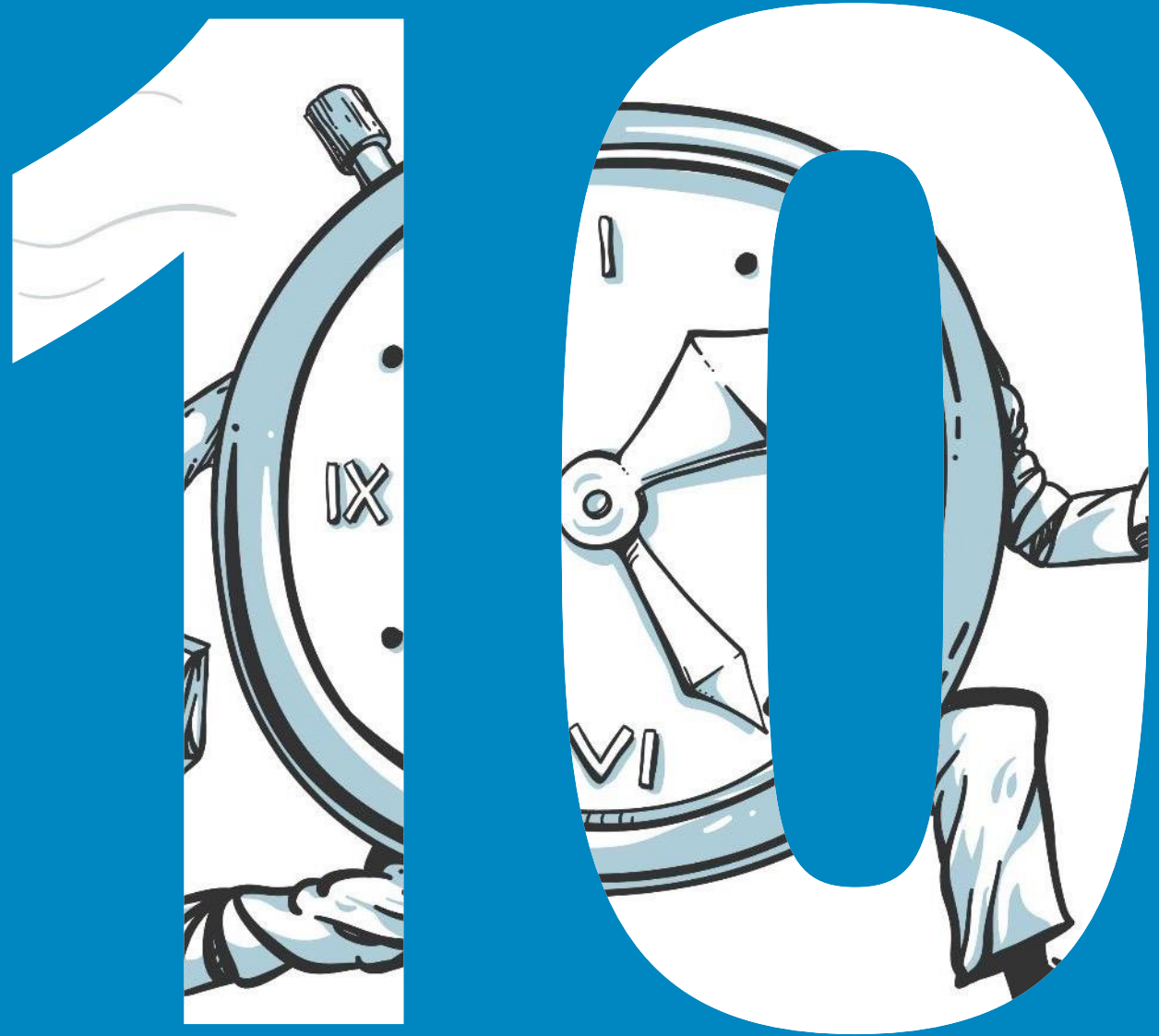


Problem: Working hours in eSports





... Time ...

Wise words from wise people

- *The most important thing in life is time. Living means using time properly.*
(Bruce Lee)
- *Life is short, not so much because of the short time it lasts, but because we have almost no time left to enjoy it.*
(Jean-Jacques Rousseau)
- *Anyone who does not have two-thirds of their day to themselves is a slave.*
(Friedrich Nietzsche)
- *It is not that we have too little time, but that we waste too much of it.* (Lucius Annaeus Seneca)



The relationship between time and working hours

24 hours – working time = leisure time

In the world of work 4.0 (the digital world), many problems relating to working hours have already become apparent.

- Maximum working hours
- Rest breaks
- Rest periods

All of these are being scrutinised in the context of globalisation (time difference → night work) and digitalisation.

The discussion de lege ferenda is raging.



Problem area

eSports – 1. time-consuming and 2. leisure activity?

1. eSports is extremely time-consuming for professionals, including training.

→ How much training is acceptable, and what about breaks and rest periods?

2. For most people, eSports is a leisure activity

For employed eSports players, this is not the case, at least within the scope of their contractual obligations. Employed eSports players pursue a profession that is, in terms of its phenotype, a leisure activity.

→ Are they allowed to pursue their hobby of "gaming" in their free time?

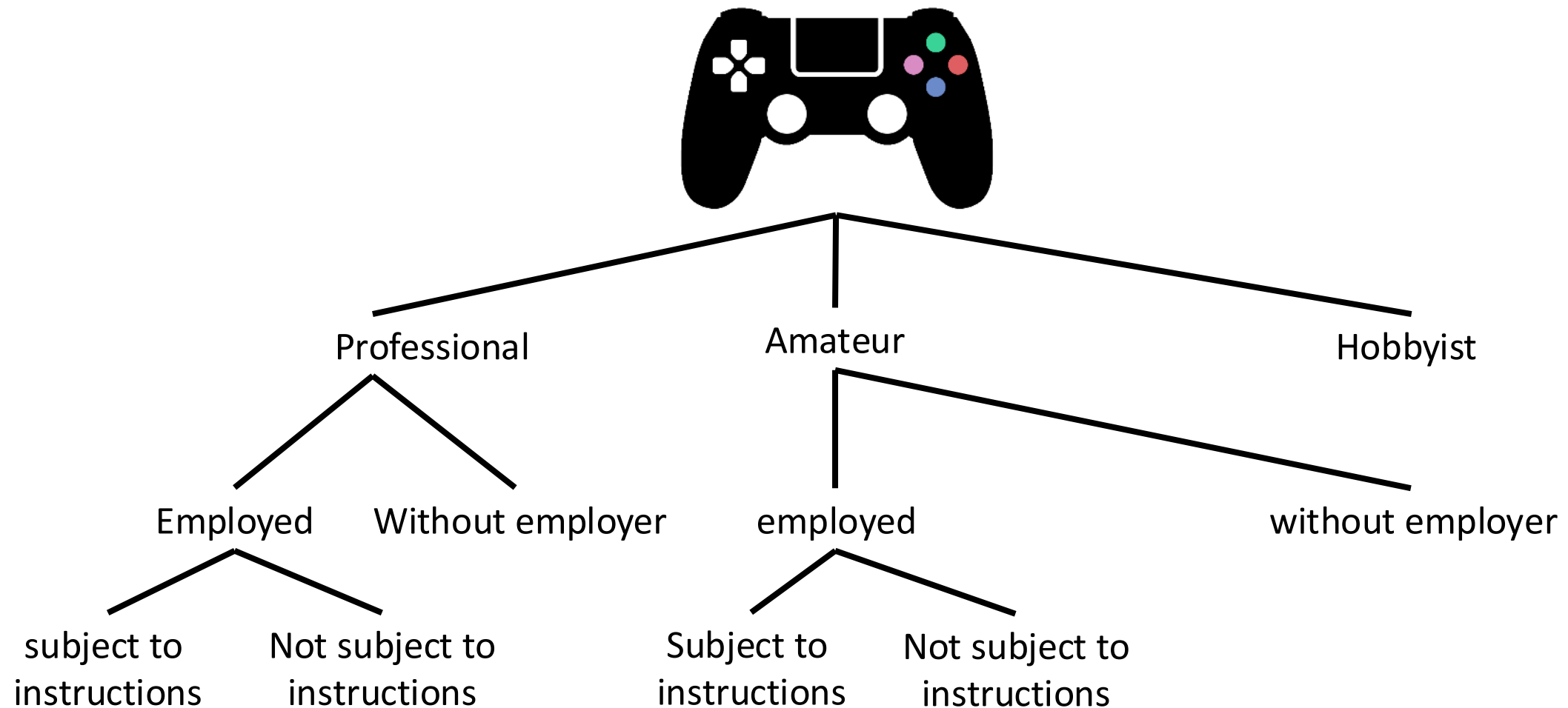
Problem:
Working
hours in
eSports

eSports in
labour law

Labour law in eSports



eSports players





Labour law in eSports

Classification of eSports players

- *Hobbyist* = plays "only" for their own enjoyment

Legal assessment → no legal obligation to anyone, possibly a sponsorship agreement for streams and advertising and licence agreements with the publisher to be allowed to play (if participating in tournaments, then more of a right than an obligation to play)

- *Amateur* = plays for their own enjoyment, but is so good that they can already earn money from it

Legal assessment → may be self-employed or employed and, depending on the degree of instruction, may be an employee or self-employed

- *Professional* = usually plays for their own enjoyment, but is so good that they do it as a profession and earn/can earn money from it

Legal assessment → may be self-employed or employed and, depending on the degree of supervision, may be an employee or self-employed

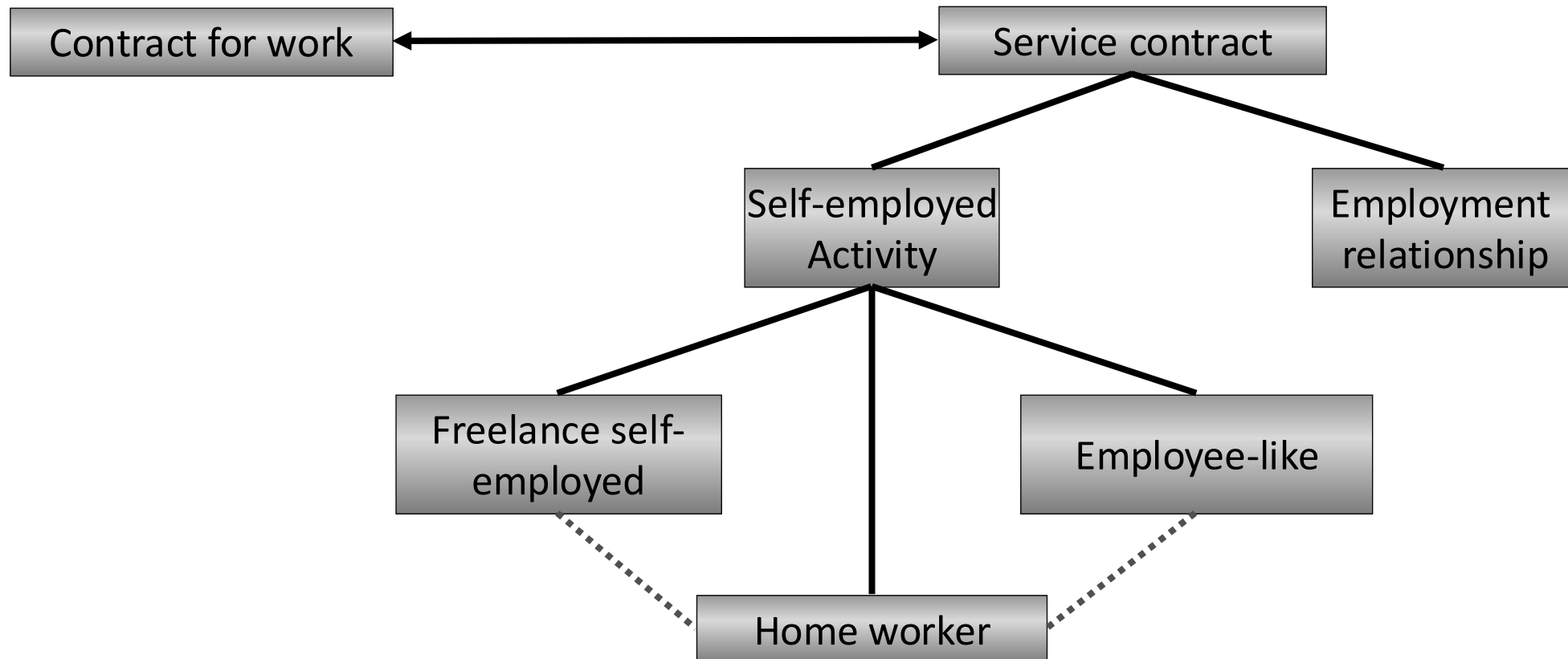


Distinctions

Contract types

The contract must be aimed at the performance of services.

This means that only the performance of the work is owed, not the success.



Labour law in eSports



Definition of employee and eSports

Section 611a Employment contract

(1)¹ The **employment contract** obliges the employee **to perform work** for another person **in a personal relationship of dependence, bound by instructions and determined by others**.² The right to issue instructions may relate to the content, performance, time and place of the work.³ Anyone who is not essentially free to organise their work and determine their working hours is bound by instructions. ⁴The degree of personal dependence also depends on the nature of the work in question.⁵ In order to determine whether an employment contract exists, all circumstances must be taken into account.⁶ If the actual implementation of the contractual relationship shows that it is an employment relationship, the designation in the contract is irrelevant. ...

(2) The employer is obliged to pay the **agreed remuneration**.

The most difficult form of differentiation is based on the characteristic of dependency. The criterion is indisputably necessary, but how it is defined and when it applies is legally controversial and difficult to understand in practice.



Interim results

Consequences

- Employed eSports players may be considered employees.
- The term "employee" is a status term.
- Labour law applies either in full or not at all (in minimal excerpts for employee-like persons).
- The entire occupational health and safety law (including protection against dismissal, etc.) applies. In particular, working time law should be considered here.
- Digression: The eSports player is therefore also an employee within the meaning of Section 7 of the German Social Security Code IV (SGB IV).

Problem:
Working
hours in
eSports

Limits on
working
hours for
adults



Definition of working time

ArbZG

Section 2 ArbZG Definitions

(1) Working time within the meaning of this Act is the time from the start to the end of work, excluding breaks; ...

- Preparation and follow-up times (getting dressed, washing, etc.) → generally (-), unless otherwise agreed [generally unproblematic in eSports]
- Travel time → generally (-), unless otherwise agreed [in eSports, possibly when travelling to tournaments in person]
- Times of reduced work performance (on-call duty, etc.) ECJ (+) → [not conceivable in eSports]

The fact that it is "also" a leisure activity does not detract from this.

Training, playing for streaming and participating in tournaments are working time within the meaning of the ArbZG.



Maximum duration & Telos

ArbZG

With regard to maximum working hours, the ArbZG is relevant as technical occupational safety (health protection) legislation.

However, there are more specific protective regulations for the protection of particular groups of people (pregnant women, young people and disabled people).

- Working hours, Section 3 ArbZG: 48 hours/week (on average), **8 hours/day**, max. 10 hours/day (compensation period 6 months)
- Rest breaks, Section 4 ArbZG: **after 6 hours at the latest for 30 minutes**; after 9 hours or more for 45 minutes (usually unpaid)
- Rest period, Section 5 ArbZG: **at least 11 hours between 2 working periods**

Purpose of the ArbZG, cf. Section 1 ArbZG:

To protect **the safety and health** of employees & to protect Sundays and nationally recognised public holidays as days of **rest** and **spiritual uplift** for employees.



Special provisions

ArbZG

Section 6 ArbZG: Night work (between 11 p.m. and 6 a.m.): additional protection

→ May be relevant in eSports due to time differences in tournaments.

Section 7 ArbZG: Opt-out: Allows for deviations through collective agreements, works agreements or service agreements

→ Not apparent in eSports that anything exists in practice.

Section 18 ArbZG: Senior executives (and certain groups of people) are not protected

→ Section 5 (3) BetrVG is not fulfilled in the case of eSports players.

Sections 19 ff. ArbZG: Special regulations for the public service, aviation, shipping, road transport

→ clearly not relevant in eSports



Location of working hours

ArbZG

Not only the duration but also the location of working hours is regulated.

Section 9 ArbZG Rest on Sundays and public holidays

(1) Employees may not be employed on Sundays and public holidays from midnight to midnight.

Numerous exceptions: Section 10 ArbZG and Section 13 (1) No. 2 lit. a and (2) ArbZG in conjunction with regulations.

Section 10 ArbZG Employment on Sundays and public holidays

...

5. for musical performances, theatre performances, film screenings, exhibitions, performances and **other similar events**, ...

7. in **sports** and leisure, recreation and entertainment facilities, in tourism, as well as in museums and scientific reference libraries,

Sanctions



ArbZG

Enforcement of the ArbZG is monitored by the trade supervisory authorities of the federal states in accordance with Section 17 ArbZG and is subject to fines in accordance with Sections 22 and 23 ArbZG (i.e. a violation constitutes an administrative offence → of up to 2,500 euros or 15,000 euros).

At the same time, the ArbZG is a protective law within the meaning of Section 134 of the German Civil Code (BGB). → Violations render the agreement null and void.

This particularly applies to violations of the maximum working hours.



ECJ – Judgment of 14 May 2019 – C-55/18

Documentation requirements

Articles 3, 5 and 6 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union and Articles 4(1), 11(3) 3 and Article 16(3) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, must be interpreted as **precluding legislation of a Member State which, as interpreted by the national courts, does not require employers to set up a system for measuring the daily working time of each worker?** (ECJ NZA 2019, 683)

Problem:
Working
hours in
eSports

Limits on
working
hours for
minors



Minors

Significance of working time regulations

Many eSports players are between the ages of 16 and 25 (partly due to their reaction speed).

With their parents' consent, they can also act as employees (Section 113(1) of the German Civil Code (BGB)).

"The 17-year-old Austrian shares an incredible 2.69 million Euro in prize money with his teammates."



Here, the health and development of minors is protected even more.



Minors – Scope of application

JArbSchG

Labour law regulations on the protection of minors

Material scope of application:

Section 1 (1) Nos. 2 and 3 JArbSchG → **Employees, home workers and other services similar to the work performed by employees or home workers**

Other age limits apply here:

Section 2 (1) JArbSchG → **Child** = age **< 15 years** (extension of the rules in paragraph 3)

Section 2 (2) JArbSchG → **Young person** = $15 \leq \text{age} < 18 \text{ years}$

Principle: Section 5 (1) JArbSchG → "Employment ban" (P): prevailing opinion sees this as a ban on concluding contracts.

Restriction: Section 5 (3) JArbSchG → Children over 13 years of age with parental consent, if the employment is light and suitable for the child (see next slide)



Minors – Children

Section 5 (3) JArbSchG

Employment is considered light if, due to its nature and the specific conditions under which it is carried out, it

1. the safety, **health and development of the children**,
2. their **school attendance**, their participation in **measures to prepare them for choosing a career** or **vocational training** recognised by the competent authority, and
3. their **ability to follow lessons effectively**,

. Children may not be employed **for more than two hours per day**, or more than three hours per day on family farms, **between 6 p.m. and 8 a.m., before school or during school hours**. Sections 15 to 31 apply accordingly to employment.

(P): In terms of mental health and development? Training and/or tournaments in the evenings?

(Exceptions possible in accordance with Section 5 (5) JArbSchG in conjunction with Section 6 JArbSchG) (P): Performances in accordance with Section 6 (1) No. 2 JArbSchG



Minors – Young people

Duration and timing in accordance with Section 8 JArbSchG

Duration:

- Max. **8 hours/day** – for a **5-day week**, Section 8(1) JArbSchG
- if the compensation period is 5 weeks, then up to 8.5 hours/day, Section 8 (2) JArbSchG

Rest breaks (at least 15 minutes):

- **4.5 <** working time $\leq$ 6 hours $\rightarrow$ **30 minutes**, Section 11 (1) No. 1 JArbSchG
- Working time $>$ **six hours** $\rightarrow$ **60 minutes**, Section 11(1)(2) JArbSchG

Rest periods:

- **at least 12 hours**, Section 13 JArbSchG



Minors – Young people

Time frame according to Section 14 JArbSchG

Current situation:

- Principle (young people up to 16 years of age) → only between **6 a.m. and 8 p.m.**, Section 14 (1) JArbSchG

Special features: Section 14 (7) JArbSchG → "Young people may participate in music performances, theatre performances and **other performances**, in **radio (radio and television) recordings**, on audio and video media, and in film and photo shoots until 11 p.m. Participation is not permitted in events, exhibitions or performances where the presence of young people is prohibited under the provisions of the Youth Protection Act. After completing their work, young people may not be employed before a continuous period of leisure time of at least 14 hours has elapsed. Sentences 1 to 3 also apply accordingly to the activities of young people as athletes in the context of sporting events."

(P): Unclear: Is a *live-streamed tournament game* equivalent to "other performances" or film recordings?

(P): Page 4: Is eSport = sport?

- Maximum 5-day week



Minors – Young people

Time frame in accordance with Section 16 JArbSchG

Current situation:

Section 16 JArbSchG Saturday rest

(1) **Young people** may not be **employed** on **Saturdays**.

(2) The employment of young people on Saturdays is **only permitted ...**

7. for music performances, theatre performances and **other performances**, for **radio** (radio and television) **recordings**, on audio and video media, and for film and photo shoots, ...

9. in **sports**, ...

At least two Saturdays per month shall remain free of employment.



Minors – Young people

Time frame in accordance with Section 17 JArbSchG

Current situation:

Section 17 JArbSchG Sunday rest

(1) **Young people** may not be **employed** on **Sundays**.

(2) The employment of young people on Sundays is **only permitted ...**

5. for musical performances, theatre performances and **other performances**, as well as for live radio and television broadcasts,

6. for **sports**, ...

Every second Sunday, and at least two Sundays per month, must remain free of employment.



Minors – Young people

Time frame in accordance with Section 18 JArbSchG

Current situation:

Section 18 JArbSchG Public holiday rest

- (1) Young people **may not** be **employed after 2 p.m.** on **24 and 31 December** or on **public holidays**.
 - (2) The employment of young people on public holidays is **permitted in the cases specified in Section 17 (2), except on 25 December, 1 January, the first day of Easter and 1 May.**
- (P): Major tournaments over public holidays?

Problem:
Working
hours in
eSports

eSports in
your free
time?



General freedom of action

Art. 2 (1) GG

Art. 2 GG

(1) Everyone has the right to free development of their personality, insofar as they do not violate the rights of others or violate the constitutional order or the moral law.

More elegantly worded (the version proposed before the Basic Law): "Everyone can do and not do what they want" (cf. v. Mangoldt, Parliamentary Council, 42nd session of the Main Committee, p. 533).

This means that construction workers/hairdressers/office workers (m/f/d) are allowed to play eSports in their free time.

But is an eSports player employed as a worker also allowed to do so?



Mandatory law

Section 7 ArbZG

Section 7 ArbZG Deviating provisions

(1) A collective agreement or, on the basis of a collective agreement, a works or service agreement may permit

1. derogations from Section 3

→ argumentum e contrario: deviations are not permitted in individual contracts.

This means that the employee cannot and may not work more "voluntarily".

Labour law does not trust the employee's voluntary nature!

→ inferior position

→ resulting pressure

→ cf. voluntary consent in data protection (cf. e.g. Section 51 (4) sentence 1 BDSG)



Mandatory law

General freedom of action

Is there a risk that eSports players will be restricted from gaming in their "free time"?

In traditional professions, it can be assumed that employees do not voluntarily and willingly pursue the same activity as a "hobby" after their contractual obligations have ended. This could be different in eSports.

In my opinion, it depends on whether the employee is really acting voluntarily, or whether the employer has issued an instruction or the employee is continuing with eSports due to "pressure".

The decisive factor is whether it is working time or time at the employee's free disposal.



Generalised regulation

Employee health protection vs. general freedom of action

The maximum working hours, breaks and rest periods are intended to preserve the health of the employee as the source of his or her income.

This ensures that employers do not exploit employees (excessively).

If it were purely a matter of health protection → no work-related activities during leisure time either

(P): Contradiction in terms: hobbyists, the self-employed and probably also amateurs can play as much as they want. There is no limit. This is already known for the self-employed.

BUT: unlike the self-employed, the hobbyist is someone who does not earn money from it.

→ Employees who perform the activity VOLUNTARILY and UNPAID in their non-contractual free time are also allowed to do so!



Freedom

Employee health protection vs. general freedom of action

How can you determine whether an eSports player is acting voluntarily?

In my opinion, the following criteria can be used as indicators:

- The activity takes place outside working hours (weak indication)
- The employer does not issue any instructions regarding time, place and content (moderate indication, as psychological pressure may exist)
- The employer does not derive any economic benefit from the employee's activity during this time (moderate indication, as training rarely yields any benefit; BUT: in the opposite case, working hours certainly exist)
- The employer is not aware that the employee is performing the activity outside of working hours (strong indication) [no reporting or information obligations]
- The employee plays a different e-sport title than the one corresponding to their work activity (very strong indication)

Problem:
Working
hours in
eSports

Conclusion



Summary

Consequences of employee status for working hours

Professional e-sports players can be employees.

The Working Hours Act (ArbZG) applies to them:

- *Adults*: 8 hours/day with a 6-day week; max. 10 hours/day in a compensation period of 4 months
Minors: 8 hours/day with a 5-day week; max. 8.5 hours/day in a compensation period of 5 weeks
- At least 11 hours of rest between work units (*minors*: 12 hours)
- After 6 hours (*minors* after 4.5 hours), a minimum break of 30 minutes must be taken. This means that this must be ensured organisationally at tournaments.
- On Sundays/public holidays (often during tournaments), work is only permitted in accordance with the ArbZG if a special condition is met. In this case, eSports can be considered a sport.
Minors: max. 2 Saturdays and 2 Sundays



Summary

Wise words from wise people

- *The most important thing in life is time. Living means using time correctly. (Bruce Lee)*
- Art. 2 (1) GG (you can continue gambling in your free time if it is voluntary)
- *Life is short, not so much because of the short time it lasts, but because we have almost no time left to enjoy it. (Jean-Jacques Rousseau)*
- Sections 3 and 5 of the Working Hours Act (the maximum working hours ensure that eSports players have enough free time)
- *Anyone who does not have two-thirds of their day to themselves is a slave. (Friedrich Nietzsche)*

Section 3 ArbZG (on average 8 hours/day, as stipulated by law, one may work for one's employer under contract)