P&O Newsletter actual

Current information and the latest developments

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PwC Whistleblower and Ethics Reporting Channel - Update on the German Whistleblower Protection Act

Shortly before the turn of the year, on 16 December 2022, the German Bundestag passed the "Act for Better Protection of Whistleblowers and for the Implementation of the Directive on the Protection of Persons Reporting Breaches of Union Law" (Whistleblower Protection Act, “Hinweisgeberschutzgesetz”, hereinafter HinSchG), implementing the Whistleblower Directive (EU) 2019/1937. This will ensure a standardized level of protection for all whistleblowers.

What is new?

In our November article, we already reported on the most important key points of the draft of the HinSchG. In the meantime, the Bundestag has passed the law. Now the Bundesrat has to approve it. The next plenary session of the Bundesrat will take place on 10 February 2023. The law is expected to enter into force three months after promulgation, i.e. probably as early as May 2023.

As of that date, employers with regularly at least 249 employees will be required to maintain an internal reporting office where whistleblowers can report violations of the law. Employers with regularly at least 50 and less than 249 employees will be required to do so as of 17 December 2023. Public sector institutions are already obligated to protect whistleblowers under the Whistleblower Directive. The obligation to establish and operate internal whistleblowing units for municipal or municipally controlled companies in public or private legal form is governed by the respective state law.

Whistleblower protection encompasses a more extensive catalog than simply reporting violations of Union law. The scope of protection has been expanded to include two areas of application in addition to the regulations previously listed in Section 4 HinSchG, which also applies to national regulations. This now also includes the reporting and disclosure of information on violations of the Digital Markets Act (DMA), which represents a comprehensive regulatory concept for large digital companies. Another new aspect of the HinSchG's scope of protection is that the reporting of anti-constitutional statements made by public officials – even below the threshold of criminal liability – will in future be covered by whistleblower protection.

It should be emphasized that, as of 1 January 2025, anonymous reports must be processed. Employers must provide reporting channels that enable anonymous contact and anonymous communication between the whistleblower and the inter-

nal reporting office. The government draft had previously only stipulated that anonymous reports "should" be processed, without establishing an obligation.

The HinSchG prohibits all unjustified disadvantages suffered by a whistleblower as a result of reporting or disclosing violations of the law. In the event of a violation of the prohibition of reprisals, there is an obligation to compensate the person who caused the violation - now also due to a damage that is not a financial damage. This completes the protection for whistleblowers.

The reporting offices must document all incoming reports and are now only allowed to delete them three years after the conclusion of the proceedings (in contrast to two years in the government draft).

Reports can be made orally, in text form, or in a personal meeting. With the consent of the person making the report, the meeting can now also take place via video and audio transmission.

What does our PwC Whistleblower and Ethics Reporting Channel offer?

Employers should provide incentives for whistleblowers to first contact the internal reporting office before reporting to an external reporting office. We can do this for you and provide you, your employees and your clients with our attractive **PwC Whistleblower and Ethics Reporting Channel.** You can outsource your company's internal reporting office to PwC Germany and receive an independent and centralized whistleblower protection system that provides you with legally secure support in uncovering and remedying wrongdoing in your company. In order to concentrate resources and target group-wide problems more effectively, affiliated companies can also establish a joint unit that acts on behalf of several independent companies in the group. It is important that the original responsibility for follow-up measures always remains with the respective group company commissioning the work.

The persons entrusted with the tasks of an (internally organized) internal reporting office must be independent in the performance of their duties, but may also perform other tasks and duties in addition to their activities for this purpose if these do not lead to a conflict of interest. However, in order to maintain the neutrality, independence and thus the functionality of the reporting office and also to avoid the appearance of influence, corresponding potential conflicts of interest should be excluded from the outset. Designate our **PwC Whistleblower and Ethics Reporting Channel** as an internal reporting office so that you can exclude potential conflicts of interest. The trust and willingness of employees to use a reporting channel is expected to be higher if they also subjectively perceive the reporting office as truly independent. This applies in particular if the information refers to e.g. executives of the respective company or in very hierarchically organized companies.

With our standardized and digital solution as a managed service, you can meet the requirements of the Whistleblower Directive and the HinSchG in a legally secure manner and without the need for costly IT implementation.

In addition to comprehensive human resources with industry experience and specific expertise, we offer you:

- the set-up and the operation of the whistleblower system
- various communication channels such as web form, whistleblower hotline and an online mailbox
- tracking the status of the whistleblower's submission
- documentation and validation of all received whistleblowing reports
- Management and fulfillment of legal deadlines, absolute legal certainty and assurance of compliance requirements
- Transparency of all submitted reports through the dashboard provided on the company side
- Recommendations from our PwC experts for taking follow-up action

Use our **PwC Whistleblower and Ethics Reporting Channel.** With our tool, we implement and manage the internal reporting channel for you in compliance with all regulations. We enable you to identify systematic misconduct in the company to reduce the risk of reputational and financial damage, and strengthen your company's accountability and integrity. Provide security. Experience trust. Benefit from the advantages of our managed service. Please feel free to get in touch with us.

From Arnulf Starck and Duygu Özcan

Employment Law

Ruling of the Federal Labour Court on forfeiture and limitation of vacation entitlements - What risks employers now face

"If all the year were playing holidays, To sport [meaning recreation] would be as tedious as to work; But when they seldom come, they wished-for come, And nothing pleaseth but rare accidents." – This is how William Shakespeare already had his character Prince Hal, later Henry V, King of England, express his appreciation of the time off from work during the year, although there is a hint of concern about too much time-off. Although not nearly as flowery as the English playwright, the Federal Labour Court (Bundesarbeitsgericht, BAG) recently underlined the importance of the statutory minimum vacation in its ruling of 20 December 2022 (BAG – 9 AZR 266/20) – with significant consequences for employers:

"An employee's statutory entitlement to paid annual vacation is subject to the statutory limitation period. However, the three-year limitation period only begins at the end of the calendar year in which the employer informed the employee of his or her specific vacation entitlement and the expiry periods and the employee nevertheless did not take the vacation of his or her own free will." (BAG press release 48/22)

No statute of limitations in case of omitted notice of forfeiture of vacation entitlement

The BAG thus implements the requirements of the European Court of Justice (ECJ) from a previous preliminary ruling procedure (cf. BAG, order for reference of 29 September 2020 – 9 AZR 266/20 (A) as well as ECJ, ruling of 22 September 2022 – C-120/21). Accordingly, an employee's statutory vacation entitlement only expires after the expiry of the three-year limitation period if the employer has fulfilled its obligation to request and notify the employee, i.e. has notified the employee of the impending expiry of the vacation entitlement and requested the employee to take the remaining vacation. If the employer does not fulfil this obligation, the limitation period does not start to run. As a result, a significant amount of vacation from years far in the past can be claimed.

The history of origins

The impacts of this ruling become clear when looking at the statutory situation, specifically at the Federal Leave Act (Bundesurlaubsgesetz, BUrlG): According to section 7 (3) BUrlG, vacation earned and not taken in the current calendar year expires at the end of the year, but no later than 31 March of the following year. In simple terms, if the employee does not take his/her vacation in the same year or,

under certain circumstances, in the first three months of the following year, he/she loses the entitlement to remaining vacation.

In contrast, the Working Time Directive (Directive 2003/88/EC) and the Charter of Fundamental Rights of the European Union do not provide for such a forfeiture mechanism. In the past, the ECJ has already established an obligation on the part of the employer to request and inform the employee of the impending expiry of vacation entitlements. The BAG has implemented this case law (see BAG, judgment of 19 February 2019 – 9 AZR 423/16). According to the interpretation in conformity with the Directive, the employer must ensure in concrete terms and in complete transparency that the employee is able to take his annual leave. To this end, if necessary, a formal request must be made to the employee to take his/her vacation and he/she must be informed clearly and in good time that the vacation will be forfeited if he/she does not take it in time. The ECJ thus shifted the fate of residual leave from the sphere of influence of the employee to a significant extent to the sphere of the employer.

What is new?

Against the background of this history, the BAG's ruling does not seem particularly surprising at first glance. Nevertheless, it has far-reaching consequences. While case law in the past has dealt with the preconditions for the mere forfeiture of the vacation entitlement at the end of the year, the forfeiture is now being discussed in the context of the statutory limitation period. While a failure to inform the employee of the impending forfeiture previously led to the vacation being carried over into the following year according to ECJ case law, the courts now also deny the commencement of the limitation period for vacation claims. It is true that the provisions of the statute of limitations continue to apply to statutory minimum vacation. Nevertheless, the regular limitation period of three years does not begin, as usual, with the end of the year in which the vacation arose and was not taken, but with the end of the year in which the employer first fulfilled its obligation to request and notify. The ECJ thus allows the purpose of the statute of limitations – the granting of legal certainty – to take a back seat to the protection of the employee's health, which is guaranteed by the use of recreational leave. Accordingly, employers cannot invoke their need for legal certainty in the employment relationship if they have not properly complied with their duty to provide a notification.

What do employers have to consider now?

Employers already had to ensure in the past that employees were informed towards the end of the year about the amount of remaining vacation as well as the imminent expiry of leave entitlements and were requested to claim them in a timely manner. This continues to apply. However, the financial risk of non-compliance with the obligation to request and notify is now much higher.

It does not seem far-fetched that employers could be confronted with waves of claims or lawsuits.

Although compliance with the obligation to request and notify can be made up for, this only lets the limitation period start. The risk of a claim for the past therefore remains for the following three years (beginning at the end of the year in which the obligation to notify was fulfilled). The case law covers vacation claims from the past

to an unlimited extent. This also includes claims that were earned before the ECJ mentioned the obligation to request and notify for the first time in 2018.

Making up for the obligation to request and inform requires precisely the naming of the days of unused vacation. The BAG ruling can thus cause immense administrative and research costs for companies (if such information is still available in the HR department at all).

Should the case law also be transferable to the compensatory vacation claim pursuant to section 7 (4) BUrlG in the context of the termination of the employment relationship, claims by employees for the past cannot be ruled out, especially in connection with the settlement of terminated employment relationships. In addition, employees who have already left the company could come up with the idea of claiming outstanding vacation compensation.

Forfeiture periods in employment contracts and collective bargaining agreements, should they have been validly agreed, were not the subject of the ruling under discussion. However, they cannot serve as an adequate means of ensuring the forfeiture of vacation entitlements, because they too must be subordinate to the interpretation in conformity with the Directive.

As a result, the only thing employers can do is to consistently comply with the obligation to request and notify their employees each year and to record the limitation period accordingly in order to be prepared against late claims by employees.

The ruling under discussion only concerns the statutory minimum leave within the meaning of section 3 (1) BUrlG. The forfeiture and limitation of vacation entitlements granted under an employment contract or collective bargaining agreement requires a separate regulation, which must be reviewed all the more against the background of the case law.

In addition, it remains to be seen what effects the BAG ruling will have on the vacation provisions to be formed in the context of accounting.

Our consulting approach

We are happy to assist you in determining outstanding vacation entitlements and the associated risks for the past (if necessary, also reviewing and amending the employment contract clauses used in your organisation). Besides our expertise in labour law, we use our data & analytics methods to show you risks and costs with the help of dashboards. In addition, we assist in setting up new HR processes to comply with the duty to request and notify as part of your annual HR compliance processes.

From Thomas Peter

Employment Law

Fundamental decision from Germany's Highest Labour Law Court on the recording of working time - What employers must do now

After the fundamental decision on 13 September 2022, the Federal Labour Court (Bundesarbeitsgericht - BAG) has now published the long-awaited written reasons of the decision on the obligation to record working time on 4 December 2022. Every company, every business must now set up and introduce regulations on the recording of working time in compliance with co-determination and data protection requirements.

What was the decision about?

The BAG had to clarify the question of whether or not the works council of a joint enterprise of two companies has a right of initiative with regard to the introduction of electronic time recording.

After initial negotiations between the employer and the works council on the introduction of such an electronic time recording system, the talks were broken off without success. However, the works council insisted on the introduction of a time recording system and called the arbitration board to resume negotiations. After the two companies objected to the competence of the arbitration board, the works council initiated a court proceeding to clarify that it was entitled to the claimed right of initiative.

The works council has no right of initiative

The Federal Labour Court denied the right of initiative and justified this by stating that the legal reservation in the introductory sentence of section 87 (1) of the Works Constitution Act (Betriebsverfassungsgesetz - BetrVG) precluded a right of co-determination and thus also the right of initiative. This is because companies are already obliged by law to introduce a system to record the beginning, end and the duration of working hours, including overtime. Therefore, a works council's right of initiative cannot refer to the introduction to the recording of working time as such.

Employers must record working timeHowever, the Federal Labour Court sees the statutory regulation neither in Article 31 (2) of the Charter of Fundamental Rights of the European Union (GRC) nor in the German Working Time Act itself, but rather in the German Occupational Health and Safety Act (Arbeitsschutzgesetz – ArbSchG), namely in section 3 (2) no. 1.

This stipulates that the employer must "ensure appropriate organisation and provide the necessary resources " to ensure health protection. This also includes the obligation to introduce a system for recording the daily working time worked by

employees. Such a system must record the beginning and end and thus the duration of working time, including overtime.

According to the BAG, the obligation to record working time applies to all workers employed in the enterprise, i.e. also to executive employees, since the BAG derives the obligation to record working time from the Occupational Health and Safety Act (Arbeitsschutzgesetz) and not from the Working Hours Act (Arbeitszeitgesetz). The restriction from the Working Hours Act for executive employees and special groups of persons according to §§ 18 ff. Working Hours Act therefore do not apply with regard to the recording of working hours. Whether this will remain the case in the future is currently open, as the legislator will have to enact a new regulation in this respect.

The obligation of employers is not limited to allowing employees to use a working time recording system, the BAG added. The system must actually be used. However, the recording of working time can be delegated to employees. The BAG also does not specify in which form, as the legislator has not currently made any regulations on the form and the system must only be "objective, reliable and accessible" according to the ECJ. Paper records are therefore possible, although not recommended for reasons of reliability.

Conclusion and practical advice

With the publication of the written reasons for the decision, it is now clear that there is a legal obligation to record all working hours. There is no transitional period. The obligation to record all working hours currently also applies to executive employees.

Every company must now consider how and for which employees the working time is recorded. Use our Quick Check solution for this. We record the current status of your existing working time models/guidelines with regard to time types/time accounts and implementation in accounting and leave systems as well as their transfer effort by means of a focused PwC questionnaire. Our analysis offers a targeted overview of your existing structures from a legal, procedural and technical perspective. This provides you with a quick transparency of the legal situation in your company, the necessary compliance, the status quo and identifies the concrete need for action.

In companies where a works council exists, there is leeway with regard to the selection and more detailed design of working time recording. We advise you on the implementation of the need for action depending on the requirements:

- Modification of existing systems and processes as well as adaptation of existing IT operating agreements
- Introduction of temporary technical solutions for minimum documentation
- Selection, configuration and advisory support for the implementation of a new time recording system: This includes a market and requirements analysis, interface adaptation, data migration, provider governance and implementation under labour law, including the drafting of appropriate IT company agreements.

From Dr. Nicole Elert and Manuel Klingenberg

Employment Law

Underestimated liability risk in deals: employee data protection

The question of the state of the "employee data protection compliance" in the company (target), business or part of a business to be acquired can no longer be ignored by serious risk management in the context of an M&A deal.

Data protection as a liability risk

For years, employee data protection was neglected in many companies. In 2018, the General Data Protection Regulation (GDPR) came into force, which in Article 83 provides for fines for companies in sensitive amounts. The sanctioning practice of the data protection authorities in recent years shows that this fine regulation is not a "paper tiger", but is rigorously applied. Sanctions are imposed not only for violations involving customer data, but also in connection with employee data. For example, the textile company H&M was fined 35 million euros for unlawful collection of employees' private information.

Managing directors and board members personally responsible

For employers, employee data protection law has become a challenge: The digital world of work is growing, which is why companies must be able to present increasingly sophisticated data protection concepts in the event of an official inspection. At the same time, according to recent case law (OLG Dresden, ruling dated 30 November 2021 - 4 U 1158/21, cited in NZG 2022, 335), executive members are even personally liable for deficits in dealing with data protection. Corporate co-determination also causes problems: Works councils refuse to give their consent to technical equipment if it could involve monitoring the employees. However, according to case law (OLG Nuremberg, ruling dated 30 March 2022 - 12 U 1520/19, cited in NZG 2022, 1058), this is precisely what is required for management boards and managing directors to fulfill their monitoring and organizational duties. Taken as a whole, data protection, employment law, works constitution and directors' and officers' liability law therefore form a set of obligations that is increasing in complexity and poses serious liability risks for companies and their CEOs. Particular caution is therefore called for in the case of company acquisitions and shareholdings, as the acquirer is exposed to the risk of buying into insufficient data protection concepts and thus operational conflict potential as well as incalculable liability risks.

Data privacy in due diligence

In preparation for a possible corporate transaction, the interested party must first form a picture of the target company. During due diligence, the target is examined from several perspectives. Employee data protection is relevant here in two respects: on the one hand, the seller wants to satisfy the interested party's information interest in the company's data protection compliance, so as not to jeopardize

the contract negotiations if possible, but on the other hand, it does not want to violate data protection regulations when passing on information.

In M&A transactions, personal data of employees, including the key data of the respective employment relationship as well as the working conditions of executives and board members, provide information about the economic and (labor) legal situation of the target. This also includes, for example, the conditions under which employment or service contracts of executives of the target company can be terminated. The increased value of data for companies in recent years – also across Europe – and in particular the stricter prosecution of violations of the now stricter data protection law make employee data protection an important part of any corporate transaction. Matters relevant to data protection law are increasingly coming into focus, as they represent an increased liability risk due to the threat of high fines. In the event of violations of certain data protection regulations, fines of up to EUR 20,000,000 or, in the case of a company, up to 4% of its total annual global sales in the previous fiscal year can be imposed by the data protection supervisory authorities.

Potential buyers of companies must therefore keep an eye on the handling of employee data and their entire data protection organization in order to avoid liability risks, unrest within the workforce and, not least, damage to their image. While fines may be imposed on both the seller and the acquirer if personal data is not passed on in compliance with data protection law, any security gaps and data protection risks after the acquisition of a company regularly only affect the buyer.

Our approach

We support you in the investigation of the target within the scope of the due diligence, also with a special focus on employee data protection, and enable an assessment of the data protection risks in the depth of examination depending on your assignment. The investigation enables us to assess whether the target company is sufficiently positioned with regard to employee data protection or whether it could pose a liability risk for you. Feel free to contact us and let us proceed together.

From Dr. Frank Degenhardt, Duygu Özcan, Dr. Thomas Götz

Pension Law and Pension Consulting

Elimination of calendar-yearly supplementary earnings limits for early statutory old-age pensions and increase in calendar-yearly supplementary earnings limits for reduced earning capacity pensions in statutory pension insurance as of 1 January 2023: More flexibility also for company pensions?

As already announced in the current P&O Newsflash, the 8th Act amending the 4th German Social Security Code (SGB IV) and other laws (hereinafter "new regulations") came into force on 1 January 2023. The previously applicable calendar-year supplementary earnings limit for early statutory old-age pensions[1] has been abolished. There are also simplifications for recipients of reduced earning capacity statutory pensions. With the new regulation, the legislator aims to create more flexibility in the transition from working life to retirement and thus counteract the existing shortage of labor and skilled workers.

Retaining qualified skilled workers can also be an incentive for employers to allow their older employees more flexibility in the transition from working life to retirement. Thus, as a result of the new regulations, employers could enable their older employees to continue working while receiving a statutory pension and, if applicable, also a company pension.

Unfortunately, the legislator has not fully considered company pensions in the new regulations. Employers who want to retain skilled workers should therefore proactively address questions that now arise as a result of the new regulations in company pension law and review their pension plans to determine whether they need to be adjusted.

What were the calendar-year supplemental earnings limits prior to 1 January 2023?

Prior to the Corona pandemic, a calendar-year supplementary earnings limit of EUR 6,300 applied with regard to early statutory retirement pensions. If this was

[1] For the purposes of this article, **early retirement pensions** are all statutory pensions whose pension commencement date is before the individual reaches the standard retirement age (completed 67 years of age from the year of birth 1964). This includes the following types of old-age pension: *old-age pension for persons insured for many years, old-age pension for persons insured for a particularly long period and old-age pension for severely disabled persons.*

exceeded, there was an entitlement to a partial pension. The partial pension was calculated by first dividing the calendar-yearly additional earnings above the additional earnings limit by twelve and deducting 40% from the monthly full pension.

There was also a so-called supplementary earnings cap to ensure that pension and supplementary earnings did not result in higher income than before the pension was drawn.

The first Corona social protection package raised the calendar-year supplementary earnings cap from EUR 6,300 to EUR 44,590 in 2020. In addition, the supplementary earnings cap no longer applied. This regulation initially applied for a limited period until 31 December 2021, but was extended until 31 December 2022, with the provision that the calendar-year supplementary earnings limit was raised to EUR 46,060.

In the case of the statutory pension for partial reduction in earning capacity, the calendar-year supplementary earnings limit was calculated individually; most recently, it was at least approximately EUR 15,990. In the case of full reduction in earning capacity, a calendar-year supplementary earnings limit of EUR 6,300 applied.

What has changed with regard to the calendar-year supplementary earnings limits as of 1 January 2023?

- The calendar-year supplementary earnings limit for early statutory **old-age pensions** has been abolished. With the receipt of an early statutory old-age pension, additional earnings can now be earned without restriction - as was previously the case only after reaching the standard retirement age.

- In the case of a statutory **pension for partial or full reduction in earning capacity,** the additional earnings limits are now calculated individually and are linked to the monthly social insurance reference amount. In 2023, the minimum additional earnings limits for partial and full reduction in earning capacity will be approximately EUR 35,650 and approximately EUR 17,820, respectively.

How will the new regulations affect companies, their pension plans and other early retirement models?

The new regulations mean that statutory retirement pensions can be drawn before the standard retirement age is reached without any reduction due to additional earnings (from continued employment).

In addition to this improvement from the employee's perspective, some early statutory pensions [2] will continue to be subject to deductions (0.3% per month). However, reductions are only disadvantageous for employees after a long period of pension receipt, as early receipt leads to a reduction in the pension payment amount, but conversely the pension has already been paid out and is therefore

[2] *Old-age pension for long-term insured persons* and *old-age pension for severely disabled persons*

drawn for longer. By contrast, the old-age pension for those insured for a particularly long period of time (the so-called "pension at 63") is free of deductions.

It is generally expected that in the future employees will increasingly apply for early statutory retirement pensions, especially the deduction-free old-age pension for those insured for a particularly long time, and then – depending on their personal income situation – continue to work at the same time, possibly on a part-time basis.

Accordingly, if a statutory old-age pension is drawn as a full pension in accordance with Section 6 Para. 1 Sentence 1 of the German Company Pensions Act (BetrAVG), there is an entitlement to an early company pension if, in addition, the other benefit requirements of the pension plan, such as the waiting period or termination of the employment relationship, are met. In particular, since the exit requirement in most pension plans [3] is a prerequisite for receiving benefits, employees with company pension entitlements are more likely to claim their company pension later in the future, as the new rules will give them an incentive to remain in the employment relationship for longer.

Regularly claiming the company pension at a later date would, in perspective, result in an increase in the final age of funding in the commercial balance sheet. A higher final age of funding can have different financial and balance sheet implications for companies, depending on the commitment and financing of the company pension:

- In the case of "classic" pension plans, where the benefit amount is often capped after a certain period of service, the bottom line is a saving for the employer, because on the one hand it saves several years of pension payments and on the other hand hardly any (possibly surcharges) or no further company pension entitlements are added.

- In the case of defined contribution plans with a one-time payment option, the employer would have to pay more contributions into the pension plan over the longer period of employment.

The new rules do not result in any changes in the tax balance sheet, as the earliest possible retirement age under the statutory pension insurance scheme may continue to be applied there despite any trend towards later retirement.

On the other hand, former employees who previously left the respective company with a vested pension entitlement have the option under Section 6 of the German Occupational Pensions Act (BetrAVG) to claim their company pension with the future trend towards earlier receipt of the statutory pension. The same applies to pension plans that do not stipulate the termination of the employment relationship as a prerequisite for drawing the company pension (particularly in the case of direct insurance).

With regard to other early retirement models, such as credit balance models, the new regulation could result in further interesting combination options for employees close to retirement age. For example, a longer release or part-time phase than previously would be possible through a combination of release and/or part-

[3] The implications for direct pension commitments are considered here.

time salary and statutory (partial) pension. Existing agreements should generally be reviewed in light of the new regulations and sometimes adjusted.

Conclusion and outlook

With the new regulations in the statutory pension insurance, the legislator has – consciously or unconsciously – not sufficiently considered the consequences for companies' pension plans.

For this reason, employers who wish to enable their older employees to continue working alongside the receipt of an early company pension should proactively address questions that now arise as a result of the new regulations in occupational pension law.

Such questions can be, for example:

- Will there be any savings or expenses as a result of the later company pension payments?
- Does it make sense to change the pension plan with a view to drawing a company pension while continuing to work?
- What regulations do the existing pension plans and pension products/pension providers provide for with regard to statutory pensions, additional earnings and retirement? Is there a need for adjustments in this respect?
- Whether and which adjustments are necessary in current partial retirement or credit balance agreements? How can different early retirement offers be combined in a meaningful way?

It is advisable for employers to have such questions examined by external legal advisors and pension specialists with regard to legal and valuation/accounting implycations and to have pension systems analyzed for a need for adjustment.

The authors

From Michael Goulios and Mario Mitrovic

Employment Tax

New regulation on the determination of wage tax for temporary work in Germany (R 39b.5 para. 2 LStR 2023)

The new Wage Tax Guidelines 2023 (LStR 2023) provide, among other things, for changes in the determination of wage tax for employees working in Germany on a daily basis. This will regularly lead to a higher wage tax payment to the tax authorities in the wage tax deduction procedure from 2023 for the same circumstances.

The new LStR 2023 of the tax authorities will come into force on 1January 2023. These are general administrative regulations addressed to the tax authorities. They are intended to ensure that the tax offices follow uniform principles when levying payroll tax. The LStR are directly binding on the administration. They therefore have an indirect external effect on the taxpayer. However, the LStR are not binding on the tax courts.

In its previous LStR 2015, the tax authorities provided that, in the case of an employee working in Germany only temporarily in a calendar month, whose employment relationship continues, working days falling within the wage payment period for which the employee does not receive wages subject to tax in Germany are also to be counted (R 39b.5 para. 2 sentence 3 LStR 2015). Thus, there was no partial wage payment period if, for example, an employee with unlimited tax liability began or ended a foreign activity that was tax-exempt under a double taxation agreement or the foreign activity decree in one month. Up to now, the tax authorities have also not assumed a partial wage payment period if, for example, a person with limited tax liability only worked in Germany for part of a month and earned taxable wages for this work.

As of 2023, the new LStR now stipulate that working days are not to be included in the determination of the wage payment period if the employee receives wages that are not subject to domestic wage tax deduction, e.g. as a result of receiving tax-exempt wages under a DTA or employment in Germany on a daily basis (R 39b.5 para. 2 sentence 4 LStR 2023). This results in a partial wage payment period.

As a rule, this leads to a significantly higher wage tax burden (application of the "daily wage tax table" instead of the "monthly wage tax table" for employees working in Germany on a daily basis in one month): For example, in 2023, an employee with limited tax liability and tax class 1 (without church tax and children) will pay wage tax of EUR 165.39 and a solidarity surcharge of EUR 9.09 (wage tax rate 2023) on wages of only EUR 500.00 (for 1 working day) if the daily wage tax table is applied, whereas no wage tax will be levied at all if the monthly wage tax table is applied. With higher wages, the different tax results become even clearer.

This primarily affects temporary employees (e. g. multi-state workers) or employees of German employers who (also) work on foreign business premises on a daily basis or employees of foreign employers who work on domestic business premises on a daily basis, but also other employees who e. g. are resident abroad and work in Germany on a daily basis (and thus earn taxable wages in Germany on a daily basis).

The changed opinion of the tax authorities can neither be based on a change in the law that has occurred in the meantime nor on changed case law. The statement of the tax authorities that an accurate taxation of wages can only be ensured by calculating the wage tax on a daily basis and that this is in line with the principle of taxation according to economic performance is therefore doubtful and not convincing. The new regulation must be viewed critically. According to general understanding, the wage payment period within the meaning of Sec. 39b EStG is the period of time for which the current wage is paid to the employee. For the determination of the wage payment period, the labor law agreements between employer and employee are decisive (i. e. monthly wage) and whether the employer then also pays a complete monthly wage.

Recommendation for action

We therefore recommend that, after examining your circumstances, you notify the payroll tax office of the (continued) application of the favorable monthly wage tax table instead of the daily wage tax table in an appropriate form when carrying out the payroll tax deduction.

This is also because a subsequent wage tax refund through an annual wage tax equalization (§ 42b EStG) or an income tax assessment will not be legally possible in individual cases and will also not lead to the desired result from a tax point of view. Also, an individual tax assumption or - if possible - a 30% lump-sum taxation by the employer for employees of foreign permanent establishments (§ 40a para. 7 EStG) leads to undesirable, higher tax costs for the employer.

Our employment tax experts look forward to exchanging ideas with you. We will be happy to support you. Please contact us.

From Johanna Wolter

About us

Your contact persons

Berlin
Sabine Ziesecke
Phone: +49 30 26365363
sabine.ziesecke@pwc.com

Frankfurt am Main
Stefan Sperandio
Phone: +49 69 95855160
stefan.sperandio@pwc.com

Düsseldorf
Petra Raspels
Phone: +49 211 9817680
petra.raspels@pwc.com

Hamburg
Sven Rindelaub
Phone: +49 40 63781439
sven.rindelaub@pwc.com

München
Nikolaus Kastenbauer
Phone: +49 89 57905160
nikolaus.kastenbauer@pwc.com

Stuttgart
Stefan Sperandio
Phone: +49 69 95855160
stefan.sperandio@pwc.com

Your specialist contacts

Employment Law

Dr. Nicole Elert
Phone: +49 211 9814196
nicole.elert@pwc.com

Manuel Klingenberg
Phone: +49 69 95857842
manuel.klingenberg@pwc.com

Betriebliche Altersversorgung

Dietmar Ketzer
Phone: +49 69 95852787
dietmar.ketzer@pwc.com

Katja Röhlen
Phone: +49 211 98125744
katja.roehlen@pwc.com

HR Strategy, Systems, Processes & Compliance

Stephan Weber
Phone: +49 151 14711918
stephan.weber@pwc.com

Stephan Rekop
Phone: +49 151 59013279
stephan.rekop@pwc.com

Leadership

Anja Sbanski
Phone: +49 151 73069416
anja.sbanski@pwc.com

Maria Epstein
Phone: +49 15161565715
maria.epstein@pwc.com

Employment Tax

Stefan Sperandio
Phone: +49 69 95855160
stefan.sperandio@pwc.com

Johanna Wolter
Phone: +49 30 26361135
johanna.wolter@pwc.com

Reward & Benefits

Pia Isabel Pleines-Müller
Tel.: +49 89 57906808
pia.isabel.pleines-mueller@pwc.com

Carolina Jahn
Tel.: +49 69 95853183
Carolina.jahn@pwc.com

Sozialversicherung

Iris Brandes
Tel.: +49 211 9812419
iris.brandes@pwc.com

Natalia Römer-Koshcheeva
Tel.: +49 211 9812769
natalia.roemer-koshcheeva@pwc.com

Editorial Office

Our contact person from the editorial department will be happy to answer your questions, comments and suggestions regarding the newsletter. We look forward to your feedback.

Britta Ludwig
Phone: +49 211 9817432
mailto:britta.ludwig@pwc.com