January 2018 | 01

Claim to Information Pursuant to the German Pay Transparency Act

Employment Law – good to know ...

Overview of the German Pay Transparency Act

The German "Act on Advancing the Transparency of Pay Structures" (short form: "German Pay Transparency Act" (*Entgelttransparenzgesetz*)) came into force on 6 July 2017. It bundles some regulations and requirements that had already been established in the German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*), the German Basic Law (*Grundgesetz*) and in European law (among other provisions, in Article 157 TFEU) anyway and according to its introductory statement is intended to close the so-called "adjusted gender pay gap" (= difference in pay despite comparable qualification and work), in particular, which was still at 6 to 7 % in 2016 according to surveys of the German Federal Statistical Office (*Statistisches Bundesamt*).

Although the act came into force already in the middle of last year, it has played hardly any role in business practice so far, which is surprising because it imposes requirements especially in § 4 (4) (request for discrimination-free structuring of pay systems), § 10 (1) (employees' entitlement to information) and § 21 (1) (duty to report in the management report) that constitute high bureaucratic hurdles primarily for employers not bound by collective bargaining agreements. This administrative burden is also likely to clearly outweigh the financial burden estimated by the lawmakers to amount to approximately three million euros for the economy as a whole. The lawmakers thus assume, according to the introductory statement of the justification of the act, that the claim to information alone affects more than 14 million employees in theory. The lawmakers furthermore assume that about one per cent of the employees will actually demand information. In consideration of the fact that a request is possible only every two years, approximately 70,000 requests per year would have to be expected.

That the practical relevance of the act has been rather low so far can certainly be explained by the fact that it was not possible to assert the claim to information under § 25 (1) of the act until 6 January 2018.

Nevertheless it should be kept in mind that the administrative burden imposed by the act is great and that the legal consequences of failures to provide information have not yet been finally clarified. Especially employers in establishments with more than 200 regular employees are thus advised to deal with the requirements of the act now at the latest because as of **6 January 2018**, these employers must provide employees with information about the **median** of the **gross monthly remuneration** and **up to two further remuneration components** if at least six employees of the opposite sex perform the **same or equivalent work**. There are simplified procedures in this regard, however, these are only for companies bound by or applying collective bargaining agreements. They only have to name the remuneration regulations under the collective bargaining agreement and communicate where these can be inspected.

In the following, we answer important questions regarding the **claim to information**. For general information about the German Pay Transparency Act, please refer to our client newsletter from May/2017.

To whom is the request for information to be addressed?

In companies bound by or applying collective bargaining agreements, the employees should generally contact the works council. The works council may demand, however, that the employer assume this responsibility, or the employer may assume the responsibility on its own initiative (for details, see § 14 German Pay Transparency Act). In companies not bound by or not applying collective bargaining agreements, the employer is the first contact according to the act, if there is no works council. If that is the case, the rule that applies to employers bound by or applying collective bargaining agreements applies to such companies as well. The following applies to both companies bound by collective bargaining agreements and to companies not bound by collective bargaining agreements: The task may be delegated only if the declaration that the responsibility is assumed has been received by the other party already prior to the request for information. Moreover, the assumption of the responsibility applies for the term of office of the acting works council at the most. The involved parties must inform one another about received requests for information and the answers provided; the employees must be informed about whom they may contact.

We generally recommend that employers assume the responsibility for answering the request for information and conclude a works agreement on this with the works council in order to avoid liability issues in the event of incorrect answers.

What is deemed remuneration within the meaning of the German Pay Transparency Act?

According to § 5 (1) German Pay Transparency Act, remuneration within the meaning of this act includes all base or minimum wages and salaries as well as all other payments rendered directly or indirectly in cash or in kind on the basis of an employment relationship. According to rulings rendered by the ECJ, the remuneration must additionally be provided **by the employer**.

It is irrelevant whether the remuneration or individual remuneration component is granted by **statute**, is agreed in **individual or collective contracts**, is subject to a **works agreement** or is granted on the basis of a **company practice** or **voluntarily**. In detail, the term remuneration encompasses the following:

a) Continued payment of remuneration during illness
b) Payments during times of maternal leave
c) Special payments such as premiums, Christmas and holiday bonuses
d) Stock options and a long-term incentive plan at the employer's company
e) Benefits regarding direct and accident insurance and sick pay
f) Additional payments, such as for unfavourable working hours, difficult working conditions
g) Pay for extra work
h) Non-cash benefits such as staff discounts in the employee cafeteria, company contributions to a gym membership, use of company facilities at reduced prices
i) Reimbursement of training costs for works council members
j) Company pension for surviving dependants
k) Paid release from the obligation to work due to age
l) Benefits granted by a third party due to a company pension system

Determining the **value** of a pay component (e.g., a stock option) can be difficult in the individual case. In the case of **non-cash benefits**, such as permission to use the company car for private purposes, the company child care facility, the sports facilities, the meals or travel allowance, the corresponding financial value of the employer's contribution will have to be taken into account. With regard to stock options, for example, the non-cash benefit consists of the difference between the preferential price and the normal subscription price outside the company. In the case of a company car that is also provided for private use, the non-cash benefit consists of the value of the car (1 % of the gross list price of the car) plus a commuting allowance (gross list price of the car x 0.03 % x distance in kilometres). In the case of a bonus payment based on a target agreement that is at the employer's discretion, however, only the factors that make up the bonus are covered by the claim to information.

Sick pay, parental benefit or compensation for reduced working hours are **not** to be included. These are only **benefits with a remuneration replacement function that are** granted on the basis of the employment relationship.

When is work comparable?

The claim for information exists with regard to the remuneration for **comparable work carried out by at least six persons of a peer group of the opposite sex**. In the absence of clear statutory requirements, it is difficult, however, to determine the conditions for comparable work.

Work is comparable when it is the same work or equivalent work.

Work of employees is the **same** if they actually perform the same or identical work. This will rarely be the case. If the work is not the same, comparability can only exist on the basis of equivalent work.

The evaluation of whether equivalent work is shown to exist poses considerable problems due to the abstract statutory requirements. Equivalent work is shown to exist if employees can be regarded as being in a comparable situation. Employers bound by collective bargaining agreements can refer to employees in the same salary group. When collective bargaining agreements do not apply, the actual objective factors of the work must be considered, including without limitation **the type of work, the educational/training requirements and the working conditions**.

It is true that this definition can be applied to any industry and profession due to its abstract nature. But precisely this abstract nature also involves the disadvantage that it is hard to determine with legal certainty whether work is equivalent. In particular, it is not set out how the assessment factors are to be weighted. Furthermore, it is not defined what degree of difference is required or sufficient to deny that work performed by different employees is equivalent.

Owing to this vague definition and the ensuing legal uncertainty, a convincing and reliable argumentation for or against the comparability of employees is indispensable.

How is the comparable remuneration (median) determined?

In response to the request for information, the employer must communicate the comparable remuneration received by the employees of the respective opposite sex. Attention must be paid here because the act does **not** mean **the average remuneration (arithmetical mean)** employees of the opposite sex receive for the same or equivalent work by using the term "*comparable remuneration*". Adding the salaries of the peer group and then dividing the total by the number of the members of the peer group therefore does not result in the information the German Pay Transparency Act requires.

What is to be communicated instead is the so-called **statistical median** of the average monthly gross remuneration received by the peer group in the course of a calendar year. This is the remuneration of the employee that takes the middle position when the remuneration received by the members of the peer group is listed by amount in descending order and thus constitutes the mean value. Thus, if the number of members belonging to the peer group is uneven, the remuneration of the employee whose salary amount is exactly in the middle represents the median. If the peer group has an even number of members, the median is between the remuneration of the two employees who jointly form the medium range regarding the salary amount.

Calculating this median poses practical problems for the legal practitioner. Also in this case, simplifications apply to employers bound by or applying collective bargaining agreements that may refer to the relevant salary group of the employee requesting information. All other companies face the challenge of having to determine – after having established the relevant peer group – the mean value of the remuneration received by all employees in this peer group.

What formalities and deadlines must be met?

Employees must assert their request for information in text form. In companies not bound by and not applying collective bargaining agreements, the employer must provide the information also in text form within three months after receipt of the request for information. For companies bound by and applying collective bargaining agreements, however, there are no formalities and deadlines that must be met. It appears advisable, nevertheless, to take the requirements for companies not bound by collective bargaining agreements as a guideline for evidentiary purposes and to avoid court disputes.

Consequences of failures to provide information

For employers not bound by and not applying collective bargaining agreements, the German Pay Transparency Act establishes the rule in § 15 (5) that in the event that the employer fails to satisfy the request for information, the employer bears the burden of proof in the case of dispute that no violation of the principle of equal pay exists. This also applies if the works council was not able to provide the information for reasons for which the employer is responsible. The lawmakers do not provide for a reversal of the burden of proof for companies bound by or applying collective bargaining agreements.

Please do not hesitate to contact us at any time if you have any questions regarding the claim to information or the German Pay Transparency Act in general.

Kind regards

CMS Germany
Employment & Pensions Practice Area Group