Oppenhoff

EU Working Conditions Directive

The reform of the German Act on Proof of Working Conditions has significant implications for the contract management of HR departments

The EU Directive 2019/1152 on Transparent and Predictable Working Conditions in the European Union of 20 June 2019 ("Working Conditions Directive") leads to a reform of the German Evidence Act (*Nachweisgesetz, NachwG)* and includes an extensive catalogue of new notification obligations for employers. It also sets new minimum requirements for working conditions. The Directive must be transposed into national law by the EU member states by 1 August 2022. The federal government recently presented its first draft bill to this end, which is scheduled for final consideration by the Bundestag on 23 June 2022. In particular, this draft bill provides for new obligations – punishable by fines for the first time – for employers to provide evidence, as well as restrictions on probationary periods in fixed-term employment contracts. As things stand at present, no significant amendments to the content of the government draft are expected.

As of 1 August 2022, these changes will have to be observed in all new employment contracts. For old contracts, this only applies if the employee requests corresponding documentation. We have summarised the most important points for you below.

1. Maximum duration of probationary period for fixed-term employment relationships

Fixed-term employment contracts may only be terminated with due notice if the termination is expressly reserved in the individual contract or agreed by collective bargaining agreement (Sec. 15 (3) German Act on Part-Time and Fixed-Term Employment (*Teilzeit- und Befristungsgesetz*, *TzBfG)*). This is being restricted even further.

If, in future, a probationary period is to be agreed for a fixed-term employment relationship, with the introduction of a new Sec. 15 (3) draft Part-Time and Fixed-Term Employment Act (TzBfG-E), the draft act requires that this must be in proportion to the expected duration of the fixed-term and the type of activity.

In future, the schematic agreement of a six-month probationary period for fixed-term contracts will therefore no longer be possible. While, according to recital 28 of the Directive, this proportionality test only applies to fixed-term employment contracts with a duration of less than twelve months, this restriction does not apply under the German draft act.

It remains unclear what the legal consequences are in the event of an invalid probationary period provision, i.e. whether the statutory period of notice under Sec. 622 (1) of the German Civil Code (*Bürgerliches Gesetzbuch*, *BGB*) then applies during the invalidly agreed probationary period or whether a (longer) period of notice contractually agreed for the period after expiry of the probationary period applies directly.

Practical tip: Employers should already review their processes now when agreeing probationary periods in fixed-term employment contracts. When concluding fixed-term employment contracts of up to twelve months, probationary period regulations should ideally be omitted in their entirety. One should also reconsider the necessity of probationary period regulations for very simple activities.

2. Employer's response obligation in the case of fixed-term employment relationships and temporary employees

Within one month of receiving one of the notifications listed below, the employer will in future be obligated in various constellations to send a substantiated response in text form (i.e. e-mail is sufficient) to the person making the notification. This is the case when:

- fixed-term employees whose employment relationships have lasted longer than six months notify their employer in text form of their wish for an unlimited employment relationship,
- fixed-term employees with more than six months of service notify the employer in text form of their desire to change the duration or location of their contractually agreed working hours, or
- temporary workers who have been hired out to the lessee for more than six months notify the lessee in text form of their wish to conclude an employment contract.

No response is required from the employer or lessee if the employee in question has already indicated such wish during the previous twelve months.

Practical tip: In these constellations, employers should implement processes for a timely response. To this end, they can already draft standardised sample response letters for an acceptance or rejection.

3. Extended obligations of employers to provide proof

The German Evidence Act (*NachwG*) will undergo far-reaching changes. To this end, Sec. 2 NachwG is expanding existing **obligations to provide proof** with regard to

- the end date of an agreed fixed term,
- the place of work,
- the termination and
- the composition of the remuneration.

In addition, new **information obligations** are being introduced with regard to, among other things, the probationary period, the scope of the entitlement to further training, overtime, on-call work and the identity of the pension provider in the case of company pension schemes.

Contract management will therefore become even more important topic in HR departments in the future. This is all the more so in view of the threat of fines in case a breach, as incorrect or incomplete information will constitute an administrative offence under Sec. 4 NachwG-E in future, punishable with fines of up to EUR 2,000. For this reason, according to the current status of the draft act, the following transparency requirements in particular need to be observed in future when concluding employment contracts or amendment agreements:

a) New obligations to provide proof

According to the draft act, the catalogue of material contractual conditions contained in the NachwG, which have to be recorded in writing and signed by the employer and handed over to the employee within certain deadlines, is being expanded to include the following content:

- In the case of fixed-term employment relationships, the **end date of the fixed term** or the foreseeable duration of the employment relationship will have to be stated in future.

- In the case of agreed mobile work, the employment contract will have to contain a reference to the fact that the employee is free to choose his or her **place of work**.

Practical tip: As a result of the corona pandemic, many employees were granted the right to work on a mobile basis. Even such subsequent changes to the contract will therefore oblige employers in future to provide written proof (if necessary, separately). However, this requirement is not met by the mere reference to a shop agreement on mobile work, as Sec. 2 (4) NachwG-E does not deem the reference to a shop agreement to be sufficient for the point “place of work”.

- If a probationary period is agreed, its duration must be included in the record.

- Furthermore, the composition and amount of remuneration, including the **remuneration of overtime**, allowances, supplements, bonuses and special payments, as well as other remuneration components, must be stated in the record. The remuneration components must be stated separately, with reference to their due date **and method of disbursement**.

Practical tip: Currently, many employment contracts often lack a reference to the method of disbursement for overtime worked. In practice, reference is also often made to a separate bonus system, which has not necessarily been introduced in the company in the form of a shop agreement. Given the threat of fines, the new obligations to provide proof - which are also triggered by contract amendments - will thus lead to an immensely high administrative burden for employers.

However, if the promised premiums, bonuses or the like are regulated in collective bargaining agreements or company/service agreements then, the employer fortunately continue to fulfil its obligation to provide proof, thanks to Sec. 2 (4) NachwG-E, by referring to the relevant collective bargaining agreement. Here, one will have to check whether these also contain the newly required obligations to provide proof in their entirety. Otherwise, reference to the collective bargaining agreement will also not suffice.

- In addition to the agreed working hours, the record will in future also have to include agreed **rest breaks** and **rest periods** and, if shift work is agreed, the shift system (e.g. three-shift system), the **shift rhythm** (e.g. weekly alternation of early, late and night shifts) and the conditions for **shift changes**.

Practical tip: According to the explanatory memorandum of the draft act, general information should suffice here. In particular, this should not result in an obligation to provide written proof of individual duty schedule changes. Since shift systems are subject to co-determination and are usually regulated in a shop agreement, the obligation to provide proof pursuant to Sec. 2 (4) NachwG-E can also be met in that the employer refers the employee to the relevant shop agreement(s) or collective agreements.

- In the case of **work on call** (Sec. 12 TzBfG), in future the employer will have to inform employees of how their working hours are determined. Here, the employer must at least inform the employee (i) that the work performance is to be performed in accordance with the workload, (ii) of the time window, determined on the basis of reference days and reference hours, which is set for the performance of the work and outside of which the employer may not demand any work performance, and (iii) of the minimum notice period for the work performance. In addition, the employer shall (iv) provide information regarding the minimum number of hours to be remunerated.

- If the possibility of ordering **overtime** is to be agreed, this must be stated in the record, including the prerequisites for this.

- Another new provision is that the employer must provide information on the scope of any entitlement to **further training** provided by the employer. This also applies if the claim arises from a collective agreement or from the law.

- If the employer has agreed to provide a **company pension** through an external pension provider, the name and address of this pension provider must be included in the record. However, there is no obligation to provide proof if the pension provider is already obliged to provide this information (such, for example, in the case of pension funds, retirement funds and life insurance companies in accordance with Secs. 234k et seq. of the German Insurance Supervision Act (*Versicherungsaufsichtsgesetz, VAG*) in conjunction with the VAG Information Obligations Ordinance (*VAG-Informationspflichtenverordnung, VAG-InfoV*)).

- Please note that, with the entry into force of the act, employers will also have to inform employees of the procedure to be followed in the event of termination. Reference must be made to the written form requirement pursuant to Sec. 623 BGB as well as to the statutory, collectively agreed or individual contractual notice periods applicable to both the employer and the employee, including the shortened notice period agreed in the case of a probationary period.

If a staggering of the length of the notice periods has been contractually agreed, e.g. linked to the length of service, then, according to the explanatory memorandum to the act, it suffices to state the agreed calculation modalities. In addition, the notification must contain information on the deadline for bringing an unfair dismissal action in accordance with Sec. 4 of the German Dismissal Protection Act (*Kündigungsschutzgesetz, KSchG)*.

Practical tip: In the explanatory memorandum to the act, the legislator has thankfully clarified that the obligation to inform about the three-week period of Sec. 4 KSchG, even if it is violated, does not result in the legal invalidity of the termination. Nevertheless, in practice, such objections from the employee side can be expected. However, since the Working Conditions Directive "only" provides for a fine as a sanction for violation, it should be possible to invalidate the argument.

It remains unclear whether employers will be required to provide reasons for terminations in the future. According to Art. 18 (2) sentence 1 of the Directive, employees should be able to demand that the employer provide sufficiently specific reasons for the termination in writing. Currently, notification of the reasons for termination or social selection in the event of termination for operational reasons is only provided for in exceptional cases. However, the draft law does not yet provide for any regulations in this regard. However, should the employee make such a request in the future, then, with the Directive in mind, employers should consider providing written reasons.

- With regard to **church employment law regulations**, the new Sec. 2 No. 10 NachwG-E lists as a further notification point the regulations of commissions with equal representation which determine working conditions for church employers on the basis of church law.

b) Deadline and form for submitting the information

In future, employers will be subject to stricter deadlines for fulfilling the aforementioned obligations to provide proof and – despite the fact that the Working Conditions Directive allows for the option of the electronic form - the German legislator has adhered to the mandatory written form requirement. Employers will therefore have to observe the following deadlines in future:

- Information on remuneration and working hours (including shift rhythms) must in future be proven in writing no later than on the first day of work.

- Information on the duration of the employment relationship, place of work, job description and probationary period, as well as on the determination of working hours in the case of work on call (Sec. 12 TzBfG) and the requirements for ordering overtime must be proven no later than on the seventh day after the agreed start of the employment relationship

- All other contractual terms and conditions must be provided in the form of a written record no later than one month after the agreed commencement of the employment relationship.

Employers must continue to provide the record of the material contractual terms and conditions to employees in writing. However, it does not legally follow from this that the employment contract is only effective if it is concluded in writing, i.e. signed by both parties. Rather, the employer can also fulfil its obligations to provide proof by unilaterally informing the employee in writing, in paper form, signed by the employer. The handing over of a written employment contract will nevertheless become established practice.

c) From when do the new obligations to provide proof apply and what applies to contract amendments?

The new obligations to provide proof apply to all employment contracts concluded as of the effective date of the implementation act. As things stand, this should come into force on 1 August 2022.

For previously concluded employment relationships, the new obligations to provide proof only apply if the employee requests a record of the corresponding working conditions. In this case, the record must be handed over within seven days.

In the event of contract amendments, the employee must be notified in writing of the new contractual conditions no later than the day on which they take effect.

4. Special notification requirements for employee secondments

The employer's obligations to provide proof have also been extended for employee secondments abroad. The notification obligations exist under the condition that the employee has to perform his/her work abroad for more than four consecutive weeks. If the employee has successive work assignments to perform in different countries, then, according to the explanatory memorandum to the act, the information regarding all work assignments may be combined. In future, in such cases employees need to be informed about:

- the country or countries in which the work abroad is to be performed and the planned duration of the work,
- the currency in which the remuneration is paid,
- if agreed, cash or non-cash benefits associated with the stay abroad, in particular secondment allowances and travel, board and lodging expenses to be reimbursed,
- whether the employee's return is envisaged and, if so, the conditions of his/her return.

If the posting falls within the scope of the German Act on the Secondment of Employees (*Arbeitnehmerentsendegesetz*, AEntG), the employee will also have to be informed about the remuneration he/she is entitled to claim under the applicable law in the host country. The employee must also be provided with a link to the host country's official national website under the Internal Market Information System (IMI).

5. Consequences in case of violation

In future, a violation of the employer's obligation to provide proof will be treated as an administrative offence. Such is the case if the record of the material terms of the contract is (i) not delivered, (ii) not delivered accurately, (iii) not delivered completely, (iv) not delivered in the manner prescribed, or (v) not delivered in a timely manner.

Practical tip: If employers – as is often the case in practice – now only sign employment contracts using DocuSign, this does not meet the requirement for a handwritten signature and in future is to constitute an administrative offence. Processes will therefore have to be adapted in such a way that either, in addition to DocuSign, the employer hands out an information document signed by the employer itself on the material terms and conditions of employment in accordance with the NachwG to the employees in paper form within the deadline, or the contract management is altered again away from electronic contract management back to written employment contracts.

6. Outlook

Given the numerous changes expected on 1 August 2022, contract management is going to become even more important in HR departments in future. Employers should already adapt their processes and standard templates accordingly, so as to be prepared for the entry into force of the implementation act.

There is also likely to be a need to train HR staff on the new requirements. The increased requirements for transparency obligations will lead to increased documentation requirements and thus, as a result, to significant additional administrative work for companies.

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