Newsletter Employment Law

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ANDERSEN

Dear reader

We are pleased to present you with the information we have found important and interesting in the field of labor law. For more in-depth information, please do not hesitate to contact us.

We hope you enjoy the reading!

Your Andersen Labor Law Team

New requirements for the drafting of employment contracts

The European Union already adopted Directive (EU) 2019/1152 on transparent and predictable working conditions in the area of civil law at the end of 2019. It aims to improve working conditions in Europe and contains a large number of provisions and requirements that have a direct impact on the drafting of employment contracts. The member states have to implement the directive by 1 August 2022.

On 23 June 2022, the Bundestag passed the Act on the Implementation of Directive (EU) 2019/1152, which makes numerous amendments to the NachweisG and other laws that are to come into force on 1 August 2022, provided that the Act has been executed by the Federal President and published in the Federal Law Gazette by that date.

I. Overview of the content

In the following we would like to give an overview of the most important changes for practice:

1. Central changes in the NachweisG

The NachweisG will undergo far-reaching amendments and additions that will have a direct impact on the content of employment contracts in the future.

a. Scope and application

The new regulations of the NachwG apply to all employment contracts concluded from 1 August 2022.

For so-called old contracts, on the other hand, the new section 5 sentence 1 NachwG provides that a transcript with the further required information is only to be handed out at the employee's request. These minutes must be handed over to the employee no later than the seventh day after receipt of the request. Although a longer period of one month applies to some points of the regulation, a differentiation according to the points of the regulation is probably not practicable as a rule.

b. Information on remuneration

Section 2 of the NachwG now stipulates that „the composition and amount of remuneration, including overtime pay, bonuses, allowances, premiums and special payments, as well as other components of remuneration, must be stated separately in each case, and must include information on their due date and the method of payment". The employee must also be provided with information on the company pension scheme, for example on the implementation method or the amount and due date of the pension contributions.

c. Working time

In future, the new NachweisG will require concrete information on working time, agreed breaks and rest periods, and, in the case of agreed shift work, information on the shift system, the shift rhythm and conditions for shift changes.

d. Information on protection against dismissal

In future, employees must be informed about the procedure to be followed by the employer when terminating the employment relationship, at least about the written form requirement, the deadlines for terminating the employment relationship as well as the deadline for bringing an action for protection against dismissal.

At least, employers benefit from the fact that section 7 of the Protection against Dismissal Act is also applicable in the case of an incorrect notice regarding the deadline for filing an action against dismissal. It thus remains the case that in the case of an action for protection against dismissal not filed within the time limit – thus after expiry of the 3-week period from receipt of the notice of dismissal - the dismissal is deemed to be legally effective from the beginning.

e. Changed deadlines for evidence of newly concluded employment relationships

A complicated and not very successful regulation will apply in future to the time by which the employer must provide the information according to the NachweisG. Previously, a deadline of one month applied for the proof. According to the planned new regulation, different deadlines will now apply, depending on the respective content of the regulation.

These can range from the first working day to seven calendar days after the agreed start of work to one month after the agreed start of work. In practice, it will not make sense to provide separate evidence / deadlines in each case, so that the evidence should be provided in its entirety at the start of the employment relationship.

f. Form of proof (written form vs. electronic form?)

Although the Directive explicitly allows for proof of working conditions in electronic form, the German legislator has refrained from doing so.

As in the past, the following applies: The essential terms and conditions of employment must be provided in writing. Employers will therefore not be able to avoid providing evidence in writing in the future. Classic written form requires: Printing out the terms and conditions of employment on paper, signing them by hand and handing them over to the employee. It is not sufficient to provide the employee with the signed conditions as a scan or to sign them digitally. The fact that violations of the requirement for written form are now subject to fines is particularly explosive.

g. Reference to collective agreements

The proof of the essential terms and conditions of employment can continue to be replaced by a reference to the collective agreements applicable in the employment relationship, such as collective agreements, works agreements and service agreements. A prerequisite for this, however, is that the respective collective agreement contains the relevant provision on the essential terms and conditions of employment. Where this is not the case, there is a need to adapt or supplement the employment contracts.

h. Fines / Sanctions

If deadlines are not met or if the employer does not provide evidence or does not provide it properly, there is now a **fine of up to EUR 2,000 per violation.**

In addition, the employment relationship exists irrespective of whether the employer has fulfilled its duty to inform. **However, employees can withhold their work performance in case of violations, while the employer continues to owe the agreed remuneration.** If the employer does not provide correct evidence of the working conditions, the employee can also invoke a reduction in the burden of proof or even a reversal of the burden of proof in a lawsuit - for example, regarding the scope of the agreed working hours.

i. Procedure for contract amendments

In the case of any amendment to the employment contract (e.g. adjustment of salary or change in working hours), there is an obligation to provide proof no later than the day on which the amendment is to take effect, section 3 sentence 1 NachwG.

2. Further legislative changes in the course of the transposition of the Directive

In the course of the implementation of the Directive, the German legislator has also „tinkered" with some other laws. In the following, we would like to give you a cursory overview of the changes relevant to practice:

a. Amendments to the Part-Time Work and Fixed-Term Employment Act (TzBfG)

In the TzBfG, section 7 (3) TzBfG provides that all employees who request a change in the duration and/or location of their contractual working hours and whose employment relationship has existed for more than six months are entitled to a response from the employer in text form within one month of receipt of the request for change. This also applies in the event of a rejection of the request for change (see below also the amendments to the AÜG).

Another amendment to the TzBfG is the new wording of section 12 (3) TzBfG (work on call). In future, the employer must determine the time frame - determined by (agreed) reference hours and reference days - in which work is to be done at his request. A minimum notice period of four days applies (as before). An analogous regulation is found in the NachweisG, i.e. the above information must also be included in the verification (the employment contract).

According to the new section 15 (2) TzBfG, a probationary period agreed in a fixed-term contract must now be in proportion to the expected duration of the fixed-term and the type of work. A disproportionately long probationary period means that the agreed probationary period is not effective.

If an employee with a fixed-term contract has already been working for the employer for more than six months, he/she may in future notify the employer of his/her wish to establish an unlimited employment relationship pursuant to section 18 (2) TzBfG. The employer is then in turn obliged to give the employee a reasoned reply in text form (even if the request is rejected) within one month.

b. Amendment of the Temporary Employment Act (AÜG)

In the AÜG, the obligations to provide proof of the hirer's identity provided for in section 11 are extended: lenders must now inform the temporary worker of the hirer's company and address in text form before each hiring out.

In addition, section 13a (2) AÜG now stipulates that the hirer must notify a temporary agency worker who has been assigned to him for at least six months and who has notified him in text form of his wish to conclude an employment contract, of a reasoned response in text form (even if the request is rejected) within one month of receipt of the notification. This does not apply if the temporary agency worker has already expressed a corresponding wish once in the last 12 months. However, the legislator leaves open the content and scope of the reasoned reply.

c. Amendment of the Gewerbeordnung

In addition, the Gewerbeordnung (GewO) also undergoes a change in the area of training costs: According to section 111 of the GewO, employees may not be charged the costs of training if the employer is obliged by or on the basis of a law, collective agreement or shop agreement (Betriebsvereinbarung) to offer the training. Such training shall take place during working hours. If they have to be held outside working hours, they shall be regarded as working hours.

II. Recommendations for implementation

In practice, there is an acute need for action, especially due to the innovations in the NachweisG. The extended obligations to provide evidence have a direct impact on the content and drafting of employment contracts in the company. These must be fundamentally revised - at least for

new employment contracts. However, there may also be a need to adapt old contracts in the event of corresponding requests for proof by employees or in the event of adjustments/changes to employment contracts.

Against this background, we recommend a fundamental review and revision of the sample employment contracts used in companies. Alternatively, the new requirements under the NachweisG could be bundled in a central annex or a supplementary agreement to the employment contract. This document would then be made available to the employees in accordance with the formal requirements of the NachweisG - in writing - together with the employment contract. We will be happy to advise you on the drafting.

If you have any queries, please do not hesitate to contact us at any time.

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