Amended Act on Evidence of the Essential Working Conditions – Employers need to take action!

WHAT EMPLOYERS NEED TO BEAR IN MIND IN LIGHT OF THE CHANGE IN THE LAW

Executive Summary

- On 1 August 2022, far reaching amendments to the German Act on Evidence of the Essential Working Conditions (Nachweisgesetz "NachwG") entered into force. The EU Directive 2019/1152 "on transparent and predictable working conditions" has been implemented and adopted by the German par-liament by way of an amendment act (German Parliament document no. 20/1636). Employers now need to take action.
- In this GSK Update, we highlight the most important aspects that employers now need to consider.
- The amendment act not only amends the NachwG, but also the Part-Time and Fixed Term Employment Act (TzBfG) and the Act on Temporary Agency Work (AÜG). These changes also require a response from employers, which will be addressed separately.

What were the previous regulations of the NachwG?

The NachwG imposes comprehensive duties on employers to provide information and evidence to employees regarding the material terms and conditions of their employment. This is to protect employees, as employment contracts can essentially be concluded without any specific prescribed form. The obligation to provide written information on the material conditions of employment is intended to avoid disputes about these conditions as well as illegal employment.

Under the previous version of the law, employers were required to provide proof of the date of commencement of the employment relationship, the foreseeable duration of the employment relationship in the case of fixed-term employment, the place(s) of work (if the employee is to be deployed at different places of work), a brief job profile, the contractually agreed working hours, the amount of remuneration, the amount of vacation leave entitlements, the relevant notice periods regarding the employment as well as any applicable collective regulations.

What further evidence must employers provide following the amendment of the law?

The list under Sec. 2 (1) sentence 2 NachwG has been expanded to include the following items:

- the duration of a probationary period
- if agreed: the possibility of overtime being assigned and the prerequisites of such assignment
- the remuneration of overtime
- a detailed breakdown of remuneration components and their amount, including all supplements, allowances, bonuses and special payments as well as other remuneration com-ponents (this generally also includes the possibility of a bonus or variable remuneration) to be stated separately, as well as their respective due date and method of payment
- agreed rest breaks and times
- in the case of shift work: shift system, shift rhythm and requirements for shift changes
- in the case of on call work (Sec. 12 TzBfG): the agreement to perform work when the need arises, the min-

imum number of hours to be remunerated, reference days and hours for the performance of work as well as the relevant period within which the employer must give advance notification of the working time
- any entitlement to professional training provided by the employer
- if there is a company pension scheme provided by a pension provider: name and address of the pension provider (only if the pension provider is not obliged to provide this information)
- the procedure to be followed by the employer and the employee in the event of termination of the em-ploy-ment relationship, at a minimum the require-ment of the written form and the notice periods ap-plicable to the em-ployment relationship as well as the period for bring-ing an action for protection against dismissal
- a general reference to applicable collective bargain-ing agree-ments and works or service agreements

In addition, the scope of application of the NachwG has been extended to cover all employees. Under the previ-ous version of the law, temporary staff was still ex-empt (if working for a maximum of one month).

What deadlines do employers need to adhere to when it comes to providing evidence?

In the case of new employment relationships established on or after 1 August 2022, the basic information (con-tracting parties, working hours and remuneration) must be handed out to the employee at the latest on their first day of work. The employee must then receive all further information within seven working days or one month af-ter the agreed start of work, depending on the specific in-formation pursuant to Sec. 2 (1) sentence 2 NachwG.

In practice, it may be advisable for employers to fulfil all their information obligations in one uniform step at the latest by the employee's first day of work rather than to provide evidence in three staggered steps according to the applicable deadlines.

What rules apply to existing employment relationships (old contracts)?

In the case of existing employment relationships, employ-ers must provide evidence in accordance with Sec. 5 Na-chwG only at the express request of the employee.

Depending on the specific information under Sec. 2 (1) sentence 2 NachwG, this evidence must be handed over at the latest on the seventh day or within one month of the employee's request.

What is clear, however, is that employers only have to provide evidence to existing employees if requested to do so. If no such request is made, the employer is not re-quired to take action.

What formal requirements apply to the obligation to provide evidence?

The obligations to provide evidence are subject to the strict written form requirement pursuant to Sec. 2 (1) sen-tence 1 NachwG. The German act specifically excludes the electronic form, even though the EU Directive did not stipulate such strict written form requirement. Docu-ments therefore cannot be exe-cuted with a simple or qualified electronic signature. Em-ployers unfortunately have to resort to pen and ink and sign the original docu-ment.

Any duly authorised representative of the company may sign the document. Unlike in the case of unilateral declarations of intent such as a notice of termination, any proof of the underlying authorisation is not required.

Employers should keep a record of the receipt of the document so they can prove that they have fulfilled their duty to inform in the required form. This can be done, for example, by the employee acknowledging receipt on a copy of the document.

Does this not result in a requirement for the written form for employment contracts "through the back door"?

No, if no other form requirement applies (as for example the written form requirement fixed term employment), the employment contract itself still does not have to adhere to a specific form. Employment contracts can still be concluded digitally and be signed by scanned or simple electronic signature or using the electronic form and be signed by qualified electronic signature (e.g. DocuSign – either with simple or qualified electronic signature).
However, the employee must be given all the terms and conditions of employment listed in the NachwG in writing, i.e. signed by the employer or a representative of the employer.

One option is to include the relevant information in the employment contract in order to comply with the obligations to provide evidence. However, due to the written form requirement stipulated in the NachwG, this means that the em-ployment contract has to be issued in writing. Signing by (simp e or qualified) electronic signature is then not pos-sible, as the original contract must be signed with wet-ink signature.

Alternatively, the employment contract can be left as it is. The conditions of employment, taking into account the requirements of the NachwG, can be summarised in a separate document. The employer then only has to prepare this separate document in compliance with the strict written form requirement (original signature of an authorised representative of the employer) and provide it to the employee.

Should employers fulfil their obligation to provide evidence by adapting their employment contract or by means of a separate memorandum?

The adjustment of employment contracts is not required by law. An ill considered adjustment of employment contracts may entail considerable risks. For example, contractual provisions can regularly only be changed again with the consent of the employee. Thus, employers could legally bind themselves against their will through careless formulations in the employment contract and also unintentionally restrict their unilateral right to issue instructions.

Employers should therefore review with caution which requirements of the NachwG are already fulfilled by the employment contract template they are currently using, which information can be added to the employment contract while still avoiding the risks mentioned above and which information should be provided in a separate document that is not legally binding.

In general, it may be advisable to draw up a separate document to meet the (old and new) statutory obligation to provide the employees with evidence of their essential working conditions. Such separate document can then be used easily, whether for a new employment rel tionship or an existing employee requesting evidence, to meet the legal requirements, and it can also be easily modified or amended as working conditions or legal requirements may change in the future.

What are the legal consequences of violations of the obligations to provide evidence?

In accordance with Sec. 4 NachwG, is an administrative offence to fail to comply with the obligation to provide evidence, to not comply with it fully or to not comply with it in the prescribed form or within the time limit. Failure to comply can be punished with a fine of up to 2,000 euros per individual offence.

GSK's employment law team will be happy to advise you on any questions you may have as well as on the practical implementation with regard to the amended NachwG.

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