

The new Minimum Wage Act - More than meets the eye!

INTRODUCTION

The German Minimum Wage Act (*Mindestlohngesetz - MiLoG*) which will take effect on January 1, 2015 meets longstanding political demands. Given the public debate of this topic in recent years, this does not come as a surprise. As we will explain below, it would however be a mistake to assume that companies which pay more than the minimum wage – in some cases much more – are not affected by the Minimum Wage Act, because this new law does much more than simply set a minimum wage.

APPLICABILITY OF THE MINIMUM WAGE ACT

Under § 1 para. 1 of the Minimum Wage Act every employee has a right to be paid a minimum wage of € 8.50 per hour. What is important here, but by no means obvious, is that the Minimum Wage Act also affects employees who earn substantially more than the minimum wage, because according to the prevailing interpretation of the Act, every employment relationship has a minimum wage floor to which the provisions of the Minimum Wage Act apply.

The Act does not apply to trainees or volunteers unless they are subject to the managerial authority of and are paid by the employer just like regular employees. Nor does the Act apply during the first six months of employment after an extended period of unemployment. It is a matter of some controversy whether the fact that the Act also does not apply to children and teenagers under the age of 18 who have not yet completed their education constitutes age discrimination.

INTERNS

Interns (*Praktikanten*) are generally covered by the provisions of the Minimum Wage Act, unless one of the exceptions defined in the Act applies. Notably, the Minimum Wage Act is the first labor law to define the term "intern".

CALCULATION OF MINIMUM WAGE

According to § 1 para. 2 sent. 1 of the Minimum Wage Act employees have the right to be paid a minimum wage of "€ 8.50 per clock hour". The Act however does not reveal which payments, benefits and other compensation paid by the employer must be taken into consideration for purposes of calculating whether the legally required minimum wage is reached, or on which time period the calculation must be based. If the Act were interpreted verbatim ("per clock hour"), this would lead to major problems for performance-based pay when for some work hours the employee's right to compensation falls below the minimum wage because the required number of units has not been reached, whereas for other hours the amount of € 8.50 is exceeded. There is good reason to think that in order to avoid such

irregularities, the question whether the legally required minimum wage is reached will be answered on the basis of a monthly average view.

PAYMENTS "COUNTING TOWARD" MINIMUM WAGE

Another question that remains unanswered by the Minimum Wage Act is which payments, benefits and other compensation paid by the employer must be taken into consideration at all for purposes of the legally required minimum wage. The question arises, for example, whether and, if so, to what extent bonuses or other special payments (commissions, Christmas bonuses, 13th monthly salary payments, vacation pay) must be taken into account when the fixed monthly salary is below the minimum wage level. Conflicts with the law in this area seem preprogrammed, since under § 2 para. 1 of the Minimum Wage Act the employer is required to pay the minimum wage at the latest on the last banking day of the month following the month for which wages are paid.

Yet another question is whether extra pay, overtime pay, and regular non-monetary benefits, including provision of a company car for personal use, may be taken into consideration.

Caveat: If an employer violates the Minimum Wage Act by paying less than the required minimum wage, the consequence is not, as one might think, that the employee's pay will be raised to the minimum wage level, but rather that the employee may demand the "standard" amount of pay for his or her work. If in doubt, this amount will be computed based on the wages payable in accordance with the regional collective bargaining agreement of the industry – even if collective bargaining agreements are otherwise not applicable to the employment relationship.

WORKING TIME ACCOUNTS

Every company that allows its employees to maintain working time accounts should critically review the relevant provisions – whether found in individual employment agreements or collective works agreements – to determine whether they are in conformity with § 2 para. 2 of the Minimum Wage Act. Under this code section work hours that go beyond the agreed work hours and are entered in a working time account pursuant to a written agreement must be compensated at the latest within 12 months, either by granting off-time or paying the minimum wage, unless the right to payment of the minimum wage has already been satisfied by payment of steady compensation. In addition, work hours entered in the working time account may not exceed 50% of the agreed work hours. In particular

applicable works agreements should be reviewed quickly to negotiate any necessary modifications with the responsible works council as soon as possible, ideally before January 1, 2015, or, if necessary, to be able to terminate the applicable works agreement as soon as possible.

EXCLUSIONARY PERIODS AND CLAUSES, WAIVERS

According to § 3 sent. 1 of the Minimum Wage Act the right to payment of the minimum wage may not be limited or excluded. While the legal minimum wage may be waived only pursuant to a court settlement in accordance with § 3 sent. 2 of the Minimum Wage Act, any forfeiture of the right to payment of the minimum wage is completely excluded by § 3 sent. 3 of the Minimum Wage Act. It is currently subject to debate whether rights to payment of the minimum wage, which arise from every employment relationship, should be expressly excluded when wording clauses in employment agreements governing exclusionary periods, or whether, as an exception to the general rule applicable to general terms and conditions, such clauses may be reduced in scope to preserve their validity.

REPORTING AND DOCUMENTATION OBLIGATION, CONTROL RIGHTS

Finally, the Minimum Wage Act introduces reporting and documentation obligations, which also must be considered. For example, reporting obligations arise under § 16 para. 1 of the Minimum Wage Act for foreign-based employers in the cargo freight, transportation and logistics businesses, the food services and lodging businesses, the personal transportation business, the building cleaning service business, and also the

construction business. Before starting work or rendering services, foreign-based employers in these industries must submit a written application to the appropriate customs office, which must include the information required by § 16 para. 1 no. 1 through 6 of the Minimum Wage Act.

Finally, it appears even more important in practical terms that even companies based in Germany with employees in minor employment as well as employers in the aforementioned industries must, under § 17 of the Minimum Wage Act, also record the beginning, end, and length of the daily work hours of such employees and keep those records on file for at least two years. Violations of these obligations are misdemeanors under § 21 of the Minimum Wage Act and may result in fines.

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