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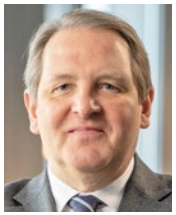

Prof. Dr.
Thomas Wegerich
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## Dear Readers,

It is probably the most important and far-reaching labor law decision of the year: On 13 September, the German Federal Labor Court announced its decision on the documentation of working hours by employers. This topic is the focus of this issue. Dr. Wolfgang Lipinski and co-author Benedikt Holzapfel, and Dr. Marius Höfler examine the ruling from different angles and with different emphases. Both articles are must-reads for you.

Life as a (business) traveler has become complicated. At least as far as the USA is concerned. Oliver Ashworth and David Iannella describe the main hurdles in obtaining a visa to enter the United States and also point out the current long wait times.

Cybersecurity has turned out to be the biggest threat to companies worldwide. Legal departments are playing an increasingly important role in defending against these looming risks. Giuseppe Marletta and Antje Teegler report on the latest ACC Foundation's biannual State of Cybersecurity Report. You should know the facts.

Sincerely yours,

Thomas Wegerich



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# BAG in the fast lane

## BAG decision of 13 September 2022 - 1 ABR 22/21: obligation to record working time for all employers

**By Dr. Wolfgang Lipinski and Benedikt Holzapfel**

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Employees would be able to record their daily working hours, for example, by means of an app, in an Excel sheet or, traditionally, with pen and paper. After all, it makes no difference whether an employee records the start of the working day by pressing a button on a computer or smartphone, by clocking in or by writing it down.

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Life has plenty of challenges in store for employers at the moment: there's the ubiquitous shortage of skilled labour, then add to the mix the new German Act on Notification of Conditions Governing an Employment Relationship (NachwG) – unnecessarily – making employment agreements subject to a factual written form requirement, and of course general economic concerns due to inflation and recession. And as if that was not enough, the German Federal Labour Court (BAG) has now introduced an extensive obligation to record working hours.

This issue was initially about the scope of the co-determination rights pursuant to Section 87 (1) 6 of the German Works Constitution Act (BetrVG). While a majority of the observers weighed up the pros and cons of the existence of a right of initiative pursuant to Section 87 (1) 6 BetrVG beforehand, not only did the BAG go beyond this, but also beyond legislators, who had not prescribed such an obligation by law before.

## Background

But let us start at the beginning: Section 87 (1) of the BetrVG provides for numerous co-determination rights which the works council has vis-à-vis the employer. In this

context, co-determination is understood to be equal involvement, which is generally only achieved if the employer also has to act upon the initiative of the works council in co-determination matters.

So far, this had not been the case for the co-determination right pursuant to Section 87 (1) 6 of the BetrVG. In a decision of 28 November 1989 - 1 ABR 97/88, the BAG decided that the works council did not have the right of initiative regarding the introduction of technical monitoring devices. The BAG essentially justified its decision in that the purpose of the statute as per Section 87 (1) 6 of the BetrVG was intended as a right of defence. It continued that a right of initiative contradicted this purpose as it allowed the works council to introduce technical devices that might violate privacy rights.

## Different view: Hamm Regional Labour Court

Recently, however, Hamm Regional Labour Court (LAG) criticised this decision. Hamm LAG declared itself in favour of a right of initiative within the scope of Section 87 (1) 6 of the BetrVG in a decision of 27 July 2021 (7 TaBV 79/20), which was now the subject of appeal in the matter-at-hand.

In this context, the arguments of Hamm LAG mainly centre on the legislative process of 1972. The legislative proposal for the BetrVG presented by the parliamentary group of the CDU/CSU still differentiated between co-determination rights with or without a right of initiative. This differentiation was not included in the final version, however, due to criticism by the Committee of Labour and Social Affairs. In the opinion of Hamm LAG, this implies a right of initiative according to Section 87 (1) 6 of the BetrVG. If legislators had not wanted to grant this right, they would have had to have made a corresponding restriction regarding the matter of co-determination rights as seen with welfare services in Section 87 (1) 8 of the BetrVG.

## Implications based on European law

In the opinion of the Hamm LAG, European law matters were not relevant to the decision even though some of the literature takes the position that a right of initiative to introduce a time recording system at a workplace must exist, based on the highly publicised decision of the ECJ in the matter of CCOO (ruling of 14 May 2019 - C-55/18).

Let me remind you: in its decision of 14 May 2019, the ECJ obliged the member states to introduce a statutory provision which stipulates the recording of working hours by means of an objective, reliable and accessible system. The ECJ stated that the system was required to implement the Working Time Directive (2003/88/EC) and it was not sufficient to merely document overtime as set out in Section 16 (2) of the German Working Hours Act (ArbZG). New statutory provisions in accordance with the requirements of the ECJ have not been put in place to date. The new regulations in the German Working Hours Act, which were included in the coalition agreement of the SPD, FDP and the Greens, have not even got as far as a first legislative draft. A direct obligation of a company on the grounds of the ECJ ruling has so far been mostly and rightly rejected.

## Decision of the BAG

According to the press release of 13 September 2022, the BAG had now actually taken into account the European law provisions, albeit in an entirely different manner than expected. According to this, Section 3 (2) 1 of the German Occupational Health and Safety Act (ArbSchG) must be interpreted in conformity with Union law resulting in employers being obliged by law to record the working hours of their employees. This also means, however, that the works council does not have the right of initiative to introduce an electronic time recording system because there is no right of co-determination according to the introductory sentence of Section 87 (1) of the BetrVG insofar as these business matters are already prescribed by legislation.

From a legal point of view, this reasoning is indeed a surprise. This is because so far, most parties rightly agree that an interpretation of the provisions regarding working hours in line with Union law is not possible. This was justified with the unambiguous wording of Section 16 (2) 1 of the ArbZG, which expressly only prescribes the recording of overtime. The BAG has now obviously avoided this obstacle by not interpreting Section 16 (2) 1 of the ArbZG, but Section 3 (2) 1 of the ArbSchG in line with Union law. In this context, the written statement of grounds to be published by the BAG should be particularly interesting because it is to be expected that relying on the general occupational safety regulations of the ArbSchG is not permissi-

ble when special statutory provisions regarding working hours exist.

It is also unclear how such interpretation is compatible with the legislative intention. So far, legislators have refrained from introducing such obligations, despite corresponding requests and despite the duty to implement under European law following the CCOO ruling. It is true that the German coalition parties agreed in the coalition agreement to "review in consultation with the social partners which adjustments are currently required in view of the rulings of the European Court of Justice on working hours legislation" (coalition agreement 2021 - 2025 between the SPD, the Greens and the FDP, p. 54). However, it also becomes apparent that legislators have not felt pressured to regulate these matters, so that you can indeed refer to a conscious non-regulation in this context.

## Practical implications

While this ruling will mean additional red tape for several employers, there is also some cause for optimism, based on the press release published on 13 September 2022 at least.

The good news for employers is that works councils are not entitled to a right of initiative when it comes to introducing electronic time recording systems. Such a right of initiative would certainly have led to significantly greater and more costly effort for employers. This is because it would have meant that works councils would have been able to dispute with the employer in a conciliation committee over the time recording system to be applied in the individual case, and they would even have been allowed to implement time recording systems rejected by the employer against their will.

Following this press release, the authors do not want to join that group of observers who are already bidding farewell to trust-based working hours. This is because the release does not state that employers were now suddenly obliged to set up time clocks. According to the provisions of the ECJ on the basis of its CCOO ruling, a time recording system is merely required to be objective, reliable and accessible. The press release of the BAG does not go into more detail either. Therefore, as matters stand, it would still be permissible to delegate time recordings to employees. They would be able to record their daily working hours, for example, by means of an app, in an Excel sheet or, traditionally, with pen and paper. After all, it makes no difference whether an employee records the start of the working day by pressing a button on a computer or smartphone, by clocking in or by writing it down. The authors also do not assume that the BAG intends to completely ignore the realities of the modern working world by prescribing a rigid, inflexible time recording system. Employers should, however, randomly check the records on a regular basis. In addition, every employer should review now whether their current time recording method will correspond with the new statutory provisions in the future and should make any necessary changes, as well as assessing potential risks.

This ruling does not, however, ease the burden of presentation and proof for employers in lawsuits concerning overtime hours. The BAG already made a decision on that matter in a ruling of 4 May 2022 (5 AZR 359/21). Unlike the May ruling, which discussed the concept of working time under remuneration law, the CCOO ruling and the current decision of the BAG deal with it from an occupational health and safety point of view. Thus, the time recording required in application of Section 3 (2) 1 of the ArbSchG in accordance with European law does not serve the purpose of enforcing remuneration claims. Instead, it serves the purpose of occupational safety and, consequently, helps comply with the corresponding provisions of the German Working Hours Act because "recording working times also protects against exploitation both by others and oneself" as BAG President Inken Gallner stated in the proceedings.

## Conclusion

Even though employers may be cautiously optimistic as explained earlier, they currently still face something of a dilemma. On the one hand, they are immediately obliged to record working time due to the decision of the BAG. On the other hand, it will presumably still take a while until the release of the reasons for the BAG ruling, which might give further advice on the practical implementation of the new legal situation in businesses. While it is encouraging that the BAG rejected the right of initiative of the works council, it is a pity that the BAG did not leave the regulation of recording working hours to legislators, as it is an obligation with practical relevance and significance for companies. ←

# Time recording now mandatory

## Employers must control working time

**By Dr. Marius Höfler**

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It could be expected that, as a result of the BAG's decision, it will be easier for an employee to demand compensation from the employer for overtime worked in the case of a missing time recording system.

On 13 September 2022, the German Federal Labor Court (Bundesarbeitsgericht, BAG) clarified in a highly regarded decision (1 ABR 22/21) that employers are legally obligated to maintain a system in their companies by which the working time of employees can be monitored and recorded. So far, only the press release of the BAG is available. A final evaluation and classification of the decision will only be possible after publication of the reasons for the decision.

### Facts

The applicant works council and the employers, who run a fully in-patient residential facility as a joint operation, concluded a works agreement on working time in 2018. At the same time, they negotiated a works agreement on the recording of working time, but no final agreement was reached on this. At the request of the works council, the labor court set up a conciliation committee on the topic of

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"Conclusion of a works agreement on the introduction and application of electronic time recording." The works council requested a declaration that it has a right of initiative to introduce an electronic time recording system pursuant to Section 87 of the German Works Constitution Act (Betriebsverfassungsgesetz, BetrVG).

Hamm Regional Labor Court (LAG) granted the works council's request and awarded it an initiative right with regard to the introduction of such an electronic time recording system.

## Decision

The employers successfully appealed against this decision of the LAG. The BAG ruled that the works council cannot demand the introduction of an electronic time recording system from the employers as it has no right of initiative in this regard. In particular, it cannot base such a right on Section 87 (1) 6 of the BetrVG, as its application is excluded under the introductory sentence of Section 87 (1) of the BetrVG. According to this, the works council only has a right of co-determination insofar as a statutory regulation or a regulation by collective bargaining agreements does not exist.

In the opinion of the BAG, however, such a statutory regulation exists in the case of time recording. If Section 3 (2) 1 of the German Occupational Health and Safety Act (Arbeitsschutzgesetz, ArbSchG) is interpreted in accordance with EU law, an employer is legally obligated to record the working hours of its employees for the purpose of health protection. The result of the BAG's decision is thus in line with the so-called time clock ruling of the European Court of Justice (ECJ) from 2019. The relevant provisions of the ArbSchG read:

### § 3 Basic obligations of the employer

(1) The employer shall be obliged to take the necessary occupational health and safety measures, taking into account the circumstances affecting the safety and health of employees at work. They shall review the measures for their effectiveness and, if necessary, adapt them to changing circumstances. [...]

(2) In order to plan and implement the measures referred to in paragraph (1), the employer shall, taking into account the nature of the activities and the number of employees

1. provide for an appropriate organization and allocate the necessary resources [...]"

Against this background, the BAG has adopted the opinion that employers are, pursuant to Section 3 (2) 1 of the ArbSchG, obligated to establish an organization within their companies that enables them to control the working hours of their employees and thereby contribute to protecting their health. In the opinion of the BAG, such an organization can be an electronic time recording system, which is why a right of initiative of the works council to introduce such a system pursuant to Section 87 (1) of the BetrVG is excluded.

## Practical advice and outlook

Although the aforementioned decision focused on whether the works council is entitled to a right of initiative with regard to the introduction of an electronic time recording system, the answer to this question is not what makes labor law practitioners sit up and take notice. Of particular interest in terms of labor law and corporate policy is the BAG's opinion with regard to Section 3 (1) and (2) of the ArbSchG, according to which employers are already obligated to record working time. Previously, it was assumed that renewed action by legislators and a specification of the Working Time Act would be required before working time also had to be comprehensively documented in Germany. The BAG has now prevented this. Companies must now check whether existing working time recording systems and processes need to be adapted. Employers that already monitor and record working time using a time clock or other means are likely to already meet the requirements of the ArbSchG. In companies with trust-based working time, a differentiation will have to be made. It will also be possible to leave the flexibility already associated with trust-based working time with regard to the distribution of working time untouched in the future. What is new, however, is that employees working on a basis of trust are also obligated to record their working time.

Notwithstanding the surprising decision of the BAG, there is no need for exaggerated actions by employers. After all, the practical consequences of a lack of a time recording system are manageable. Violations of Section 3 (2) 1 of the ArbSchG are not an administrative offence. Thus, there is at least no threat of fines if an employer does not immediately

introduce a working time recording system. However, it could be problematic how it will be legally assessed in the future if employees make a claim against an employer for payment of overtime and the employer has not introduced a time recording system. This could lead to a reversal of the burden of proof. In principle, employees have to prove that they have worked overtime and are therefore entitled to compensation. The absence of a time recording system could be interpreted by the courts as requiring the employer to prove that the overtime claimed by an employee has not been worked. So far, no court has ruled in this sense. However, due to the trend in case law toward employee-friendly decisions, it is not unlikely that such a reversal of the burden of proof will occur in the future. This means that it could be expected that, as a result of the BAG's decision, it will be easier for an employee to demand compensation from their employer for overtime worked if there is no time recording system.

It will only be possible to conclusively assess the effective scope of the BAG's decision when the reasons for the decision are available. ←

# Visa wait times

## The major hurdles for travelers to the United States

**By Oliver Ashworth, LL.B, LL.M., and David Iannella**




Although US consulates and embassies do prioritize appointment availability for nationals and residents of the host country, individuals can apply as a third-country national in a location that offers more favorable wait times.

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## Introduction

Those requiring a visa to enter the United States, including workers, students, and certain business travelers and tourists, must carefully plan their trips months in advance in light of current consular wait times. As travel returns to pre-pandemic levels, individuals awaiting issuance of a US visa remain impacted by COVID-related delays. Ultimately, the global pandemic significantly disrupted visa processing at US consulates and embassies across the world, and despite improvements, major hurdles persist.

This article provides an overview of the current environment at US consulates worldwide and examines important considerations that travelers must take into account when planning a trip to the United States. The article also discusses practical alternatives to consider if someone is affected by visa processing delays.

## Impacts of COVID-19 and the current post-COVID environment

The US Department of State's important function of issuing visas to foreign nationals has undeniably been impacted by the COVID-19 pandemic, which is also largely to blame for the current backlog of visa applicants. The Department of State ("DOS") is responsible for issuing visas to those seeking to travel to the United States and currently operates over 270 embassies, consulates, and other posts in more than 180 countries around the world.

In early 2020, US consular posts began suspending routine visa operations and transitioned to providing essential and mission-critical consular services. This was due to a variety of issues stemming from the pandemic, including COVID-19 travel restrictions, local policies of the host country, government lockdowns, social distancing guidelines, and staffing shortages.

The suspension of routine services lasted more than one year at many US consular posts and had a direct impact on the number of visas US consulates were able to issue. For example, the US Consulate in Frankfurt, Germany issued only 12,835 nonimmigrant visas in fiscal year 2021 as opposed to 45,156 in fiscal year 2019. The US Embassy in London, United Kingdom issued 20,901 nonimmigrant visas in fiscal year 2021 as opposed to the 142,486 nonimmigrant visas issued in fiscal year 2019. However, the sharp drop in the number of visas issued is by no means exclusive to Europe. In Chennai, India, 69,614 nonimmigrant visas were issued in fiscal year 2021 compared to 224,289 in fiscal year 2019, and in Bogota, Columbia, 57,542 nonimmigrant visas were issued in fiscal year 2021 compared to 215,902 in fiscal year 2019. These figures reflect a trend which was visible at nearly all US visa-issuing consulates across the world.

> "A specialized knowledge worker from western India will need to wait 351 days for an H-1B visa appointment at the US Embassy in Mumbai."

The Ukraine-Russia conflict has further contributed to visa delays. Cessation of both Ukrainian and Russian consular operations has resulted in nationals from those countries seeking alternative locations to apply. The US Consulate in Frankfurt has been redesignated as the primary processing post for Ukrainians seeking immigrant visas, and the US Embassy in Warsaw has been redesignated as the primary processing post for Russians seeking immigrant visas. The US Embassies in Warsaw and Krakow, Poland have also seen a considerable volume of Ukrainian applicants seeking nonimmigrant visas, whereas posts such as the US Embassy in Yerevan, Armenia and the US Embassy in Muscat, Oman have had to absorb an additional volume of Russian nationals seeking nonimmigrant visas.

As we approach three years since the start of the COVID-19 pandemic, there have been noticeable improvements in visa processing. Perhaps most significantly, 96 percent of US consulates and embassies are now providing routine services to customers. However, those seeking to travel to the United States must continue to plan well in advance to ensure they can obtain a visa prior to departure.

## Current wait times at US Consulates and Embassies

Although the Department of State has been able to resume operations at most US consulates, wait times for US visa appointments vary significantly from a few days to several months. These delays adversely impact families, employers, and students, who are forced to push back their travel plans to the United States as they await an in-person interview at a US consulate.

A family travelling to Disney World from the Netherlands will have to wait 194 days to attend a B-1/B-2 visa appointment at the US Embassy in Amsterdam, based on current processing times. A student travelling from the UAE to attend university in the United States will need to wait 129 days for an F-1 visa appointment at the US Embassy in Dubai. A specialized knowledge worker from western India will need to wait 351 days for an H-1B visa appointment at the US Embassy in Mumbai. In some cases, visa applicants may have to wait over one year simply to attend a visa appointment. This is a significant wait, especially when considering most face-to-face visa interviews generally last less than five minutes in total.

Although progress has been slow, the situation is improving. The Department of State recently reported that the median worldwide wait time for B-1/B-2 business visitor and

tourist visa appointments averaged about two months as of November 2022. However, a wait time of even two months still poses challenges for individuals that have to travel unexpectedly or urgently. Consider an engineer who must install critical equipment at a power plant in the United States or an executive that must meet with US-based colleagues to explore a potential merger Situations like these simply do not offer the luxury of several months of advanced planning.

Further, many visa applicants are often unaware of the current backlogs and are surprised by how long it takes to obtain a visa appointment. Although the Department of State has recently released an updated and improved wait time estimator, applicants must pay a required government visa fee to view real-time appointment calendars. This has proven especially frustrating to those who pay the government visa fee, only to discover there are no immediately available appointments, essentially resulting in a sunk cost if their travel plans become untenable.

Ultimately, visa wait times present a serious hindrance to companies who need critical workers to be physically present in the US, to families who are separated, and to individuals whose futures are uncertain and subject to both financial and logistical complexities.

## Increase in security-related clearances

Lengthy visa wait times have been exacerbated by an increase in mandatory security clearances, which can take months to complete. This has created an additional obstacle for many travelers.

Prior to issuing a visa, the Department of State must vet travelers for a range of security-related risks. During the visa appointment, the consular officer submits the applicant's electronic visa application to an electronic database which automatically screens the individual for possible threats. When there is a match, the visa application must undergo an inter-agency national security review, commonly referred to as "administrative processing." Although only a small percentage of applicants are subject to additional administrative processing, the volume of impacted individuals is noticeably increasing, despite most of these individuals not posing any real threat to US national security.

> "In order to meet its goal of returning to pre-pandemic processing levels by the end of fiscal year 2023, the Department of State has expanded the waiver of in-person interviews to certain qualifying applicants."

Whereas it usually only takes about one week for a visa to be issued following a standard visa appointment, there is no minimum processing time for applications subject to additional administrative processing. Many security-related clearances can exceed six months and applicants have little recourse or alternative methods to travel to the United States while a clearance is being reviewed. The lack of a clear timeline introduces an additional complication and one that is largely unavoidable.

## Steps taken to address long visa wait times

Despite the lasting impacts, the Department of State has taken active steps in order to address the backlogs. In order to meet its goal of returning to pre-pandemic processing levels by the end of fiscal year 2023, the DOS has expanded the waiver of in-person interviews to certain qualifying applicants. According to a recent DOS press release, almost half of the nearly seven million nonimmigrant visas that were issued globally in fiscal year 2022 were adjudicated without an in-person interview. This has alleviated the strain on US consulate and embassy staff. The DOS has also increased its staffing levels, with embassies seeking to double their hiring of US foreign service personnel.

Moreover, the Department of State has made strides to expand visa processing for certain categories of applicants that make key contributions to the US economy, including seasonal workers, students, health care workers, and airline personnel. Notably, the DOS issued more student visas in fiscal year 2022 than in the previous five years.

The US government has also taken steps to streamline internal processes so that it is able to review more visa applications with fewer resources. As of the end of fiscal year 2022, the Department of State had processed nearly the same number of nonimmigrant visas that they processed in

fiscal year 2019. However, the number of individuals seeking a visa has dramatically increased due to pent up demand during the pandemic.

## Practical considerations and what to expect going forward

US visa applicants should continue to expect lengthy visa wait times in the immediate future. However, as the US Department of State bolsters its international workforce, processing times are expected to improve. As mentioned above, 96% of US consulates and embassies have resumed visa interviews and have reached 94% processing timelines for nonimmigrant visas and 130% for immigrant visas as of October 2022. Despite these commendable improvements, there is a scarcity of visa appointments in many locations, and the current climate is unlikely to change before the end of 2022 and into early 2023.

Applicants should consider whether they meet the eligibility criteria for a waiver of the in-person interview. If so, they should then compare processing times for interview waiver cases with in-person interview wait times for their specific visa category. Because visa applications eligible for a waiver are reviewed on a "first-come-first-served" basis, it can prove quicker to attend an in-person appointment, depending on the consular location. Further, many applicants do not qualify for the in-person interview waiver and therefore must resort to scheduling regular interviews.

In addition, applicants with an urgent need to travel to the United States can request an emergency visa appointment directly from their local US consulate or embassy. Generally, consular officials will grant expedited visa appointments for medical emergencies, urgent humanitarian concerns, and compelling business necessities. Furthermore, applicants should regularly monitor appointment calendars for earlier openings, as cancelations and the release of additional appointments can occur.

If an individual is present in a country where there are significant visa backlogs, that individual may also seek to apply at an alternative consulate either within or beyond their local country of residence. Although US consulates and embassies do prioritize appointment availability for nationals and residents of the host country, individuals can apply as a third-country national in a location that offers more favorable wait times. Consular officers have been increasingly accommodating to nonresident applicants and are aware of the backlogs that applicants face.

In conclusion, individuals seeking to travel to the United States who require a visa must plan well in advance. Individuals are encouraged to keep their travel arrangements flexible or refundable in the event that delays persist. It can also be helpful to seek the advice and strategic guidance of an immigration professional to navigate the complex environment of obtaining a timely visa appointment. ←


In-house counsel share their organisation's most sensitive data with outside law firms. Yet 70% of legal departments have no tool for assessing their law firms' data security, and nearly 30% are dissatisfied with current methods.

# In-house legal's expanding role in cybersecurity

## Key findings: The ACC Foundation's biannual State of Cybersecurity Report

**By Giuseppe Marletta and Antje Teegler**

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The latest **State of Cybersecurity Report** released by the ACC Foundation in collaboration with EY has revealed that legal departments continue to play an increasingly important role in a business-wide cybersecurity strategy. There is growing cross-functional collaboration among Legal, IT, Security, and other applicable business units, and one out of five companies now have a dedicated cybersecurity lawyer (often a senior-level position), who is sometimes even embedded in the IT department. The data included in this report represents 265 companies across 17 industries and 24 countries, providing a comprehensive understanding of how legal departments of different sizes engage in cybersecurity matters.

When asked who in the organisation is primarily responsible for coordinating the response to a data breach, the most common answer was the chief legal officer (CLO) for 38% of companies, up from 21.2% in 2020. Moreover, 84% of CLOs now have at least some cybersecurity-related responsibilities (up from 76% in 2020), whether in a leadership position, as part of a broader team with cyber responsibilities, or as part of an incident response team.

"As modern CLOs' roles and responsibilities continue to expand, cybersecurity strategy and oversight is unquestionably one area where we've seen the largest growth," noted Susanna McDonald, vice president and chief legal officer of ACC. "Between the ever-increasing frequency of attacks and substantial financial and reputational risk to the organisation's operations and brand, this comes as no surprise. CLOs bring a unique combination of legal training, strategic thinking, and risk analysis to the table to best help prevent and, if need be, react to cybersecurity situations."

"As modern CLOs' roles and responsibilities continue to expand, cybersecurity strategy and oversight is unquestionably one area where we've seen the largest growth."

With so much at risk, including damage to brand reputation, the liability of data subjects, regulatory action, loss of proprietary information, loss of business continuity, and potential executive liability, it is also no wonder that CLOs rank cybersecurity as the single most important issue in their overall business today (see other top findings from the **2022 ACC Chief Legal Officers Survey**).

## CLOs play an important role in cybersecurity

Not only are CLOs expected to react (once a data breach has occurred, for example), they often play an integral role in developing the underlying risk-mitigation strategy for the organisation. 61% of survey respondents say the legal department has a co-equal voice in setting the company's overall risk-mitigation strategy alongside IT and compliance, and 64% of CLOs regularly report to the board of directors on cyber issues or, at least do so on an ad hoc basis.

More chief legal officers and general counsel oversee privacy than cybersecurity. In three-quarters of organisations, the CLO oversees privacy, which is either the direct responsibility of the CLO (55%) or has a dotted line to the top legal officer of the company (19%). Conversely, the cybersecurity function reports to the CLO in just 38% of organisations, 15% indicated that the CLO oversees cybersecurity directly and 23% do so through a dotted line.

The fact that privacy reports to the CLO more often than cybersecurity is consistent with the results observed in the previous edition of the survey. However, the number of participating organisations where the CLO oversees cybersecurity shows a 20-point increase from 18% to 38%.

The cybersecurity function is housed in many separate departments within the organisation, according to survey participants. A plurality (35%) of respondents report that cybersecurity is primarily handled by the chief information officer (CIO), 23% indicate that it is under the chief technology officer (CTO), 11% report that the responsibility for cybersecurity is spread among different departments or business functions, and 9% indicated that it is primarily housed in the legal department. This is the largest percentage of legal departments that house the cybersecurity function that has been observed since 2015, although it remains a relatively uncommon practice.

## In-house counsel dedicated to cybersecurity increasing

38% of legal departments say their spend has increased as a result of their approach to cyber, compared to one year ago. This is an increase from just 23% who said so in 2015. 50% said this increase was mainly attributed to outside spend (on law firms, ALSPs, and consultants), while 25% said the increase was mainly attributed to inside spend (on legal resources exclusively devoted to cybersecurity).

This spending pattern is in line with what we are observing in hiring patterns. 22% of companies now employ an in-house counsel with responsibility for cybersecurity, up 10 percentage points since 2018. In 48% of cases, this lawyer is responsible for coordinating cyberlaw strategy across the entire business and in 29% of cases this lawyer is fully embedded in cybersecurity/IT and works directly with technical resources. 56% of these lawyers are in senior-level positions.

The number of companies that now require annual cybersecurity training for all employees has also increased by 20 percentage points since 2020. 63% of companies now have mandatory annual training on cybersecurity for all employees, an increase from 43% in 2020. 27% require training at different intervals and just 9% have no training requirements at all, a reduction from 33% in 2018. Among companies that require training, a quarter customise that training to the specific role or level of security access of individual staff.

These are just a few of the many findings made in the most recent iteration of the ACC Foundation's biannual State of Cybersecurity Report. To find out more, buy the full report **here** and check out these ACC resources that might have the solution you are looking for:

- Cybersecurity is one of the top three issues for chief legal officers — learn the basics and how to work with your technology department (see **here**).

- Connect with like-minded peers and tap into the wisdom of the crowd when tackling your company's risk management challenges or starting a new cybersecurity initiative. Join the **ACC IT, Privacy & eCommerce Network** to exchange ideas and expertise on policies, best practices and more. (An ACC membership benefit.)

- In-house counsel share their organisation's most sensitive data with outside law firms. Yet 70% of legal departments have no tool for assessing their law firms' data security, and nearly 30% are dissatisfied with current methods. Check out the **Data Steward Program** that gives legal departments a push-button tool for assessing law firm data security, consistent with their organisation's most rigorous information security requirements, at no cost to in-house counsel. ←

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