

Finally, a Minimum Wage Comes to Germany. Are Employers Ready?

Employers should act now to ensure all employees — including contractors' employees — receive adequate pay to avoid risk of significant fines.

21 of the 28 member states of the European Union have minimum wage laws. On 1 January 2015, Germany will become number 22. For the first time in its history, Germany will introduce a nationwide minimum wage — set at Euro 8.50 gross per hour. Failure to comply with the Minimum Wage Act can have serious consequences for employers: the government can impose fines of up to half a million Euro.

Scope of the Minimum Wage Act

The Minimum Wage Act (the Act) applies to all employees and across all industry sectors. There are, however, exceptions for some categories of workers: trainees, volunteers, the long-term unemployed as well as children and adolescents who have not completed professional training. Interns can be exempt if their internship meets certain specified requirements. There are transitional rules, which will delay the full implementation of the new minimum wage regulations in certain industry sectors until 31 December 2017.

The minimum wage requirement also applies to Germany-based employees of companies whose domicile is outside of the country. The Act applies to employees working in Germany, even if the employment relationship is not subject to German law.

Minimum wage is set at Euro 8.50 gross per hour

Although the minimum wage is expressed as an hourly rate, the employee does not have to be paid by the hour. Weekly, monthly or yearly salaries are permissible. The same applies to different compensation systems, such as piece rates. In each case, however, the compensation the employee receives for the hours worked must equal at least the minimum wage. The Act does not provide for a specific reference period for determining compliance with the minimum wage requirement. Rather, the employer and employee may freely agree on such a period. Typically, however, the period may not exceed two months. The average hourly rate within that reference period must then amount to not less than Euro 8.50.

If a company customarily pays salaries monthly, the law is satisfied if the total compensation paid to the employees for the month, divided by the number of hours worked, equals at least the minimum wage. A day or a week in which the employee makes less than the minimum wage can be averaged within the month. Accordingly, the requirement to pay a minimum wage at an hourly rate does not mean that every hour must be compensated at that rate.

Assume, for example, that an employee works 95 hours per month for a salary of Euro 850. If this employee agrees to work five additional hours of unpaid overtime, the employer does not owe an extra Euro 42.50 (five hours at Euro 8.50 per hour) to the employee. The employer has already complied with the Minimum Wage Act by paying Euro 850 for 100 hours (= Euro 8.50 per hour on average).

Some uncertainty remains concerning which items an employer may include to determine the average hourly rate; particularly, variable pay components such as performance bonuses or commissions. Can an annual bonus only be considered in the month it is paid out for determining compliance with the minimum wage requirement? Or does the Act permit an employer (virtually) to allocate 1/12 of an annual bonus to each calendar month in order to ensure that the employee's pay in each month at least equals the minimum wage? While the regulations do not provide a conclusive answer, the legislative history suggests that the former is the case. Therefore, variable pay components which are paid in respect of periods longer than a calendar month (e.g., a quarterly or annual bonus), likely may only count as salary in the month in which they are actually paid. Consequently, an employer cannot justify paying a salary below the minimum wage in November based on a substantial bonus the employee will receive in December, even if this bonus is meant to compensate the employee for work during the whole final quarter of the year.

Implications for standard employment contracts

The Act creates issues even for companies that pay their employees at or above minimum wage. For example, the Act has cast doubt on the validity of so-called "preclusion" clauses, which can be found in almost every employment contract in Germany. A typical such clause would provide that any claims arising out of the employment relationship would be forfeit, unless asserted against the other party in writing within three months after the claim arose. A useful tool to shorten the otherwise applicable three-year statute of limitations, these clauses can protect companies from claims (e.g., for overtime or other compensation) which an employee may assert long after the employment relationship has ended. Some legal commentators posit that, following 1 January 2015, such clauses will only be valid if they explicitly exclude minimum wage claims, because the Minimum Wage Act provides that such claims are protected and cannot be waived by the parties. Whether the employment courts will adopt this view remains to be seen. Employers that do not want to assume the risk that their preclusion clauses may be found invalid may, however, want to consider amending their standard employment contracts now.

Additional compliance obligations

Also of note, the Act imposes compliance obligations on companies that contract out work. Under the Act, an employer can be held liable for its contractor's failure to comply with the minimum wage requirement. Employers that contract work to a third party, therefore, must ensure that the third party pays its employees at least the minimum wage. Otherwise, the contractor's employees may sue the employer for the difference between the minimum wage and what the contractor paid the employee. The employer would then need to take recourse against the contractor. This shifts the risk of recovery to the employer — a risk that is only magnified if the contractor is potentially insolvent.

Conclusion

Employers with employees in Germany are well advised to confirm before 1 January 2015 that their compensation rates meet the requirements of the Minimum Wage Act. Companies that are in the process of revising their standard form employment contracts should also consider amending any preclusion clauses. In order to limit their liability under the Act, employers that contract out work should require their contractors to confirm the contractors' employees are paid at least the minimum wage.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

[John D. Shyer](#)

john.shyer@lw.com
+1.212.9061270
New York

[Tobias Leder](#)

tobias.leder@lw.com
+49.89.2080.3.8092
Munich

You Might Also Be Interested In

[New French Employment Legislation One Year Later](#)

[A Useful Tool for Global Employers: A Look at Short-time Work in Germany](#)

Client Alert is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the lawyer with whom you normally consult. The invitation to contact is not a solicitation for legal work under the laws of any jurisdiction in which Latham lawyers are not authorized to practice. A complete list of Latham's *Client Alerts* can be found at www.lw.com. If you wish to update your contact details or customize the information you receive from Latham & Watkins, visit <http://events.lw.com/reaction/subscriptionpage.html> to subscribe to the firm's global client mailings program.