instructions in performing his or her tasks as DPO, he or she is subject to the employer's instructions for his or her other tasks same as any other employee.

In such cases, controllers and processors must make sure to avoid any conflict of interests. Accordingly, a DPO must not be charged with any task or duty that could lead to a conflict of interests. This includes in particular positions that involve determining the purpose and means of processing personal data. Thus, a conflict of interests may arise when the DPO should have to monitor him- or herself. This would be the case if he or she were to run the IT, marketing or human resources department. Acting as the manager would also be incompatible with the responsibility under the GDPR to report directly to the highest management level. Enterprises are therefore recommended to develop internal guidelines to avoid conflicts of interests when appointing a DPO.

Neither the GDPR nor the Austrian Data Protection Act (DSG) has any provision regarding a minimum term of office for a DPO. Whereas employees can be given notice at any time without any grounds, a DPO under the GDPR must *"not be dismissed or penalised for performing his tasks"*. It remains to be seen how this conflict will be resolved in actual practice. Nevertheless, the DPO will not enjoy the same protection against firing that is accorded to members of a works council, so that his or her dismissal will not require any judicial consent. Gross dereliction of duty, which constitutes grounds for dismissal, justifies his or her removal from the office of DPO. Limiting the period of appointment is permissible and recommended.

Voluntary assignment of a DPO

Enterprises are free to assign a DPO even if there is no such obligation under the GDPR. Such a voluntary appointment is recommended specifically when it is not entirely clear whether it is obligatory. It should, however, be noted that DPOs who are voluntarily appointed have the same rights and duties as those that are mandatorily appointed.

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Invitation to the informative meeting on the Public Procurement Act of 2018

The Public Procurement Act of 2018 offers some important novelties which need to be taken into consideration by contracting authorities as much as bidders. A major issue is electronic tendering in the upper threshold range, applicable from 18 October 2018, which calls for some procedural readjustments. Similarly, the changes regarding the grounds for exclusion and the requirements for restoration of the reliability as well as changes regarding the means of proof of selection criteria are of relevance for contracting authorities and bidders alike.

We cordially invite you to our informative meeting on the new Public Procurement Act of 2018, held at our premises between 9 a.m. and 10:30 a.m. on **18 October 2018**, when Oliver Walther and Thomas Blecha, our experts in public procurement, will familiarise you with the key changes in the federal public procurement law.

Please register under anmeldung@preslmayr.at or 01 / 533 16 95.

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