

## A paper tiger is getting teeth! – The new Documentation Act is coming

### INTRODUCTION

It was already in 2019 that the European Directive 2019/1152 on “transparent and predictable working conditions in the European Union” was passed. In this directive, new requirements were postulated with regard to the duties of employers to inform employees on the essential aspects of the employment relationship (Documentation Duty). The Directive obliged the Member States to issue corresponding legal regulations by no later than July 31, 2022. In light of this, the Bundestag passed a comprehensive amendment of the Documentation/Notification of Terms of Employment Act on July 23, 2022 during the second and third readings (*Nachweisgesetz*, abbreviated Documentation Act), which is expected to come into effect on August 1, 2022.

The Documentation Act had already obliged employers to set down some essential terms of employment in writing, to sign this document and to deliver it to the employee. As an alternative to the physical delivery of a separate document of the terms of employment, the duties under the Documentation Act could (and still can) be satisfied by stating this information in a written employment contract which is delivered to the employee. Until now, the information to be provided was thus manageable and was usually contained in employment contracts as a matter of course. Moreover, the Documentation Act was practically a toothless paper tiger. Although violations could theoretically lead to damage claims of an employee, they regularly failed because it was not possible to document a causative, quantifiable loss. Other conceivable legal consequences of a violation (such as an employee’s right of retention with respect to their work performance) did not play a major role in practice.

With the amendment of the Documentation Act, the catalogue of the employer’s information duties has been expanded (also with respect to employment relationships that were already in place prior to the effective date of the amended Documentation Act). Employers will need to come to terms with this expansion and adapt their employment contract templates or the templates for the appropriate documentation accordingly. Unfortunately, parts of the new Documentation Act give rise to questions concerning the details of how individual documentation duties are to be implemented. This appears to be particularly problematical in light of the

fact that violations of the Documentation Act can be punishable in the future by fines.

For this reason, we would like to present a few of the key changes:

### INFORMATION ON THE TERMINATION PROCESS

The new catalogue of facts that must be documented provides in Sec. 2 (1) sentence 2 no. 14 Documentation Act that, from now on, the employer must also provide information on “the procedure to be complied with by employer and employee in the event of a termination of the employment relationship”. It stands to reason that the question of what this exactly means has already been a point of discussion.

As is well-known, the termination process is marked by a number of complex requirements, some of which could fill whole books. It is hardly possible (and will certainly not be seriously demanded) that employers must provide information on every eventuality. Some questions remain nevertheless unanswered. Even the “minimum information” specified by lawmakers in this connection (information on the written form of the notice of termination, the termination periods and the period for filing an action for protection against dismissal) help only to a limited extent. Is it for example necessary to also provide information, within the context of the information on the period on extension of the start of a filing period (three weeks under Sec. 4 (1) Protection Against Dismissal Act), if a government authority is involved (Sec. 4 sentence 4 Protection Against Dismissal Act) or on the possible acceptance of the late filing of actions (Sec. 5 Protection Against Dismissal Act)?

Any not quite complete information will always harbor the risk that the person being informed has been misled. It is conceivable that employees would at least make the attempt, if a filing deadline has been missed and they have not been informed in compliance with the law, to claim damages against the employer because of inaccurate/incomplete information. Under the concept of restitution in kind (Sec. 249 German Civil Code), they could even try to sue for the reinstatement of their employment (with the argument that the employee would have filed an action in time and would have won if they had been properly informed). Even though this is a stony path, one must agree that the new Documentation Act offers several causes of conflict.

## “DIGITALIZATION? NO THANKS!”

The following aspect of the new Act appears to be just plain outdated: Although the EU Directive expressly allows that information be provided to employees in electronic form, German lawmakers (in contrast to the rest of Europe) continue to insist on the “real” written form provided for in the previous Documentation Act. Accordingly, the documentation or the employment contract that is supposed to satisfy the documentation duty must continue to be provided in hard copy (cf. Sec. 2 (4) Documentation Act as amended). Digitalization efforts in personnel management are hampered by this completely backward approach. The argument presented particularly by the Social Democratic fraction as the reason for this rule, that employees should receive clear and secure information “in their hands” that they can use within the scope of actions before the labor courts, could have been satisfied in a considerably more contemporary manner. Our European neighbors evidently have significantly fewer difficulties in reconciling employment protection with digitalization.

## APPLICATION OF THE NEW LAW ALSO FOR EXISTING CONTRACTS

It is interesting that the new Documentation Act also applies for employment relationships that were established prior to its entry into force. If the (written) contracts of these employees not already satisfy the requirements of the Documentation Act (which will probably be the normal case), employees have a claim against their employer under Sec. 5 Documentation Act for the delivery of a written document that conforms with the new Documentation Act, and moreover, already on the seventh day after the employer receives such demand. Employers should therefore at least be prepared for these types of claims prior to August 1<sup>st</sup>.

## RISK OF FINES

Whereas employers merely had to reckon with the risk of more theoretical damage claims in the event of violation of the old Documentation Act, Sec. 4 of the new Documentation Act provides for a fine of up to EUR 2,000 (per case) in the event that documentation has not be fully or correctly provided or not provided in a timely manner. If the new law is disregarded in a larger number of cases, this may therefore have grave consequences.

## SUMMARY

The new Documentation Act gives rise to an acute need for employers to act. It must be ensured, either through discrete „documentation management“ or at least through the adaptation of the existing employment contract templates that the legal duties are met. In light of the partially unclear wording of the law, designing this will certainly be a challenge. Again, it will be the job of the courts to settle the questions that lawmakers have unfortunately not clearly regulated. The insistence of lawmakers on written form to provide documentation appears totally behind the times, and this means that either a separate document or the employment contract must be produced in hard copy.

This is all backed up by the threat of a fine which will lead the Documentation Act to have a new, practical significance. Aside from this, one must fear that the questions surrounding the Documentation Act will play a greater role in future employment law litigation and that employers will have to deal with the demands of the existing workforce for updated documentation, which may lead to the filing of legal action.

We would be pleased to support you in dealing with the challenges presented by the new legislation and/or in including you on our mailing list of the subscribers to our Newsletter. To become a subscriber, just send us a brief Mail with your request.

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