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Approval of the Transparency of Remuneration Act

Employment law – in brief …

At the beginning of the year, the Bundeskabinett (German federal cabinet) passed the "Act on advancing the transparency of remuneration between women and men" (Transparency of Remuneration Act (*Entgelttransparenzgesetz –EntgTransG*)). The Act is supposed to come into force before the summer break.

The highly controversial preliminary ministerial draft originally presented by the Ministry for Family Affairs was revised on several occasions. The requirement that the minimum remuneration must be stated when advertising a position and an additional codetermination right when "implementing measures in terms of actual remuneration equality between women and men" were omitted and not replaced. Small and medium-sized companies are also no longer addressees of the now adopted Act.

1. Statutory Changes

a) Individual right to be informed

Under the new Act, all employees have a claim against their employer to be paid the remuneration that would have had to be paid if they had not been directly or indirectly disadvantaged with regard to remuneration based on their sex. The regular limitation period of three years pursuant to §§ 195, 199 of the German Civil Code (*BGB*) applies in this respect. The employer's retroactive payment obligation is expressly intended. At the same time, arrangements in employment or collective bargaining agreements that provide for shorter preclusion periods for mutual claims are invalid.

In contrast to the preliminary ministerial draft, only employees in establishments that regularly employ more than 200 workers having the same employer can assert the individual right to be informed. Unlike under the preliminary ministerial draft, the employee must additionally state his comparison group in his request. If an employee is aware of indications that at least six colleagues of the opposite sex are paid more for the same or equivalent performance, he can have his remuneration compared with the aver-age income. This involves gathering information on the criteria and procedures used to determine remuneration and also up to two remuneration components such as the permission to use the company car for private purposes, anniversary bonuses/awards or premiums. However, only the average remuneration is to be disclosed to the requester because all personal data of other employees must be anonymised by the employer. The right to be informed includes only such remuneration arrangements that are applied in the same establishment and with the same employer. Regionally varying remuneration arrangements with the same employer are not included in the scope of application.

In companies bound to a collective bargaining agreement, the works council is the employees' point of contact. The works council must bundle all information requests and may inspect the employer's remuneration tables.

Owing to existing transitional provisions, the right to be informed can be asserted at the earliest six months after the promulgation of the Act. Employees who request information within the first three years after the Act comes into force cannot repeat such a request until

three years later; subsequently, the request can be repeated every two years.

b) Business examination procedure

Using business examination procedures, employers with more than 500 employees usually in their service are moreover requested to examine their remuneration arrangements, the various remuneration components paid and their application at least every five years as to whether the principal of equal remuneration is complied with. The business examination procedure was omitted and not replaced for companies with a works council bound to a collective bar-gaining agreement. The examination procedure is also considered to be satisfied if a controlling company assumes the examination procedure on behalf of its subsidiaries. The Act no longer requires that previously established remuneration concepts have to be approved by the Federal Antidiscrimination Agency.

c) Reporting duties

Finally, companies with usually more than 500 employees that are obligated to produce a management report pursuant to §§ 264, 289 of the German Commercial Code (*HGB*) must report whether and how they promote women and how they create remuneration equality. The first report will be due for the year 2018. Companies bound to collective bar-gaining agreements must then report every five years, all other large companies every three years, on remuneration equality and advancement of women.

2. Important Key Aspects for Companies

The employer is obligated to provide information within three months. There is no harm in already preparing relevant remuneration data. If the employer does not meet the request, unequal treatment is assumed to exist. Although the employer is free to provide adequate justification for unequal remuneration, the burden of proof that reasons related to the employment market exist or the preferred employee performs his work in an extraordinary manner lies with the employer.

Irrespective of this, no sanctions for unequally paying employers were included in the Act – with the exception of damage to reputation and the subsequent wage payment duty following the corresponding court decision.

The right to be informed does not exist if the work is unequal or non-equivalent. If the employer considers the activities specified by the employer not to be comparable or if the scope of activities is, in practice, not equal or equivalent, the employee must specify another comparable activity or give reasons for this if such an activity does not exist. There is no obligation to compare various employment groups with one another. If the company is bound to a collective bargaining agreement and has a works council, only the works council can assert the employee's claim. The employer can meet this request relatively simply by referring to the provisions set out in the collective bargaining agreement.

Compared to the previous version, the employer is not obligated to "immediately remedy" unequal treatment based on gender, but merely to "take adequate measures to remedy such inequalities".

Based on §§ 27, 38 of the Works Constitution Act (*BetrVG*), the mentioned 200 usually employed workers create a new threshold regarding the right to be informed, which should be borne in mind when it comes to personnel development.

Yours sincerely

CMS Hasche Sigle
Practice Group Employment Law

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