WORKING TIME REGULATION

German Team Report

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1. Sources of working time regulation in Germany

The German Labour Law relating to working time is derived from different sources. It is influenced by European law.

European Union law takes precedence over conflicting national German law. In the national legal order, constitutional norms rank higher than statutes and federal law prevails over state law. Statutory labour law takes primacy over collective agreements which in turn prevail over works council agreements and individual contracts. Individual contracts may deviate from statutes or collective agreements if the latter contain dispositive provisions or if the terms in the individual contract are favourable to the employee.

1.1. EU[1] directives

Important directives are the Working Time Directive 2003/88/EC (organization of working time) and the Part Time Directive 97/81/EC. The Working Time Directive is put in place to ensure safety and health protection during the working time. Due to Art. 288 Treaty on the Functioning of the European Union, the Directives are not directly applicable and need to be implemented

1.2. EU case law

Cases decided by the European Court of Justice (ECJ) give examples and influence the national norm shaping process and national practice. Whether ECJ case law is to be regarded as a source of law is disputed. The ECJ alone is authorised to interpret the scope and terms of the directives. It gives the national courts instructions on how to define "working time" or "rest time" and sets examples for subsequent decisions in order to achieve full harmonization of German Labour Law (as seen in "Kiel v Jaeger[2]").

1.3. National statutory labour law

The Working Time Act (ArbZG, Arbeitszeitgesetz) is a central piece of national working time legislation; it implements the Working Time Directive. But provisions relating to working time can be found in various other legislative acts:

- The Act of Social Insurance for Flexible Working Time Conditions ("Flexi II", Gesetz zur sozialrechtlichen Absicherung flexibler Arbeitszeitregelungen) aims to ensure better conditions if flexible working time arrangements and working time accounts are in place.
- The Part Time and Fixed Term Employment Contracts Act (TzBfG, Teilzeit- und Befristungsgesetz) applies to employees working part time or whose contracts are limited in time.
- The Working Time Act for Federal Public Officials (AZV, Arbeitszeitverordnung für Beamte und Beamtinnen des Bundes) is a special regulation for civil servants in the federal service.
- The Works Council Constitution Act (BetrVG, Betriebsverfassungsgesetz) gives employees special rights to found a works council. According to Art. 87 BetrVG, the works council shall have a right of co-determination to negotiate with the employer on matters like: commencement and termination of the daily working hours including breaks and the distribution of working hours among the days of the week.
- The Federal Leave Act (BUrlG, Bundesurlaubsgesetz) contains rules relating to holidays.

[1] European Union.

[2] ECJ Case C-151/02 Kiel v *Jaeger* [2003] ECLI:EU:C:2003:437.

- Working time is also regulated in sec. 8 of the Act for the Protection of the Working Mother (MuSchG, Mutterschutzgesetz) and sec. 15 para. 4 Federal Act of Parental Leave and Allowance (BEEG, Bundeselterngeld- und Elternzeitgesetz) which provides that a person on parental leave must not work more than 30h on average per month. Sec. 2 para. 1 Family Care Time Act (FpfZG, Familienpflegezeitgesetz) states that employees taking care of family members at home can reduce their working hours for up to 24 months, provided that the employee continues to work on average at least 15 hours per week.

1.4. National case law

National German case law is not binding for every following case as it is in common law systems. Its character as a source of law is therefore debated. Every case is decided on its own merits. The Federal Labour Court (BAG, Bundesarbeitsgericht), the highest instance in the system of employment jurisdiction, interprets and develops the law. Although decisions by the BAG are theoretically not binding for lower courts, they are generally followed. Due to the considerable regulatory gaps in German Labour Law, case law is of particular relevance.

1.5. Collective private regulation

1.5.1. Collective agreements

Collective agreements are contracts between trade unions and employers' associations. Trade unions are interest groups defending and negotiating better conditions for their members or a whole branch i.e. Train and Traffic (EGV), Industrial Union of Metalworkers (IG Metall), Services (Verdi). They determine higher wages, conditions including working time, number of holidays etc. and organize strikes to enforce their demands if necessary. The employer is obliged to comply with collective agreements concluded between him or herself and a trade union.

1.5.2. Works council agreements

In every establishment with 5 workers, the staff is able to found a works council to influence the employer's decisions. Works council agreements are contracts between the employer and the works council relating to all employees of one factory. Art. 87 BetrVG empowers the works council to form agreements concerning working hours, breaks and distribution of working time during the week.

1.6. Individual Contract

Every employer is bound by a private employment contract between him or her and the employee. Generally, both parties are free to organize the conditions in the contract individually, with due regard to the minimum standards set by law or collective agreement.

Daily practice relating to working conditions such as breaks can develop into an established right, even though not contractually agreed upon.

1.7. Constitution and principles

The German Constitution (GG, Grundgesetz) is the foundation of the German legal order. It provides a framework which has to be considered when interpreting every national statutory or contractual provision.

The ECHR (European Convention on Human Rights) and the Charter of Fundamental Rights of the European Union have an essential influence on national law and its interpretation. An example relating to working time is art. 8 para. 1 ECHR, the right to respect every person's private home and family life,

and art. 31 European Fundamental Rights Charter (fair and just working conditions) mentioning that every worker has the right to rest periods, health and safety.

2. Goals

The main goals are to guarantee safety and health for every worker in his or her working place and protection from exploitation. As overtime and extra hours are often considered normal and expected by employers, employees need protection. This will not only protect the health of the workers themselves but their family life which is a valuable asset. Ultimately, this also serves the employer's interests as it is proven that working more than 8 hours a day leads to more mishaps and accidents.

3. Implementation of the Working Time Directive and Part Time Directive

3.1. How did your country implement the Working Time Directive?

3.1.1. General Ideas

The Working Time Directive 2003/88/EC which took effect in August 2004 is the final editorial revision of the former Directives 93/104/EC and 2000/34/EC.

3.1.2. Main goal

The main goal of these three working time regulation programmes is to create a common standard of workers' health and safety.

3.1.3. Scope of the Directive

The scope of the Directive includes all public and private activities apart from seafarers (art. 1 para. 3 Working Time Directive[3]). Besides there exists special regulation for employees in the civil aviation sector or public transport[4].

3.1.4. Working time vs. rest period

As defined in art. 2 para. 1, working time "means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties". The opposite term would be the rest period (art. 2 para. 2) "which is not working time".

Based on these ideas of European social policy the German law-maker tried to apply the Union's norms to federal working conditions.

3.1.5. Implementation in general

There are two federal acts which represent the working time regulation of the European Union in national terms.

3.1.5.1. Working Time Act

In 1994, Germany passed the Working Time Act by replacing older legislation - set during the Nazi period - to harmonize the national legislation with the Working Time Directive 93/104/EC.

[3] The following articles refer to the Working Time Directive; it will be mentioned if not.

[4] Seamen: 1999/63/EC; aviation: 2000/79/EC; public transport: 2002/15/EC.

This federal act was amended in 2004 as a result of the ECJ judgements "SIMAP[5]" and "Jaeger[6]" (see 3.1.6.3).

3.1.5.2. Federal Leave Act

In 2009, the ECJ judgement "Schultz-Hoff[7]" declared German case law relating to the transferability of annual leave in the case of long-term illnesses to be incompatible with EU law. The Federal Labour Court as the highest labour court in Germany amended its judicature to comply with the ECJ judgment (see 7.3.4.1).

Since then the affected sec. 7 of the Federal Leave Act (BUrlG; Bundesurlaubsgesetz) which regulates the annual leave of German employees has been interpreted extensively to be in line with the ECJ judges' verdict.

3.1.6. Implementation in detail

A closer analysis of the contents of the Working Time Directive 2003/88/EC allows a definition of the status quo of the German application efforts until today.

Following the implementation report[8] of the European Commission and including the most controversial topics the enumeration of working time contents would be this:

Figure 1 European Commissions analysis on the Member States Implementation

		Working Time Directive	Level of satisfaction (MS[9] in general)
1	Limits to working time	Art. 6	satisfactorily transposed
2	Opt-Out[10]	Art. 22 I	frequently applied
3	Annual leave	Art. 7	satisfactorily transposed
4	On-call time	Art. 2 I	applied in 16 MS
5	Compensatory rest	Art. 3-5	satisfactorily transposed

Comparing the report's analysis of German application efforts to the results relating to all Member States, the Commission gives a subtle hint to the national legislator that there still exists a lack of harmonization with regard to several norms of the Directive.

Figure 2 European commission's analysis on the German implementation efforts

		German Labour Law	Level of satisfaction (Germany in particular)
1	Limits to working time	Sec. 3 ArbZG	Not fully complying
2	Opt-Out	Sec. 7 para. 2 a, 7 ArbZG	Restricted/limited use

[5] ECJ Case C-303/98 *SIMAP=Sindicato de médicos de asistencia pública* [2000] ECLI:EU:C:2000:528.

[6] ECJ Case C-151/02 *Kiel v Jaeger* [2003] ECLI:EU:C:2003:437.

[7] ECJ Cases C-350/06 and C-520/06 *Schultz-Hoff v Deutsche Rentenversicherung* [2009] ECLI:EU:C:2009:18.

[8] Commission's Report COM (2010) 802 FINAL.

[9] Member State.

[10] Option-out.

3	Annual leave	Sec. 3 para. 1 BUrlG	Significant changes of practice
4	On-call time	Sec. 2 para. 1 ArbZG	Not fully treated as working time
5	Compensatory rest	Sec. 4, 5 ArbZG	No legally binding norm for substantial sectors

The analysis gives an idea of the national level of application but surely the implementation effort cannot be evaluated by just a few words. Therefore, it is appropriate to draw upon more detailed observations given by other sources that try to widen the perspective in relation to the Directive's content.

The following analysis focuses on the most relevant topics in terms of German implementation including the limits of working time, with its opt-out-deviation and the problem of on-call time as working time (see 7).

3.1.6.1. Limits to working time

According to art. 6, Member States shall pass legislation that guarantees an average working time of maximum 48 hours per week for each seven-day period. In art. 16 b the Directive's reference period is 4 months at the most.

In sec. 3 ArbZG, German legislation set a limit of maximum 8 hours per workday (Monday-Saturday). In exceptional cases the limit can be raised to up to 10 hours per workday. In doing so the employer has to respect either a 6 months or a 24 weeks reference period.

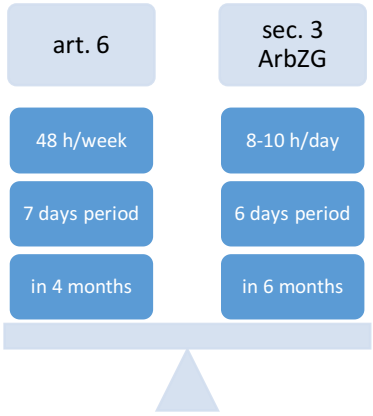

Figure 3 comparison of European and German working time limits

3.1.6.1.1. German Trade Union vs. scholars

Going more into detail, the definition of working time and its limits is a very controversial topic. There are several opinions about the level of implementation: Some claim that the German regulation in sec. 3 ArbZG satisfies the European requirements in art. 6, while others think that there is a lack of implementation which needs to be corrected by new legislation.

Based on the Commission's statement of "not fully complying" there exist additional analyses and results. As an example you can consult the German Trade Union Federation (DGB, Deutscher Gewerkschaftsbund) which supports the European Commission's criticism about the extended implementation of reference periods in sec. 3 ArbZG.

The Commission's statement criticizes particularly the 6 month period for all activities and the possible 12 month period without collective agreement.[11]

A DGB's example[12] shows a theoretical case with a possible 60 hours working week for more than 4 months, which contravenes the reference period in art 16 b:

[11] Commission's Report COM (2010) 802 FINAL, p. 4.
[12] DGB Statement about the national report of German government to the EU Commission about the application of the Directive 2003/88/EG, 16 October 2014.

- 60 hours per week in a period of 4.5 months
- 10 hours * 6 days a week
- Followed by a 1.5 months rest period

The analysis result mentions an extreme use of employees' work capacity which the Directive just allows in a few occasions e.g. collective agreements, according to art. 19 para. 1.

On the other side, scholars' opinion of Hümmerich/Boecken/Düwell[13] takes the view that the current German legislation is comparable to the Working Time Directive.

The example calculates a limit of 48 hours a week even according to sec. 3 ArbZG:

- 48 hours per week in a period of 6 months
- 8 hours * 6 days a week

In this case the German law would be in line with the European Directive. Supporting their analysis Hümmerich/etc. quote the following statistics published in 2008:

- German average working time: 41.2 hours per week,
- European average working time: 40.4 hours.[14]

In both cases the average working time is lower than the limit of 48 hours provided for in the Directive.

These two kinds of interpretation of sec. 3 ArbZG as one text of law give an idea of how profound the conflict is. At this moment a change of the status quo is not expected neither by German nor by European legislation. However, there has been a recent discussion about the need of "liberalizing" the current German statutory solution (see 9.2), which would have been able to change the scope of the German working time regulation (and probably resolve the aforementioned conflict).

[13] Hümmerich/Boecken/Düwell, § 3 ArbZG margin no. 3.
[14] Hümmerich/Boecken/Düwell, § 3 ArbZG margin no. 3a.

3.1.6.2. Opt-out

One of the most controversial topics within the working time debate is the so called "option-out" in art. 22 para. 1. This norm allows for a deviation from the norm set in art. 6 and its limit of 48 hours working time in a 7 days period.

Based on art. 22 para. 1 even the 4 months and the 6 months reference periods (art. 16 b, 19) can be extended.

The figure 2 may express the serious worries of the Directive's critics. Every now and again some social partners try to initiate an amendment of the Working Time Directive and, especially, to improve its provisions in relation to the working time limit. Their aim is to abolish the opt-out.[15]

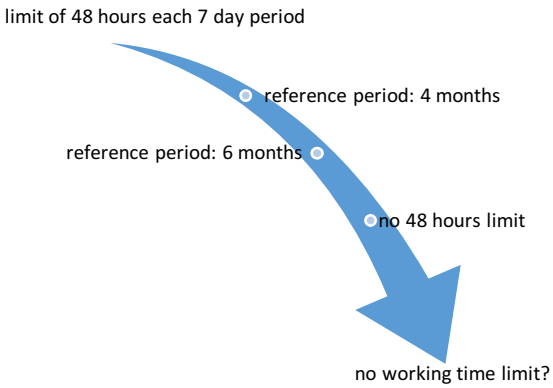

Figure 4 the opt-out consequences by the perspective of Directive´s critics

In 2004, by amending the German Working Time Act the legislature implemented art. 22 para. 1 with its conditions and established sec. 7 para. 2 a ArbZG in connection with sec. 7 para. 7 ArbZG. Since then the literature and several affected persons or groups are in dispute about the compliance between European and German regulation.

3.1.6.2.1. European vs. German opt-out

The following overview shall illustrate the content of the two versions of opt-out:

[15] Schütt/Schulte, § 7 ArbZG margin no. 91.

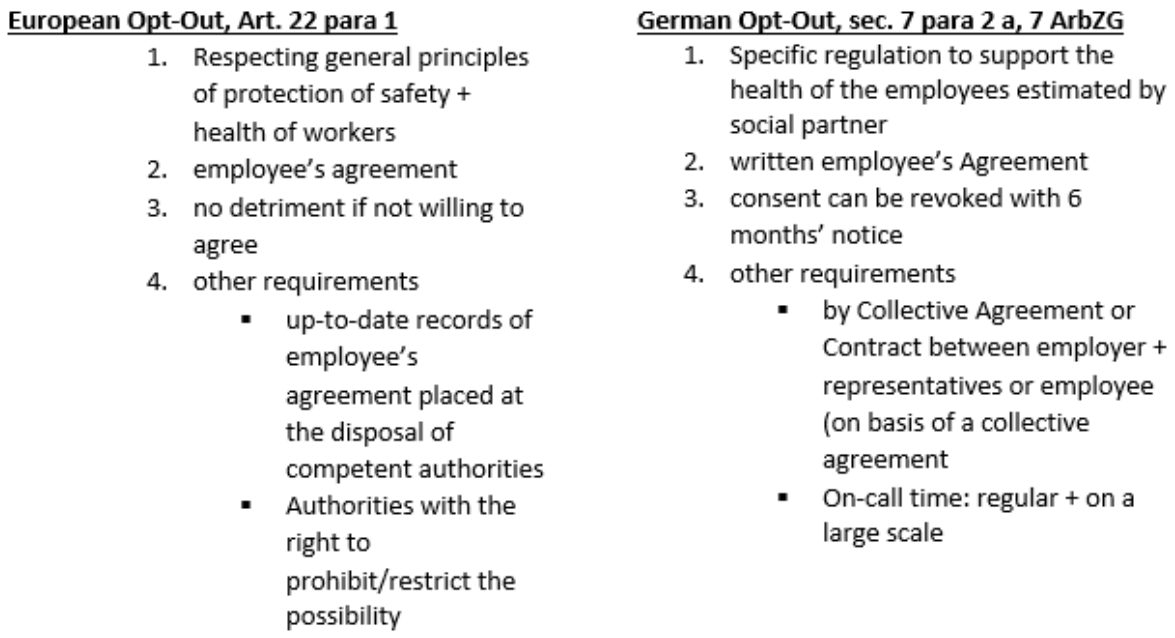

Figure 5 Comparison of European and German opt-out version

The opt-out as the dividing line separates those who believe that the German legislature went too far and overstepped the limits set by the European Directive[16] from others who claim that the legislation may be too careful and Germany would have done better by giving more competence to the social partners.[17]

An example of daily practice can be found with regard to the Trade Union of German Salaried Doctors "Marburger Bund" which represents the salaried doctors working in hospitals. The organisation cancelled the opt-out condition in their collective agreement with effect from 31/12/2012. Affected persons especially criticized the opt-out regulation. The argument of the trade union and its members is the massive workload with 60 to 79 hours a week. The data is based on a membership survey[18] in 2010. In further questions most members made clear that they just want more leisure time or spend more time with friends and family.

3.1.6.3. On- call time

The last topic to obtain a more detailed idea of German implementation in relation to the Working Time Directive is the problem of on-call time and its evaluation as working time.

In the ECJ rulings "SIMAP[19]" and "Jaeger[20]", the court made clear that on- call time at the workplace must be fully counted as working time.

[16] Buschmann/Ulber, § 7 ArbZG margin no. 24; ErfK/Wank, § 7 ArbZG margin no. 18.
[17] Baeck/Deutsch, § 7 ArbZG margin no. 112.
[18] Marburger Bund Hintergrundinformationen, 2012.
[19] ECJ Case C-303/98 *SIMAP=Sindicato de médicos de asistencia pública* [2000] ECLI:EU:C:2000:528.
[20] ECJ Case C-151/02 *Kiel v Jaeger* [2003] ECLI:EU:C:2003:437.

The implementation report mentions: On-call time refers to periods where a worker is required to remain at the workplace, ready to carry out his or her duties if requested to do so. It does not matter if the employee is still working (active on- call time) or may rest (passive on- call time).

Generally, the German Working Time Act distinguishes between three types of on- call time:

- Arbeitsbereitschaft: ready to work at workplace
- Bereitschaftsdienst: on- call time at workplace
- Rufbereitschaft: on- call time outside workplace

In 2004, the German legislative changed sec. 2 ArbZG as a reaction of the ECJ rulings, especially "Jaeger". Since then, Arbeitsbereitschaft and Bereitschaftsdienst are equalized and count as working time.

But Rufbereitschaft is still not seen as working time in the case that the employee can decide where he or she stays. If the employer controls the stay of the employee this time will be full working time.

The former definition and differentiation of working time by the German Working Time Act provoked this conflict.

3.2. How did your country implement the Part Time Directive?

The implementation of Directive 97/81/EC aims to carry out the Framework Agreement on part-time work between the cross-industrial organizations UNICE[21], CEEP[22] and ETUC[23].

The Part Time Directive passed in December 1997, was published in January 1998 and its period of implementation ended on 20/01/2000.

Until that date (or as a special exception in January 2001), the Member States had to implement the Directive based on the Framework Agreement.

The main goal of the regulation is a support of the ever-increasing rate of new employment relationships as a result of the changing global economy.

One of the most popular types is the possibility of part-time work desired by both the employee and the employer.

3.2.1. Implementation in general

The Part Time and Fixed Term Employment Contracts Act (TzBfG, Gesetz über Teilzeit und befristete Arbeitsverträge) protects part-time workers as well as fixed-term workers protected by the EU Directive 1999/70/EC. The German legislator implemented in just one national act two European Directives.

Contrary to the Working Time Directive, the Part Time Directive has been implemented with great success according to the Commission's report in 2003[24]:

[21] Union of Industrial and Employers' Confederation of Europe, former name of BUSINESSEUROPE.
[22] European Centre of Employers and Enterprises providing public services.
[23] European Trade Union Confederation.
[24] Commission's Report 21/01/2003.

		Part Time Directive	Level of satisfaction (Germany)	German Law (TzBfG)
Cl[25].	1[26]	purpose	in terms of content, not literally	-
Cl.	2	scope	all employees without exclusion clause	Sec. 2 para. 1,2
Cl.	3	definitions	detailed description	Sec. 2 para. 1
Cl.	4	principle of non-discrimination	implementation without criterion of access	Sec. 4 para. 1,2
Cl.	5	opportunities for part-time work	removed all obstacles	Sec. 11, 8 para. 1, 9, 7 para. 2,3
Cl.	6	provisions for implementation	in general without any problems	-

Figure 6 European Commission's analysis of the German implementation efforts

3.3. Implementation in detail

A more detailed description than in figure 6 will round off the national efforts.

3.3.1. Purpose, scope and definitions

The Directive's purpose to remove discrimination, improve the quality and facilitate the development of part time work was not implemented literally. But on a closer examination the German legislation translates the European social partners' ideas into practice through the TzBfG.

According to sec. 2 para. 1 TzBfG the norm includes all part time workers within its scope. The detailed definition of this special type of employee took the place of the former insufficient description[27]. Today's norm can be evaluated as sufficiently precise.[28]

The German legislator did not make full use of the given possibilities in cl. 2 para 2. The exclusion of part-time workers on a casual basis was not applied. Quite on the contrary, according to sec. 2 para. 2 TzBfG the norm expressly includes workers with an income of less than 450 Euro per month[29].

3.3.2. Principle of Non-Discrimination

One of the central and most important clauses is the so called principle of non-discrimination.

3.3.2.1. Overview of Principle of Non-Discrimination, cl. 4

- Principle, cl. 4 I
- Between part-time worker and a comparable full-time worker
  - In respect of employment conditions
  - Just because of working part time
  - Possibility of exception by objective grounds

[25] Clause.

[26] Clause of the Framework Agreement on Part-Time Work set by ETUC, UNICE and CEEP, 06/06/1997 and implemented by the Part Time Directive 1997/81/EC; the following articles refer to the mentioned Framework Agreement; it will be mentioned if not.

[27] Former sec. 2 para. 2 Promotion of Employment Act (BESCHFG, Beschäftigungsförderungsgesetz).

[28] Boecken/Joussen, TzBfG § 2 margin no. 2.

[29] See sec. 8 para. 1 no. 1 SGB IV „Geringfügig Beschäftigte".

- Application of principle of pro rata temporis, cl. 4 II
- Arrangement of application by Member State, cl. 4 III
- Criterion for admission, cl. 4 IV
    - Access to particular employment conditions by justification on objective grounds
        - Subject to: certain period of service, working time, earning conditions

3.3.2.2. German implementation as a discrimination ban, sec. 4 para. 1 TzBfG

- Discrimination ban, sec. 4 para 1 sentence 1 TzBfG corresponds to cl. 4 1
- Application of pro rata temporis in sec. 4 para. 1 sentence 2 TzBfG
    - Plus an explicit application of that principle to wages[30]
- No implementation of a criterion for admission as in cl. 4 para. 4

3.3.2.3. Part time work as women's work

Because the German implementation of the non-discrimination principle is seen as an application of the principle of equal treatment[31] the discrimination ban according to § 4 para. 1 TzBfG can relate to other facts of discrimination. In the present instance there is an indirect relation to the discrimination of women. It seems that this number sank until 2015, but the majority of part-time workers are still female.[32] Since about two-thirds of all part-time workers are women,[33] the discrimination of part-time workers can be seen as an indirect discrimination of women. Even the ECJ recognizes that the discrimination of part-time workers satisfies the conditions of an indirect discrimination of women.[34]

3.3.3. Opportunities and provisions

The Commission's report which evaluates the national implementation efforts of each Member State considers the German legislation in relation to the opportunities for part time workers quite positive: Germany removed all obstacles through its implementation.[35] This opinion refers to cl. 5 para 1.

Further requirements of the norm seem to be fulfilled by sec. 11 TzBfG which corresponds to cl. 5 para 2. Cl. 5 para 2 states that an employment contract may not be terminated for the reason of changing between part-time and full-time work. The employer's duties such as the obligation to give consideration to employees' requests for part time work (cl. 5 para. III a-e) were implemented in sec. 7 para 2, 3 (letter c + e), 8 para. 4 (letter a), 9 (letter b) TzBfG. Only the letter d and its demand to facilitate access to part time work at all levels of the enterprise is not regulated particularly.

The legal requirement to maintain or introduce more favourable provisions as mentioned in cl. 6 para. 1 is already part of the German Labour Law. According to the Commission's Report, there are no conflicts relating to the implementation.

[30] Boecken/Joussen, TzBfG § 2 margin no. 2.

[31] "Allgemeiner Gleichbehandlungsgrundsatz"; Laux/Schlachter/Laux, TzBfG § 4, margin no. 5; see also margin no. 12.

[32] Steffen, Das Ende des Achtstundentages, Zeit-Online, 2015.

[33] BT-DRUCKS. 14/4374, 11; BAG Case 3 AZR 613/89, 20 January 1990, AP No. 8.

[34] ECJ Case C- 96/80 *Jenkins v Kingsgate* [1981] ECLI:EU:C:1981:80.

[35] Commission's Report 21/01/2003, p. 28.

4. General framework

In Germany, the general framework about working time is primarily provided by the Working Time Act (see 1.3).

According to sec. 1 no. 1 ArbZG the aim and purpose of the provisions in the Working Time Act is to insure the health and safety of all employees to enable more flexibility in working arrangements.

De jure, according to sec. 2 para. 1 ArbZG, working time is considered as the time from the start of work until the end of work deducting working breaks. The reason for deducting the time of working breaks is in accordance with the judgement of the European Court of Justice "Kiel vs. Jaeger" that this time is for the free disposal of the employee. For employees in the mining industry working breaks are part of working time as their workplace is seen as an inappropriate resting spot. Besides that, even the waiting time at a place the employer defines, travelling by car to a place the employer defines, business trips and the time at work, where the employee needs to be ready to immediately start working are considered as working time.

Not considered as working time is the daily way to work, any ways to places decided by the employee, working breaks, rest periods or standby time, in accordance with "Kiel vs. Jaeger".

There are specific tools to reach the aim of the statute:

To insure the health and safety, there are mandatory working breaks (sec. 4 ArbZG), rest periods (sec. 5 ArbZG), a maximum working time (sec. 3, 6 ArbZG) and a rest period for all Sundays and legal holidays (sec. 9 ArbZG).

Sec. 16 para. 1, 2 ArbZG obliges all employers to post these statutory laws visible to all employees and register the working time of all employees and to keep this information for at least two years.

As sec. 17 para. 1 ArbZG states, the employer is controlled by the responsible authority of the federal state. Violations of these provisions will be punished not only if committed by German companies but also in the case of companies from abroad violating these rules in Germany.

4.1. Statutory working time rules

To insure the health and safety of all employees, according to sec. 3 and Sec. 6 para 2 sentence 1 ArbZG, a daily maximum working time of 8 hours shall not be exceeded. An extension to 10 hours of daily working time is possible if within a period of 6 months (for night workers and shift workers within a period of 1 month) the average working time does not exceed 8 hours a day (see: 3.1.6.1).

In accordance with sec. 4 sentence 3 ArbZG, it is not allowed to work for more than 6 hours without a working break. This break shall be 30 minutes if the daily working time exceeds 6 hours and shall be 45 minutes if the daily working time exceeds 9 hours. The break periods described hereby can be split up into 2 or 3 breaks of 15 minutes each. Unlike working hours (see section 6.2 of this paper dealing with working time accounts), breaks cannot be collected in order to serve as free time.

After finishing work, all employees have the right to have a rest period of 11 hours. Rest periods are defined as an uninterrupted period of time where the employee shall be free to do whatever he or she likes to do. In the past, short interruptions of this rest period were not been a big issue. Rest period interruptions of less than 1 hour were considered as marginally. Only breaks exceeding 1 hour had the effect of to restart the rest period. Today the wording of sec. 5 ArbZG does not allow for such

interruptions any more. Nowadays the rest period shall be uninterrupted. A reduction to a 9 hour rest period is legally possible in certain exceptional cases, for example for the transportation sector. Violations of sec. 5 ArbZG can cause penalties for the companies and the chief executive of the violating employee. According to sec. 22 para 2 ArbZG fines up to 15,000 € for the company and the manager of the violating employee are possible in cases of acceptance of the violation or even direction of the chief executive to the employee to violate the provisions. Repeated offences or intent to harm the health of an employee by overtime exceeding the legal provisions can even be punished by prison sentence under the German law according sec. 23 ArbZG.

Night work is possible in Germany, but it has to be remunerated by a higher wage or additional free days according to sec. 6 para 5 ArbZG. The night worker has a legal right to a medical check-up every 3 years and the right to have a day time working place in case of having a child under the age of 12 or a person in need of care at home. The night worker also has this right in case that his or her health is endangered by continuing night work (sec. 6 para 3 ArbZG).

4.2. Weekly rest and statutory holidays

According to sec. 9 para 1 ArbZG, there is a general prohibition to work on Sundays and statutory holidays from 0 am to 12 pm. The statutory holidays are not completely unified in Germany. Every federal state of Germany defines its own holidays. Nonetheless there are statutory holidays which are uniform all over Germany. Those are New Year's Eve, Good Friday (Friday before Easter), Easter Sunday, Easter Monday, 1st May (Labour day), Ascension Day, Pentecost, Pentecost Monday, 3rd October (German Unification Day), 25th and 26th December (as the first two days of Christmas although the main celebration generally takes place in the evening of 24th December).

An adjournment of this 24 hours working prohibition is possible for companies doing shift work (+/- 6 hours) and car drivers (+/- 2 hours) according to sec. 9 para 2 and 3 ArbZG.

According to sec. 10 ArbZG, further exceptions are possible to ensure public safety and order, relating to the police and ambulances, for entertainment and other events and in pubs, for the media, transportation of perishables, to avoid irreversible damage in individual cases or for the maintenance of energy supply and comparable cases. Also minor works like the start of the machine engines to ensure that they are heated up for the start of work on the following Monday are possible. According to sec. 11 para 1 ArbZG at least 15 Sundays within a year shall be free for all employees in order to increase the emotional well-being of the employees. Sec. 11 para 3 ArbZG states that after each Sunday which was not free, there has to be a mandatory free day within the next two weeks.

4.3. Specifications concerning overtime working hours

Divergent regulations are in accordance with the law if they were made in a collective agreement (sec. 7 ArbZG) and if they are not contrary to the law. Collective agreements can differ from the basic German law, but only by a reasonable amount, e.g. an 11 hour rest period can be shortened to 9 hours, but not to 5. For dangerous work the government can provide that deviations are not possible (sec. 8 ArbZG).

4.4. Scope of this regulation

The provisions in the German Working Time Act only apply to employees. Employees within the meaning of the statute (sec. 2 para 2 ArbZG) are all workers as well as all persons working for the

purpose of their education. Sec. 18 ff. ArbZG contains special modifications, which exclude certain professions from the scope of the statute law.

According to sec. 18 ArbZG, the provision of the statute do not apply to chief executives or head physicians (no. 1), persons in civil service in a leading position (no. 2), live-in care workers or educators (no. 3) or the liturgical part of the church (no. 4).

Furthermore, there are special regulations concerning under-age persons (sec. 18 para 2 ArbZG), workers on open sea and inland waterway transport (sec. 18 para 3 and sec. 21 ArbZG), the civil service (sec. 19 ArbZG), aviation (sec. 20 ArbZG) and road transportation (sec. 21a ArbZG).

5. Statutory, contractual and conventional working time regulation

5.1. Limits of working time

5.1.1. Statutory system

Under certain conditions, an extension of the 8 hour day to 10 or more hours per day is possible based on individual or collective agreements, according to sec. 3, 7 Working Time Act.

5.1.2. Individual contracts

The employer has the right to claim overtime if it is provided for by contract (or works council agreement or collective agreement). The employer can require overtime if it is needed to avoid damages in emergency situations even in the absence of a contractual agreement.

If a lump-sum compensation is to be paid, it needs to be clearly recognizable to the employee how many hours it relates to. A clause which declares any amount of overtime to be compensated through the monthly wage is void. If there is no contractually stipulated number of hours, the employer has a right to decide but neither over the 10h border nor over what would be reasonable according to sec. 315 Civil Code (BGB, Bürgerliches Gesetzbuch). On the other side, the employee has no right to make unasked overtime to collect compensation, for example.

5.1.3. Collective agreements

Collective agreements can contain stipulations relating to overtime. As an example: the Federal Framework Collective Agreement for the Building Industry (BRTV-Bau, Bundesrahmentarifvertrag) provides in sec. 3 para. 1.43 BRTV-Bau for the difference between effectively done work and the regular monthly wages.[36] The hours of overtime can only be collected up to an absolute maximum of 150h (sec. 3 para. 143), hours in excess of that number need to be compensated along with the monthly wage.[37]

5.2. Derogations from the general regulation

While the hours of working time have increased within the last 20 years, the hours of unpaid over-time have become more.[38] In most of the cases workers say they are working more in the hope of a

[36] http://www.soka-bau.de/soka-bau_2011/desktop/de/download/tarifvertrag_brtv.pdf.
[37] BAG Case 5 AZR 521/09, 28 July 2010.
[38] Zapf, Institut für Arbeitsmarkt u. Berufsforschung, Forschungsbericht 3/2012, Flexibilität am Arbeitsmarkt durch Überstunden- und Arbeitszeitkonten, p. 10-11.

promotion or because the work cannot be done in the normal time and it may be that they are under pressure because of competition from their colleagues. Furthermore, over time is often expected.

Provided that there is one, the works council[39] has a right to decide on the temporary extension or reduction of working time. It must not be done if it is not approved by the works council according to sec. 87 para. 1 no. 3 Enterprise Constitution Act (BetrVG, Betriebsverfassungsgesetz). The council and the employer can negotiate scope, requirement and a maximum of over time hours as a general framework so that the council does not have to be asked every time.[40]

5.2.1. Definition

Over time and extra work are not legally defined but are understood as work which the employee performs over the time limit which is contractually stipulated. Extra work is understood as the working time exceeding the 10 hours a day limit. It can also be distinguished between paid working time (including contractually agreed hours plus paid over time) and effectively accomplished hours of work.[41] The working contract can stipulate how many hours of extra work must be done and when the border to over time is reached.[42]

Example: For half time workers in the public service, extra work means extra working hours up to the workload of a full time worker so overtime is given when the part time worker worked more than a full time worker and only the hours above the full time border get paid (sec. 7 para. 6, 7 Collective Agreement for the Public Service (TVöD, Tarifvertrag über den öffentlichen Dienst)).

5.2.2. Is the worker allowed to refuse overtime work and if so under which conditions and what are the consequences?

If there is no contractually stipulated number of hours, the employer has a right to decide but neither over the 10h border nor over what would be reasonable. If the worker refuses to work over time it can cause a written warning. In general, the worker is obliged to loyalty, acting for the company's interest and welfare. Refusing to work necessary over time can be harmful for the company and can be a reason for a dismissal.

Disabled persons have to inform the employer that they want to be exempt from overtime.[43]

Sec. 18 Adolescence Protection Act (JArbSchG, Jugendarbeitsschutzgesetz) provides that adolescents cannot work more than 40 hours per week, based on a daily basis. This special protection rule cannot be waived.

5.3. Compensation

Every employee has a claim to compensation in some form for extra work done. If nothing is stipulated in collective agreement, works council agreement or contract, there is a right to be paid the regular

[39] Betriebsrat.

[40] Bundesministerium für Arbeit und Soziales, Teilzeit- Alles was Recht ist, Rechtliche Rahmenbedingungen für Arbeitnehmer und Arbeitgeber, S. 34.

[41] Zapf, Institut für Arbeitsmarkt u. Berufsforschung, Forschungsbericht 3/2012, Flexibilität am Arbeitsmarkt durch Überstunden- und Arbeitszeitkonten, p. 8.

[42] BeckOK ArbR/Werner, BetrVG, § 87 margin no. 65-66.

[43] BeckOK SozR/Gutzeit, SGB IX § 124 margin no. 3.

hourly wage according to sec. 612 BGB unless an exception applies (as in the case of highly paid employees).

Extra hours can also be compensated in free time.[44]

There can be special regulations for compensation in collective agreements. For example in the collective agreement of IG Metall, the metal workers' union, for every hour the employee works more, he or she can require 20-60% on top of his or her standard hourly wage.[45]

An exceptional claim of free time compensation can arise when an employee has worked more than 10h over 6 months on a daily average, there must be bigger rest periods until the average of 8h per day is reached. Apart from that the worker cannot request a free time compensation without a legal claim.

5.4. Do workers have the right to a reduction or an increase of working time?

5.4.1. Under which conditions

The employee has no right to make unasked overtime to collect compensation. If the employee does over time without the employer's consent, he or she cannot demand to get paid for it.[46] But if the employer gives the worker extra duties which cannot be fulfilled without working over time or if the employer or superior recognizes that the worker is making extra hours and endorses it, this is considered as a consent and the worker has a claim to be paid for these hours.

An employee who has worked more than 6 months for the employer, can request a reduction of the contractually stipulated hours according to sec. 8 para. 1 TzBfG (see 3.2).

According to sec. 8 para. 3 TzBfG, the employer has to discuss the wish of reduction of working time with the employer and has to agree the allocation of working time over the week with the employer. The worker needs to make the request to the employer at least 3 months before he or she wants to start.

According to para. 4 TzBfG, the employer can refuse the request if the company's interests are affected e.g. if the reduction of working time would lead to disproportionate costs or would excessively affect the workflow or safety in the company. According to para. 5 TzBfG, if the worker submits his or her request but the employer still neither comes to an agreement with the employee nor refuses the request by letter one month before the reduction is to take effect, it comes to the reduction the worker has requested.

According to para. 7 TzBfG to have a claim of reduction there need to work more than 15 employees in the business.

In case the employee already works part time, but wants to increase his or her working hours, he or she is to be considered preferentially when a new position with similar requirements is released (sec. 9 TzBfG).

[44] BAG Case 3 AZR 399/94, 17 January 1995.
[45] https://www.igmetall.de/tarifinfo-zuschlaege-896.htm.
[46] BAG Case 5 AZR 122/12, 10 April 2013, DB 2013, 2089.

5.4.2. Reasons to refuse the change

The employer has the right to refuse the worker's request under the legal conditions if he or she announces by letter, at least one month before the requested date, that the business interests prevent the reduction.

If the employer has refused the request, the worker is entitled to repeat the request after two years.

6. How is working time organized over the week, the month or the year? Do working time accounts exist?

As stated under 3.1.6.1 or 4.1, sec. 3 ArbZG provides that the average working time of an employee starts on Monday and ends on Saturday, and shall not exceed 8 hours per day (which is the regular case applied to an employee working full-time).

Besides the classical part-time model (see 3.2, 5.4) there are also other alternatives to the full-time employment. The most important ones are the following:

6.1. Flexitime and flexihours

Flexitime[47] is based on setting up a framework of working hours (usually on a daily or weekly basis) which generally allows the employee to set up a preferred starting and ending time.[48] A provision on flexitime can be included in the employment contract. It usually determines the core working time (when all employees have to show presence at their workplace), the earliest possible starting time and the latest possible ending time. The chosen working hours can either be served on a basis of trust between the employer and the employee[49] or can be recorded in a working time account.

6.2. Working time accounts

Working time accounts serve to record the factual committed work (including overtime hours, holidays and illness) of an employee in order to set it off against the working time stipulated by the contract of employment. By making use of working time accounts the employer can adapt his or her employees' working time to seasonal or cyclical needs and thus save labour costs. In turn, the employee can save overtime hours for more free time or for longer holidays (e.g. sabbaticals) or even for an earlier retirement without the need of relinquishing his or her regular salary. Working time accounts are usually provided for collective agreements, works council agreements or (rather rarely) in contracts of employment. According to sec. 310 para. 4 ArbZG a working time account can also be arranged in terms and conditions. The employer's agreement to set up a working time account cannot be presumed which means that working overtime hours does not automatically lead to "working time account savings". At the same time the German Federal Labour Court decided that hours cannot be subtracted from savings in an existing working time account if the employee has worked less hours than it would have been possible under the collective agreement.[50] Consequently, minus hours can indeed be calculated if the regulation forming the basis to the working time account (collective wage agreements, works agreements) explicitly states this possibility. In this case, burdening a working time

[47] In German: Gleitzeit.
[48] BAG Case 6 AZR 236/93, 16 December 1993.
[49] In German: Vertrauensarbeitszeit.
[50] BAG Case 5 AZR 676/11, 21 March 2012.

account with minus hours presupposes that the employer has already paid for them within the framework of a regular basis, obliging the employee to subsequent performance.[51]

The most frequent working time accounts applied in Germany are the long-term account[52] and the working life account[53]. In other cases, the contract of employment usually states whether plus or minus hours have to be passed off to future working time. When it comes to long term working accounts exceeding 27 months the employee is furthermore obliged to protect the working time account for the case of insolvency according to sec. 7d para. 1 of the Fourth German Social Act [*Sozialgesetzbuch IV]* which enables the employee to set up a claim for the financial equivalent of the working time account.

However, the idea of working life accounts seem to lose its current relevance as people nowadays work very rarely at the same employer for almost their whole life.[54] Additionally, when an employee leaves the company, he or she usually cannot transfer his or her "savings" to his or her next workplace.

Working time accounts are largely applied in the industrial and agricultural sector. Some companies have even stated that it helped them to get through the economic crisis.[55] Interestingly, companies which make large use of working time accounts are generally known for their strong trade unions, which exert strong pressure on the employer to uphold a general 8 hour model in order to avoid the recording of and the payment for extra working hours.

6.3. What are the consequences on wages?

The wage of part time employees (who usually work 30 instead of 40 hours a week) is naturally lower due to the reduced working time. Consequently, the old-age pension and unemployment benefits are reduced as well, as both the fees paid into the legal pension insurance and unemployment insurance are calculated according to the income. Moreover, the unemployment benefits depend on the income an employee has had in the last 12 months of employment. This means that part time workers have to work more than three and a half years on a part time basis, even if they were working on a full time basis before, in order not to lose their "higher claim for pension".

Working time accounts do not generally influence the claim for old-age pensions or unemployment benefits. Since 2009, even saved hours from a working time account can be transferred to retirement insurance.

6.4. What are the consequences on rest periods (breaks/holidays)?

There are no consequences on rest periods in the form of breaks described in 4.1. when it comes to different working time models (no matter if it is a working time account, flexitime or temporary work). That means that the aforementioned sec. 4 ArbZG is equal for any type of working model existing in Germany.

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[51] BAG Case 5 AZR 819/09, 26 January 2011, NJW 2011, 1693.

[52] In German: Langzeitarbeitskonto.

[53] In German: Lebensarbeitszeitkonto.

[54] Von Daniels, Einmal Arbeitszeit abheben bitte!, article published in the „Zeit" – Newspaper under http://www.zeit.de/2014/32/lebensarbeitszeitkonten-vorteile-nachteile, site last opened 1st March 2016.

[55] Zapf, Brehmer, Arbeitszeitkonten haben sich bewährt, Kurzbericht des Instituts für Arbeitsmarkt- und Berufsforschung 22/2010, see under http://doku.iab.de/kurzber/2010/kb2210.pdf.

According to sec. 3 German Holiday Act (BUrlG, Bundesurlaubsgesetz) the minimum of holidays an employee should have is 24 business days (which harmonizes with Sect. 7 of the Working Time Directive determining an annual holiday of 4 weeks), assuming an employee works full-time during 6 days a week (see 7). Holidays are counted according to the number of days an employee works during the week. Consequently, unlike working breaks the different working time models influence the rest periods in the form of holidays. A part time employee working less than six days a week has to get an equivalent of holidays, for example 20 holidays a year when working 4 days a week (see 7.1.1).

Special regulations are applied to so-called temporary workers (better known as "borrowed workers") who work for a specific person or company on the basis of an employment contract set up between the "temporary worker" and a temporary work agency *[Zeitarbeitsfirma]*. The full claim for 24 holidays can only be set up by the temporary worker, when he or she has worked for the same temporary work agency for at least six months. If this barrier is not reached, the temporary worker can only set up a claim for a twelfth of his or her annual holiday.

7. German paid leave regulation

Since 1963, the Bundesurlaubsgesetz (BUrlG) as the Federal Leaves Act contains the most important legal rules about a paid vacation period for employees on a national level.

The statute's objective is the employee's relaxation to maintain his or her working capacity. Within this period of self-determination the employee is exempt from the obligation to work.[56]

Beside the federal rules, there are a lot of different collective agreements, arrangements on company's level or regulation within the individual contract that give more specific rules on paid leave than the federal act. In case of any double regulation the employee can count on the principle of the more favourable norm.

In the course of increasing European harmonization of the national legislation the Federal Leaves Act was the subject of several court rulings of the ECJ and a central source of dispute. From a German point of view one of the most interesting cases is the decision "Schultz-Hoff"[57] from 2009. The German Federal Labour Court had to change its long standing case law in relation to the expiry of vacation entitlement (see 7.3.3).

7.1. Paid leave

In addition to its legally binding function as a lower bound for national paid leave regulation the Federal Leave act seems to be an important point of orientation for any more favourable national arrangement.

7.1.1. The quantity of the annual leave

Every employee is entitled to take 24 (working) days of vacation. The starting point is a 6 days working week, according to sec. 3 para. 1+2 BUrlG. The annual leave differs depending on the total number of days an employee works per week.

The German Labour Courts developed the following conversion rule in their case law[58]:

[56] BAG Judgement from 20 June 2000, NZA 2000, 100.

[57] ECJ Cases C-350/06 and C-520/06 *Schultz-Hoff v Deutsche Rentenversicherung* [2009] ECLI:EU:C:2009:18.

[58] ErfK/Gallner, BurlG § 3 margin no. 4 ff.

- 24 working days of vacation: 6 days working in a week = 4 weeks of annual leave
- 4 weeks of annual leave * 5 days working in a week = 20 days off per year
- 4 weeks of annual leave * 4 days working in a week = 16 days off per year
- And so on

Working days in a week	Days off per year
6	24
5	20
4	16
3	12
2	8
1	4

Figure 7 German conversion rule of the annual leave

The German system defines Mondays until Saturdays as regular working days; Sundays and federal bank holidays will not count (see 4). An exception would be an employee who works usually on Sundays; e.g. as a waitress/waiter or most jobs in the hotel business.

The statute's idea of a 4 weeks leave builds the base of the further calculation which is necessary in case of part time workers.

Since art. 7 para. 1 Working Time Directive 2003/88/EC provides that employers are to guarantee "at least four weeks" of paid leave, German national legislation was in line with this Directive which made further adaptation unnecessary.

Most collective agreements raise the amount of days of paid holidays for their employees. In 1999, the average annual leave entitlement in Germany amounted to 30-31 working days per year.

A survey from the same year, conducted by the German Institute for Economic Research (DIW Berlin Deutsches Institut für Wirschaftsforschung e.V.), counted an average annual leave entitlement of 28 days a year.[59] In practice only 26 days were taken off.

There is a great gap between the average number of holidays of full time or part time employees (29.4/26.4 days off) and in the precarious employment sector (10.6 days off) in relation to their annual leave.[60] This can be explained by the fact that employees working part time are – if working time is reduced by taking days off during the weeks – entitled to fewer days off. 7.6 % of part time workers and 37.9 % of workers in precarious employment reported that they had no leave entitlement at all.[61]

All over Europe – the Union and Norway – the average entitlement is 25.3 days of paid leave per year.[62]

[59] The difference can be explained by the fact that the leave entitlement of employees who do not work during the whole year is proportionately lower.
[60] DIW Berlin Calculations, available under https://www.diw.de/documents/publikationen/73/diw_01.c.360229.de/diw_eb_2004-06-5.pdf.
[61] The legality of these results cannot be judged from the statistical material.
[62] Carley, Entwicklungen im Bereich der Arbeitszeit, European Observatory of Working Life 2004, available under http://www.eurofound.europa.eu/observatories/eurwork/articles/entwicklungen-im-bereich-der-arbeitszeit-2003.

7.1.2. The quantity of payment on paid leave

The amount is calculated[63] according to sec. 11 para. 1 BUrlG; its due date is before starting the holidays.

This remuneration norm is "just" a calculation rule, the real foundation of a claim is sec. 611 BGB in connection with the contract of employment or collective agreements.

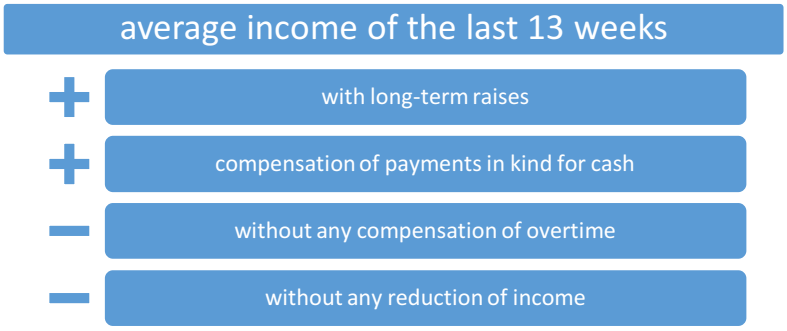

Figure 8 calculation of the average income of the last 13 weeks

The Federal Leave Act - as the whole German labour law - is based on daily calculation (see the calculation of annual leave). This principle leads to another calculation which relates the average income of the past 13 weeks to the regular working days of every single employee:

- 13 weeks * 6 working days a week = 78 working days in the reference period
- 13 weeks * 5 working days a week = 65 working days in the reference period
- And so on

The results above (number of regular working days in the reference period) will be used as the divisor by calculating the exact vacation payment of every single person[64]:

- 1500 EUR of average income / 65 working days = 23.10 EUR daily vacation income
- 23.10 EUR * 10 days of vacation = 231 EUR income for the 10 days of vacation

Court rulings on what constitutes "income"

Norms become interesting when applied to real life. The calculation of income in compliance with the law as well. Lots of court ruling in different areas express certain difficulties regarding the implementation.

The German Federal Labour Court (BAG, Bundesarbeitsgericht)[65] for instance recognizes the payments for emergency service or employees on standby as regular income.

The German courts have distinguished between tips that someone receives personally from the guest or a turnover orientated service charge, although the latter just consists of the recollected tips handed out by the employer. [66]

[63] ErfK/Gallner, BurlG § 11 margin no. 5 ff.
[64] Example developed by the authors.
[65] BAG Judgement from 24 October 2000 NZA 2001, 449 and Judgement from 20 June 2000 NZA 2001, 625.
[66] ErfK/Gallner, BurlG § 11 margin no. 10.

Turning into the world of professional soccer players, the extra pay for being on duty or reaching a certain amount of points or a certain league position counts as a regular part of their income. [67]

7.2. The term "employee"

According to sec. 2 BUrlG, workers, employees and trainees come within the purview of the statute. But there is no definition of "employees" in the Federal Leave Act. The term corresponds to the general definition developed by court rulings and literature: [68]

- The definition of an "employee" in accordance with sec. 611 BGB, 84 HGB[69], 106 GewO[70]
  - someone who performs services
  - under a contract of employment
  - and bound by the employer's instructions

In addition, sec. 2 BUrlG names persons who are "economically dependent" as employees within the meaning of the Act alluding to the term of "employee-like" persons (see sec. 12a para. 1 Collective Agreements Act (TVG, Tarifvertragsgesetz)). The definition in sec. 12a para. 1 TVG can be applied here.

- The definition of an "employee-like" person in accordance to sec. 12a para. 1 TVG
  - economically dependent
  - in need of protection (like a "real" employee)
  - contract for work or services
  - one principal and one agent

By extension the norm includes even "outworkers" with some special rules in sec. 12 BUrlG.

7.3. Further regulation details

Having mentioned the most important parts of the norm there are further regulation details.

7.3.1. One claim per employee, sec. 6 BUrlG

Every employee has got one legal claim to paid leave. In case of changing the employer you cannot take holidays twice.

7.3.2. Date of vacation, sec. 7 para. 1 + 2 BUrlG

Generally, the employee has the right to request a period which conforms to his or her schedule. Social aspects of other employees or urgent interests of the company may have priority.

Furthermore, the norm envisages a continuous period of vacation. Only in case of urgent interest of the employer or because of the employee's request the holidays should be split.

7.3.3. No transferability, sec. 7 para. 3 BUrlG

The same exceptional matters of fact need to be present in order to allow for a transfer of holidays into the new calendar year. In general, there is no transferability allowed. In case of an exception the "old" leave has to be given and taken in the first quarter of the new calendar year.

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[67] BeckOK ArbR/Lampe, BUrlG § 11 margin no. 8.

[68] BAG Judgement from 21 October 1965, AP BURLG § 1 No. 1; BAG Judgement from 20 October 1966, AP BurlG § 2 No.; Neumann/Fenski margin no. 11.

[69] Handelsgesetzbuch as the German Commercial Code.

[70] Gewerbeordnung as the German Industrial Code.

7.3.4. Compensation; sec. 7 para. 4 BUrlG

In case of termination of the employment contract the rest of holidays has to be compensated by the employer.

7.3.4.1. ECJ rulings "Schultz-Hoff" + "KHS"

As mentioned above, according to sec. 7 para 3, 4 BUrlG the ECJ ruling "Schultz-Hoff" in 2009 and the "KHS" judgement[71] published in 2011 caused a massive debate especially in Germany.[72]

Until 2009, the BAG took the view that in case of inability to work caused by illness the holiday entitlement and respective compensation expires.

The ECJ made clear that this construction of sec. 7 para. 3, 4 BUrlG stands in the way of art. 7 Working Time Directive 2003/88/EC.

In 2011 the ECJ completed its court ruling by restricting the entitlement and compensation of holidays to a maximum of 15 months in accordance with the 6th Legal Justification of the Working Time Directive and the transition periods in art. 9 para 1 of the 132th Agreement of the International Labour Organisation (ILO) which mention a period of 12-18 months.

In this way the ECJ tries to balance the employee's holiday entitlement for the purpose of relaxation with the employer's interest of not accumulating an infinite amount of holidays or compensation.

Further requests of preliminary decision proceedings may be a consequence particularly in Germany.

7.3.5. Incidents during vacation, sec. 8, 9, 10 BUrlG

- It is not allowed to have any additional employment which impedes the relaxation, sec. 8 BUrlG.
- Sick days do not count as holidays, sec. 9 BUrlG.
- Even provision of medical care and rehabilitation do not count as holidays under the condition of "payment during illness", sec. 10 BUrlG.

7.3.6. Unalienable right, sec. 13 BUrlG

The entitlement of annual paid leave is – according to sec. 13 BUrlG – unalienable. Thus the paragraph mentioned restricts the right to free collective bargaining. The provisions in sec. 1, 2 and 3 para. 1 BUrlG are irrevocable. The right to a 24 days annual leave is also supported by art. 7 para. 1 Working Time Directive 2003/88/EC.

The bargaining parties are allowed to change the conditions given by the BUrlG in case of more favourable or neutral rules in relation to sec. 3-12 BUrlG (sec. 13 I 3 BUrlG).[73]

8. Specific working time models

8.1. Part time work

Part time work exists in Germany and is protected by law (see 3.2). It is not allowed to treat part time workers as inferior to ordinary employees (sec. 4 para. 1 TzBfG).

[71] ECJ Case C-214/10 *KHS AG v Schulte* [2011] ECLI:EU:C:2011:761.
[72] ErfK/Gallner, BurlG § 7 margin no. 43 ff.
[73] BeckOK ArbR/Lampe, BUrlG § 13 margin no. 1.

According to sec. 2 para. 1 TzBfG part time workers are those whose regular working time per week is lower than that of a comparable employee working full time.

The right to work less than full time exists for every person who has worked in his or her job for more than 6 months. After the employee has asked for a reduction of working time, there is a 3 month period for the employer to find a solution. The employer has to find a compromise with his or her employee and can only deny the employee's wish in case of major harmful consequences to the company (sec. 8 para. 4 sentence 2 TzBfG). One month before the 3 month period ends, the employer has to hand the employees his or her new working time schedule. If he or she fails to do so, the employee's working time wish is granted at the favoured working times of the employee (sec. 8 para 5 TzBfG).

An extension of the working time back to full time is possible according to sec. 9 TzBfG. Part time workers shall be favoured in case a free full time position is available in the company.

An employee's refusal to accept a transformation of his or her full time working position into a part time working position is no reason for termination of his or her working contract. According to sec. 11 TzBfG such a dismissal is null and void.

Due to sec. 13 TzBfG it is also possible to share a working place.

The wages and the mandatory number of free days a year decrease by the amount of days the employee is working (see 7.1.1).

8.2. Week-end work

As mentioned earlier it is generally forbidden to work on Sundays (sec. 9 para. 1 ArbZG). But there are possible exceptions. Sec. 10 para. 1 ArbZG mentions statutory exceptions as listed earlier (see 4.2).

As compensation for the work on Sundays the employee shall have an extra day off within the next two weeks (sec. 11 para. 3 ArbZG). An additional compensation in money is paid in many companies but is no statutory law. [74]

Nevertheless, according to sec. 11 para. 1 ArbZG 15 Sundays per year shall be only for the employee's recreation.

According to sec. 9 para. 2 ArbZG, it is possible for companies with shift workers at night and day time to relocate the free time on Sundays and legal holidays by +/- 6 hours and according to sec. 9 para 3 ArbZG transportation companies for +/- 2 hours.

8.3. Night and shift work

Night work (see 4.1) is considered as working time within in the time from 11 pm until 6 am due to sec. 2 para. 3 ArbZG, lasting at least two hours (sec. 2 para. 4 ArbZG). According to sec. 2 para. 5 No. 1 ArbZG, a night employee is a person usually working during these night hours or on at least 48 days a year (sec. 2 para 5 No.2).

The working time for night and shift workers shall not exceed 8 hours. An extension to 10 hours is possible if the average working time within the month does not exceed 8 hours (Sec. 6 para 2 ArbZG).

[74] BAG Case 5 AZR 97/ 05, 11 January 2006.

Night workers have the right to have a medical check-up each third year. If they are older than 50 years they have this right each year. In addition, night workers shall have the same access to further training and education as day time workers. Furthermore, the night worker has the right to a day-time work if the medical check-up detects an endangerment of the night worker's health (sec. 6 para. 4 a ArbZG) or the night worker has a child of the age of 12 years or younger at home (sec. 6 para 4 b ArbZG) or a relative dependent on care (sec. 6 para 4c ArbZG).

These rights can only be denied by the employer in case of an urgent requirement. In this event the employee representatives and the works council have to be consulted according to sec. 6 para 4 ArbZG.

As a compensation for the night work, employees shall receive a free day or compensation in money according to sec. 6 para 5 ArbZG. [75]

9. Is there a debate in your country about working time? And if so, what are the issues discussed especially in the context of the economic crisis?

9.1. What has already been accomplished?

Concluding from former debates about achieving a better work-life balance one can conclude that those debates have already shown certain success in establishing a statutory right for part-time employment (see 8.1). However, recent investigations have shown that part time employees are still confronted with a lot of difficulties (e.g. the prejudice of not being able to fulfil the employer's expectation of work capacity) when expressing the wish to return to full time working hours, which results in big obstacles in their career path.[76] As a consequence young parents, especially mothers, become affected by a vicious circle when they give up working full time in exchange of undesirable lifelong part time (see the issue of discrimination of women described under 3.3.2.2). Despite the existence of a legal framework enabling the idea of work-life balance, we thus cannot deny the fact that intransigent and hard-line mentalities focusing on the ideal employee cannot change as quickly as the parliament can enact a new law.

Regardless the specificity of part-time models, studies focusing on more general aspects have also shown that employers fear unforeseeable absences of employees and losses in their availability to an extent which already *keeps them* from employing "risk groups" such as young or middle-aged women, women and men in advanced ages or disabled persons. In this context, the German Female Lawyers' Association (djb) recently published a proposal for a legal act on so-called "Working Time Choice".[77] Its authors voiced their support for a further concretisation of the currently binding general clauses in

[75] 30% higher wage - BAG Case 10 AZR 423/14, 9 December 2015.

[76] Baillod, Chance Teilzeitarbeit: Argumente und Materialien für Verantwortliche, vdf Hochschulverlag AG, 2002, p. 150.; DGB German Trade Union Association, Teilzeit als Option der Lebenslaufgestaltung, Brochure published by the German Trade Union Association „DGB", see http://www.dgb.de/familie/++co++89e5265e-cba1-11e3-bf3b-52540023ef1a, site last opened 1st March 2016.

[77] In German: Wahlarbeitszeitgesetz.

order to abolish gender-specific differences in employment relationships.[78] Consequently, the proposal contains quite concrete ideas on how working time could be split (e.g. by job sharing, flexible shift swapping, transferable working time accounts, mobile working or operational funds previewed for compensations in salary during maternal leave).[79] The ideas presented in the aforementioned proposal seem to be quite plausible and fair, and there remains hope that it will have an impact on current as well as on future working time debates.

As we could further read in the present report, the German Labour Law seems to already contain numerous regulations which are capable of matching the needs of any working relationship imaginable. Although overtime hours seem to be no rare phenomenon[80], the average working time of 8 hours on a daily basis remains a legal standard in any full time employment relationship. However, recent studies and research have shown strong tendencies to break with the 8 hour day tradition. The outcome of the underlying discussions could almost be assessed revolutionary.

9.2. What else could be achieved?

Focusing on the aforementioned average working time one could legitimately wonder whether the rule of an 8 hour-day is still perceived as something precious and unalterable in today's practice and modern society. A broader public discussion on working time issues just restarted recently, when the German Federal Ministry of Labour and Social Affairs published a Green Paper called "Labour 4.0" in April 22, 2015. This Green Paper announced an upcoming change in future working life by emphasizing the key words "demographic development", "globalisation" and "knowledge-based society"[81] which were already well-known to the public as a result of media coverage. In order to initiate a debate concerning various work-related topics the Ministry invited experts from different industrial fields and branches (including representatives of both employer and employee organisations) who critically examined the current labour models in the context of their utility for future generations.

In this context the representatives of the Federal German Employer Association (Bundesvereinigung der Deutschen Arbeitgeberverbände) criticized the 8 hour day as an obstacle towards upholding German economic prosperity and global competitiveness. They blamed it for not being up-to-date with an era of digital working methods, time differences in global cooperation and other concomitant circumstances requiring permanent availability.[82] Following this assumption they expressed the necessity of eliminating overtime hours that employees are regularly confronted with due to the employer's needs to react more quickly on last-minute instructions.[83] As a solution they suggested an abolition of an upper limit of daily working time in favour of a maximum limit of weekly working time.[84]

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[78] Pisal/Hofmann/Schübel/Kopp, *Konzept für ein Wahlarbeitszeitgesetz*, djbz 3/2015, p. 124.
[79] Ibidem, p. 126.
[80] Dämon, Überstunden - Deutschland macht Extraschichten, article published in the „Wirtschaftswoche" – magazine under http://www.wiwo.de/erfolg/beruf/ueberstunden-deutschland-macht-extraschichten/12211954.html, site last opened 1st March 2016.
[81] German Federal Ministry of Labour and Social Affairs, Green Paper "Grünbuch Arbeiten 4.0", see under http://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen-DinA4/gruenbuch-arbeiten-vier-null.pdf?__blob=publicationFile, site last opened 1st March 2016.
[82] Position Paper of the Federal German Employer Association, Chancen der Digitalisierung nutzen, see http://einblick.dgb.de/++co++5a8cba76-26f3-11e5-b71c-52540023ef1a, p. 5.
[83] Ibidem, p. 4.
[84] Ibidem, p. 3.

It would allow working more than 8 hours daily without working extra hours, when in return less busy working periods during the week could be designated for work-free time.[85]

That idea proposed by the employer's representatives was strongly criticized by the representatives of the German Trade Union Association. They referred to scientific research results confirming the lack of concentration an employee regularly shows after working 8 hours daily.[86] They further suspected a prospective exploitation as the current laws are not equipped with any sufficient controlling mechanism which could assure maintaining the average weekly working time.[87] In their opinion, the companies should rather set up smart strategies in order to find plausible solutions within the limits of the current laws instead of defaming social and labour law as useless bureaucracy.[88]

Whereas the employee representatives clearly rejected the idea of eliminating the 8 hour – day, most of the famous politicians tended to be rather restrictive.[89] They recalled the reasons why the 8 hour day was once established and issued warnings about imminent physical health problems.[90]

What can we now conclude from the discussion raised by the previous parties? Statistics show that a massive use of overtime hours has almost become common[91] and that most employers feel exploited[92] - despite the existence of compensation models for almost every consequence of overtime hours - whether financial or temporal (see 3.1.6.1, 4.1, 5.3, 5.4). As a consequence, one could conclude that due to the existence of those regulations there should be no problem with overtime work, unless the employer does not apply the law correctly. The current legal regulations should not be expected to cover the (rare and therefore marginal) case of last-minute international transaction closings in big corporations which involve the cooperation of other units working in different time zones. Also situations when ordinary workers would theoretically be needed to work 14 hours on a Monday but only 3 on a Friday (which right now cannot take place in any situation without breaking the law) do not seem to be enough for a plausible argument supporting an overall abolition of the 8 hour day. However, the German legislator's approach is still based on the idea that overtime hours (which basically means everything that exceeds 8 hours on a daily basis) are exceptional by mainly disregarding the fact that various factors such as internet or mobile accessibility inevitably lead to

[85] Ibidem, p. 4.

[86] IG Metall, Arbeitszeitdebatte - Arbeitszeit erfassen und vergüten, article published under https://www.igmetall.de/arbeitszeitdebatte-16813.htm, site last opened 1st March 2016.

[87] Ibidem.

[88] DGB German Trade Union Association, Kommentar - Digitalisierung der Arbeitswelt, available under http://www.dgb.de/themen/++co++46eecd14-262c-11e5-a4fc-52540023ef1a, site last opened 1st March 2016.

[89] Süddeutsche Zeitung, Ministerin Nahles will nicht am Acht-Stunden-Tag rütteln, article published by the „Süddeutsche" – newspaper, see under http://www.sueddeutsche.de/news/karriere/arbeitgeber-ministerin-nahles-will-nicht-am-acht-stunden-tag-ruetteln-dpa.urn-newsml-dpa-com-20090101-150723-99-07509, site last opened 1st March 2016.

[90] Sigmar Gabriel, Video comment recorded at a press conference concerning working time, see under http://www.welt.de/wirtschaft/article144427507/Gibt-es-den-Acht-Stunden-Tag-ueberhaupt-noch.html, site last opened the 1st of March 2016.

[91] http://de.statista.com/statistik/daten/studie/76945/umfrage/ueberstunden-der-arbeitnehmer-in-deutschland-seit-2000/.

[92] Brautzsch, Drechsel, Schultz, Unbezahlte Überstunden in Deutschland, Wirtschaft im Wandel, Jg. 18 (10), 2012, p. 308-315, see http://iwh-halle.de/d/publik/wiwa/10-12-4.pdf.

blurring traditional barriers defining the difference between working and private life. 10 hours of office-work can thus be easily extended by a following 20 minutes - office call, which would not be counted into the overall daily working time.

In our mind, the solution of that problem does not seem too hard as the general idea of collecting working hours to take some other time off strongly reminds one of the previously described working time account model which is already familiar to the German legal system. An abolition of the average daily working time could therefore only work by assuring a sufficient system which would record the working time (including the opening of any e-mail or text message, any computer reboot and any phone call related to work). Working time could thus be controlled easily and the whole recording (and possible exploitations) would become very transparent. Knowing that art. 6 of the Working Time Directive does not even set up a daily but a weekly time barrier (48 hours for a seven-day period) one could also state that this solution would lead to better implementation of European law - assuming that the European legislator already looked ahead by taking these problems into consideration.

9.3. How does the current debate fit in with the reality of the German labour market?

Regarding the economic downturn in 2008/2009[93] and continuously high unemployment rates in various EU-member states[94] a discussion about the sense of an 8-hour day seems to be quite comprehensible in the context of the need to maintain effectiveness as a key factor to economic stability. However, statistics show that there is no reasonable way to connect German economic slowdown to any lack of effectiveness. Despite the economic crisis having reached its climax in 2008/2009, the German economy recovered comparatively well, especially regarding other EU Member States.[95] Within the years of 2007 – 2014, the overall employment rate did not suffer any great decline either.[96] The relatively low growth in atypical working models (such as temporary work, minijobs[97] or subcontracted employment)[98] between 2008 and 2013 does not even reflect a serious loss of quality or stability of work when compared to times before the economic crisis. On the other hand, knowing about this variety of possible working models, one could also argue that those serve to generally maintain a low unemployment rate – which naturally can also be portrayed as a good way

[93] HTTP://DE.STATISTA.COM/STATISTIK/DATEN/STUDIE/156282/UMFRAGE/ENTWICKLUNG-DES-BRUTTOINLANDSPRODUKTS-BIP-IN-DER-EU-UND-DER-EUROZONE/.

[94] HTTP://DE.STATISTA.COM/STATISTIK/DATEN/STUDIE/161608/UMFRAGE/ATYPISCH-BESCHAEFTIGTE-IN-DEUTSCHLAND-NACH-ERWERBSFORMEN-SEIT-1999/.

[95] HTTP://EC.EUROPA.EU/EUROSTAT/STATISTICS - EXPLAINED/INDEX.PHP/FILE:REAL_GDP_GROWTH,_2004%E2%80%9314_%28%25_CHANGE_COMPARED_WITH_THE_PREVIOUS_YEAR;_AVERAGE_2004%E2%80%9314%29_YB15-DE.PNG; HTTP://WWW.MARKT-DATEN.DE/BLOG/WORDPRESS/WP-CONTENT/IMAGES/2013/03/20130325-EU-BIP.GIF.

[96] HTTP://DE.STATISTA.COM/STATISTIK/DATEN/STUDIE/74315/UMFRAGE/ANZAHL-DER-ERWERBSTAETIGEN-MIT-ARBEITSORT-IN-DEUTSCHLAND-NACH-WIRTSCHAFTSBEREICHEN/.

[97] Employment that after German tax law is deduction-free for employees who do not earn more than 450 Euro per month.

[98] http://de.statista.com/statistik/daten/studie/161608/umfrage/atypisch-beschaeftigte-in-deutschland-nach-erwerbsformen-seit-1999.

to "survive" an economic crisis. As already mentioned, large companies stated that working time accounts helped them to get through the economic crisis.[99]

Recent studies have shown that especially full time workers would like to work less whereas part time or temporary workers strongly wish to extend their working hours.[100] Fewer working hours necessarily result in lower wages, fewer rest periods and, most of all, fewer career opportunities. We thus cannot talk about an overall satisfaction when it comes to working times and what comes with it, even when following the statement of "less work is better than no work".

In any way, regardless of any numbers, the younger German working generation (thus the supply – side of an employment relationship) does not seem to be gravely concerned about their working perspectives either. Often referred to as the so-called "Generation Y" their main wishes are currently revolving around individual work allocation, less working time and, most of all, a high level of self-determination in one's personal career.[101] The economic crisis does thus not seem to have strongly influenced any universal consciousness of the current German economic situation – and if at all, at least not to an extent which would make it necessary to come up with doubts about working effectiveness. Reviewing the employers wishes of the abolition of the 8 hour day in the context of the expectations stated by the "Generation Y" it can be concluded that there rather remain some clear differences between the young employees' and current employers' perceptions of flexibility.[102] The following decades shall show to which extent both sides are able to find compromises in order to resolve this conflict of interests.

[99] Zapf, Brehmer, Flexibilität in der Wirtschaftskrise, Kurzbericht des Institus für Arbeitsmarkt- und Berufsforschung, 22/2010, see http://doku.iab.de/kurzber/2010/kb2210.pdf.

[100] Kramer, Beschäftigte würden gern mehr arbeiten – oder weniger, article published in the „Tagesspiegel" – newspaper, see under http://www.tagesspiegel.de/wirtschaft/die-deutschen-und-ihre-arbeit-beschaeftigte-wuerden-gern-mehr-arbeiten-oder-weniger/11964826.html, site last opened the 1st March 2016.

[101] Absolventen unter die Lupe genommen: Ziele, Wertvorstellungen und Karriereorientierung der Generation Y, Study published by the Kienbaum – Institute, see under http://www.kienbauminstitut-ism.de/fileadmin/user_data/veroeffentlichungen/kienbaum_institut_ism_studie_absolventen_08_2015.pdf, p. 10-11., site last opened the 1st March 2016 .

[102] Steffan, Ralf, Arbeitszeit(recht) auf dem Weg zu 4.0, NZA 2015, p. 1412.

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