P&O Newsletter actual

Current information and the latest developments

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Employment Law

The draft of the Whistleblower Protection Act - The most important key points on the implementation law of the EU Whistleblower Directive

Whistleblowing has established itself as an integral part of compliance in Germany. In companies and public authorities, employees often notice grievances at a very early stage and can contribute to them being uncovered, investigated and remedied through their tips.

The German legislator has failed to fulfil its obligation to transpose Directive (EU) 2019/1937 into national law by 17 December 2021. Therefore, the EU has initiated infringement proceedings against Germany. The German Federal Government has now reacted and passed a government draft for the national Whistleblower Protection Act (HinSchG).

The purpose of the law envisaged by the government draft is to offer whistleblowers in the professional environment more extensive protection. In this context, internal and also external reporting channels are to be set up to report violations in the company or in a public authority. Whistleblowers should also be protected against professional reprisals following a report or disclosure. The essential requirements and procedures for the protection of whistleblowers are to be included in the law.

The most important regulations of the government draft are presented below.

Scope of application

First of all, the personal and material scope of application must be examined more closely. Both areas of application are defined more broadly in the government draft than in the EU Directive.

The personal scope of application refers to whistleblowers. This means all natural persons who have already gained knowledge of violations in the run-up to or in connection with their professional activity and then report or disclose them to the reporting offices to be established according to the government draft. In addition to employees, this also includes civil servants, shareholders, employees of suppliers, self-employed persons and persons who have already obtained information about possible violations before the start of an employment relationship. Furthermore, according to the explanatory memorandum of the draft, persons whose employment relationship has been terminated in the meantime as well as persons affected by a report or disclosure are to be included in the scope of application.

In the material scope of application, the government draft provides for the disclosure of violations of a large number of legal provisions - partly going beyond the EU Directive. These include, for example, violations of criminal law and certain admi-

nistrative offences. However, the latter are only covered to the extent that they serve to protect the life, limb, health or rights of employees or their representative bodies. Also covered are legal provisions aimed at combating money laundering and terrorist financing, traffic and product safety, consumer protection and the security of network and information systems.

Reporting channels

It is up to the whistleblower to decide whether to turn to an internal or external reporting channel for the disclosure of violations. These reporting channels are of equal value.

The establishment of internal reporting channels is to be mandatory for companies with 50 to 249 employees as of 17 December 2023. If the number of employees exceeds 249, it will be mandatory three months after the HinSchG is promulgated. Regardless of the number of employees, this establishment obligation is to apply to stock exchange operators or credit and financial services institutions, among others. In addition, in case of 50 to 249 employed employees, it shall be possible for several private companies to jointly establish and operate reporting channels.

The internal reporting channel shall have appropriate procedures to check the validity of a report and to take follow-up measures. Within a period of three months, feedback hall be provided to the whistleblower on the planned and already taken follow-up measures as well as their reasons.

The establishment of the external reporting channels shall be carried out by the state and shall be located at the Federal Office of Justice. This reporting channel shall relieve the person making the report from having to deal with questions of competencies. The Federal Office of Finance is to serve as an external reporting channel for reports of certain violations (amongst others of accounting regulations). In addition, the Federal Cartel Office serves as an external reporting channel for reports of information regarding violations of national and European competition regulations. As with the internal reporting channels, it should be the task of the external reporting channels to operate suitable reporting procedure which check a report for its validity and take follow-up measures. Here, too, feedback shall be given to the person making the report. However, if the processing is extensive, the feedback period shall be a maximum of six months. Furthermore, the external reporting channel shall inform the whistleblower of the result of the investigation immediately after it has been completed.

When reports are made to an internal or external reporting channel, the identity of the person making the report must always be treated confidentially. There is - apart from special legal exceptions - no obligation to construct the reporting channels in such a way that anonymous reports can be submitted. Nevertheless, every reporting office shall also process anonymous reports.

Protection for whistleblowers

Follow-up measures to a report may include internal investigations or the discontinuation of proceedings due to lack of evidence. If further investigations are to be conducted, the proceedings can be handed over to a competent work unit or a competent authority.

After disclosure, whistleblowers should be protected against reprisals or the attempt or threat of reprisals. If a whistleblower is "disadvantaged" in connection with his or her professional activities after a report, the existence of reprisals is presumed. The person who has been discriminated against has the burden of proving that this discrimination was based on sufficiently justified reasons or that the disclosure of a violation was not the basis for discrimination. This shifts the burden of proof in favor of the whistleblower. Reprisals can occur, for example, in the form of dismissals, transfers, failure to give notice of termination or promotions or damage to reputation.

Whistleblowers who disclose information to the public shall only be protected by the law in certain cases. This protection is to be assumed if no action is taken against the violation despite reporting, if there is a risk of irreversible damage, if reprisals are to be feared in the event of external reporting or if there is little prospect of effective action being taken against the violation.

Fines

The government draft provides for high fines for violations of the HinSchG. For example, the failure to set up an internal reporting channel can be punished with up to EUR 20,000. If the duty to protect the identity of a whistleblower is violated, fines of up to EUR 100,000 may be imposed.

Practical advice

In view of the fact that the HinSchG is expected to come into force in the near future, companies should start setting up an internal reporting channel. This is because significant changes to the government draft are not to be expected overall, despite the fact that the German legislator has not yet given its approval. If an internal reporting channel has already been set up, it should be checked whether it meets the requirements of the government draft of the HinSchG. In addition, processes and responsibilities should be defined as to how reports are to be processed. If companies take action now, they will have sufficient time to implement the extensive requirements of the law.

PwC offers a standardised and digitalised one-stop-shop solution for your company in the form of the **Whistleblower and Ethics Reporting Channel.** This minimises the risk on the company side (also for cross-border companies), ensures compliance requirements and does not require an expensive software application. Please feel free to contact us!

From Patrick Kominiak

Employment Tax

No permanent assignment of the employee to the hirer in the case of only temporary assignments within the framework of a temporary employment relationship

In its ruling of 12.5.2022 - VI R 32/20, the Federal Fiscal Court (BFH) overturned the ruling of the Lower Saxony Fiscal Court (FG) of 28.5.2020 - 1 K 382/16 in the appeal proceedings and came to the following assessment in the present case: The lender under the AÜG (German Labor Transfer Act) is the temporary worker's employer for wage tax purposes. This is because this employment relationship is characterized by the employee's obligation to work for various hirers according to the employer's instructions. The lender determines the respective recipient of the work performance by unilateral determination. In this respect, this employment relationship is the decisive employment relationship for the question of whether the employee is permanently assigned to an operational facility within the meaning of Section 9 (4) sentences 1-3 EStG (German Income Tax Act, GITA). In case of an unlimited employment relationship between the lender and the temporary worker and repeated but temporary (each for not more than 48 months) assignments of the temporary worker to the hirer, there is no such permanent assignment with the hirer within the meaning of Section 9 (4) sentence 3 GITA.

The BFH had to deal with the question of the permanent assignment to a place of employment at the hirer for the determination of the first place of work under section 9 (4) sentence 1 GITA of an employee with an unlimited temporary employment contract with the lender.

In the facts of the case, the lender repeatedly provided the plaintiff as a temporary employee to the hirer for a limited period, here in the year in dispute 2014. The plaintiff actually only worked for the hirer in the entire year in dispute 2014 (as well as the years before that since the beginning of the employment relationship in 2012). After the first temporary assignment, a further assignment was dependent on the establishment of a further (temporary) employee assignment between the lender and the hirer. An unlimited employment relationship existed between the lender and the temporary employee. There were no contractual agreements between the plaintiff and the hirer.

In the opinion of the FG, the temporary worker was permanently assigned to the hirer (third party) and thus the first place of work within the meaning of section 9 (4) sentence 1 GITA was at the hirer's place of employment.

This decision was based on the fact that, according to section 9 (4) sentence 1 GITA, the first place of work is the fixed operational facility of the employer, an affiliated company (section 15 of the German Stock Corporation Act) or a third party designated by the employer to which the employee is permanently assigned.

An assignment is primarily made by contractual determination as well as by the filling-in agreements and instructions of the employer (otherwise according to quantitative criteria). A permanent assignment is to be assumed in particular if the employee should work at such a place of work for an unlimited period, for the duration of the employment relationship or beyond a period of 48 months (section 9 (4) sentence 3 GITA).

From the perspective of the FG, the essential contracts had been structured in such a way that the plaintiff had to work for the hirer until further notice and thus for an unlimited period, and the plaintiff had eventually also worked exclusively there at the hirer since the beginning of the employment relationship with the lender.

The BFH stated in this regard that for the assessment of an assignment to the first place of work, generally not the agreements made between the lender and the hirer, but the agreements made between the lender (as the employer under wage tax law) and the employee are decisive. From an ex-ante point of view, according to the clear wording of the contracts in the present case, these were only temporary assignments to the hirer, which led to a further temporary assignment after the expiration of the period. It is irrelevant, so the BFH, that the employee only worked for the hirer. Agreements on other assignments with other customers of the employer (lender) could only exist if a corresponding assignment with another customer was pending. According to the employer's repeated stipulations, the plaintiff was indeed assigned to the hirer. However, this was not a permanent assignment based on the respective temporary assignment, and further from an ex-ante perspective, the respective individual temporary assignment to the hirer did not cover a period of more than 48 months.

Consequently, the BFH overturned the decision of the FG in its ruling of May 12, 2022. Thus, the plaintiff's first place of work was not at the place of employment of the hirer, and therefore the travel expenses to the hirer’s place of work are to be assessed according to the business trip principles.

Note:

The BFH had ruled in its decision of 10.4.2019 - VI R 6/17 that in case of a temporary employment relationship for a limited period, an unlimited allocation with the hirer according to the wording of section 9 (4) Sentence 3 GITA is not possible and an allocation for the duration of the employment or service relationship with the hirer according to section 9 (4) Sentence 3 Alt. 2 GITA can only be considered from a relevant ex-ante point of view if it is intended to last for the entire duration of the employment relationship.

Recommendation for action:

Relevant are the essential agreements between the lender as the employer and the employee as to whether an employment relationship of unlimited or limited duration exists and whether, from an ex-ante viewpoint, the deployment within the framework of a temporary employment relationship indicates whether it is a temporary or unlimited deployment with the hirer.

In particular, the tax authorities assume the first place of employment based on a permanent assignment to the hirer if an assignment is made to the hirer "for the time being" (cf. BMF letter dated 25.11.2020 - IV C 5 - S 2353/19/10011 :006, marginal no. 21, Ex. 9, variation).

From the employer's point of view, the overall issue is relevant in particular and in general, not only in the case of temporary workers, but for all employees, who are on a business-trip away from home, with regard to the question of whether a tax-free reimbursement of travel expenses can be considered or not.

Please do not hesitate to contact us if you need assistance with the wage tax assessment of your contracts or with the findings of the wage tax auditors on the subject of the first place of work.

From Johanna Wolter

Employment Tax

Consequences due to the "additionality requirement" for the tax exemption of wage components

The "Act on the Temporary Reduction of the Value Added Tax Rate on Gas Deliveries via the Natural Gas Network", which is the basis for the inflation compensation premium, has meanwhile been promulgated in the Federal Law Gazette on 25 October 2022; it will come into force retroactively as of 1 October 2022.

At the same time, the tax-privileged payment period of the inflation compensation premium was specified and regulated in § 3 no. 11 letter c EStG. Accordingly, "benefits granted by the employer in the period from 26 October 2022 to 31 December 2024 in the form of subsidies (“in addition”) and benefits in kind to mitigate the increase in consumer prices" are tax-exempt up to an amount of 3,000 euros. In addition, we refer to our Newsflash on the above-mentioned matter of 9 October 2022.

The mechanisms are to be comparable to the requirements for the “Corona special payment”. An FAQ catalog from the German Federal Ministry of Finance is expected on this by the end of November. As a legal requirement to ensure tax and social security exemption, the "additionality" is therefore also required here in any case.

Tax-exempt or other tax-advantaged wage components are increasingly linked to this requirement of "additionality". The most recent/relevant examples in addition to the two just mentioned above are

- benefits in kind within the monthly 50-EUR exemption limit,
- kindergarten allowances,
- transfer of ownership of data processing equipment,
- transfer of ownership of company bicycles and e-bikes, and
- allowances for travel between home and the "first place of work", etc.

Benefits are only paid in addition to the wages owed in any case if

- the benefit is not offset against the entitlement to wages,
- the entitlement to wages is not reduced in favor of the benefit,
- the benefit for a specific purpose is not granted in lieu of a future increase in wages that has already been agreed, and
- the benefit is discontinued, and the salary will not (automatically) increase (cf. Sec. 8 (4) Sentence 1 EStG).

Accordingly, so-called "reversionary clauses", according to which the employee has the option of demanding an increase in the current remuneration instead of the previously promised benefits, are particularly harmful.

Hence, the conversion of a special payment into a tax-free or lump-sum benefit can only constitute an "additional" payment if an employment contract entitlement to this has not arisen under any of the above-mentioned bases of entitlement. The tax authorities may also recognize an additional benefit, for example, if it is offset against another voluntary special payment (e.g. voluntary Christmas bonus).

Possible consequences of not recognizing "additionality":

The tax law definition of "additionality" exists from the 2020 tax assessment period (social security is based on this, but in some cases has more differentiated assessment standards). It is already becoming apparent that wage tax audits (and social security audits) will examine and discuss this point in greater depth, with the possible result of corresponding additional claims over the entire audit period.

This applies not only to the currently more specific special payments (Corona special payment/inflation compensation premium), but above all to existing employee programs that offer tax-free and tax-privileged wage components under certain conditions, or generally in the case of wage optimization.

The following (non-exhaustive) examples are intended to provide an initial assessment from a wage tax perspective of what approach is possible, is to review, is to avoid and, if necessary, is to correct:

Issues to be avoided and – If already existing – to be corrected:

- Conversion of contractually agreed bonus/special payment
- Conversion of contractually agreed overtime pay
- Gross wage replacement in the event of discontinuation of tax-privileged wage type

Issues that are potentially feasible, but in particular need to be legally verified:

- Special payments under effective voluntariness proviso (often not effectively regulated)

Issues that are potentially feasible, but in particular to be checked for proper documentation:

- Compensation for overtime if only possibility of compensatory time off agreed upon
- "new" (one-time) benefit without reference to existing components (also applies if additional benefit is stipulated in individual contract or by company agreement, collective bargaining agreement or salary law)

How we can support you:

We gladly support you

- in checking your documentation and contractual/company regulations on the relevant benefits with regard to the additionality requirement that may have to be complied with,
- in checking your payroll accounting for the relevant wage components that you grant your employees tax-free/tax-privileged,
- in making any necessary corrections, and if required
- in the implementation of security mechanisms in order to be better prepared for future audits.

Please feel free to contact us if we can assist you with our experience and our holistic knowledge and solution approach

From Nikolaus Kastenbauer

Company pension scheme

Outsourcing of pension obligations - an evergreen even in times of rising interest rates

Inflation is rising and with it the interest rates achievable on the capital market. For the time being, this seems to be a good development for the valuation of companies' pension obligations. This is because the interest rates for accounting for pension provisions are also affected by this and are rising. The value of provisions to be reported in the (commercial) balance sheet should fall accordingly. In fact, however, the relieving effect does not materialize for companies with many pensioners. The trend towards outsourcing pensioner portfolios to external providers therefore continues. In the current year, PwC has advised in numerous cases on the suitability, structure and accounting effects of outsourcing pension obligations to a pensioner company as well as pension fund outsourcing with a volume of several hundred million euros.

The HGB interest rate (10-year average), which is forecast to be 1.79% as of December 31, 2022, is expected to be 1.94% as early as December 31, 2024. Interest Rate Trend Rising. This should mean a reduction in pension provisions for many companies.

However, accrual values do not decline in cases where the population of beneficiaries is characterized by many benefit recipients to whom the company owes an adjustment of their pension benefit according to the consumer price index (CPI). CPI trends suggest that for many companies that practice adjustments on a 3-year cycle, company pensions will likely need to be increased by 15% or more at the next adjustment date due to accumulated inflation rates. Right now may be the right moment to outsource the obligations.

However, rising interest rates are reducing the premium charged by external pension providers for assuming pension obligations. Provided that sufficient liquidity or other financial resources are available at present or in the foreseeable future, the rising interest rate level can be a reason to decide to outsource pension obligations. Pension obligations from direct commitments, for example, can be outsourced to a **pension fund.** Furthermore, the transfer of **pension obligations** to a **pensioner company** can be considered.

The legal difference in the various options lies in particular in the implementation under company and labour law, the required volume of funding and the subsequent liability of the outsourcing company.

In the case of the outsourcing to a pension fund, the outsourcing company remains liable pursuant to Section 1 (1) sentence 3 BetrAVG. However, the risk of subsidiary

liability can be reduced as far as possible, for example by choosing an insurance-type implementation, an established provider and a conservative tariff.

An alternative is to set up (and sell) a pensioner company. In a first step, the obligations are transferred to the pensioner company under the law of conversion. In a second step, the pensioner company can be sold to a third party outside the group of companies. If the pensioner company is adequately equipped, the outsourcing company is no longer liable after 10 years.

Outsourcing and de-risking through outsourcing of pension obligations to external pension providers

The motives for outsourcing pension obligations to an external pension provider are manifold. The focus is always on transferring risks and costs to a third party. As well as the balance sheet relief of the outsourcing company, for example in the run-up to a corporate transaction.

Specifically:

The outsourcing or spin-off of pension obligations always pursues one or more of the following objectives

- Reduction of administrative costs and effort
- Elimination of uncertainties based on biometric risks, in particular with regard to the biometric risk "longevity"
- Avoidance or reduction of the adjustment obligation in accordance with section 16 of the BetrAVG
- Reduce contributions to the PSVaG
- To shorten the (commercial) balance sheet
- For the pooling of pension obligations with an external third party

(Labour) legal implications of the outsourcing of pension obligations

The way in which you as a company decide to outsource is determined by the financial objective (volume of funding, liquidity burden, effect on results and tax structuring). The legal structure is derived from this.

From a purely employment law perspective, the following issues should be considered when deciding on the form of outsourcing.

In the case of a transfer of a direct commitment to a pension fund, it must be checked whether employee consent is required and which pension beneficiaries are affected. In some direct commitments, for example, there is also a commitment to comply with the specifically chosen implementation path. In such a case, the consent of the employees (representatives) is usually required.

The transfer of pension obligations to a pensioner company, on the other hand, can be implemented unilaterally by entrepreneurial decision without consent. In this case, questions are more likely to arise about the right (sufficient) endowment.

PwC Legal and PwC Pension Consulting advise you from a single source

Are you a company owner, board member or responsible for the financial area of your company? If your company has pension obligations, we at PwC Legal will

work with our colleagues at PwC Pension Consulting to evaluate which options are available for your company and provide full support for your outsourcing.

Von Dietmar Ketzer and Katja Röhlen

Reward & Benefits

Compensation Study 2022 - Executive and Supervisory Board Compensation of the Dax 160 Family

For several years, PwC has published a study on the remuneration of management and supervisory boards of listed companies. Our analysis covers the remuneration of the management and supervisory boards of the 160 companies in the DAX family (Dax, MDax, SDax, TecDax) from 2014 to 2021.

The analysis covers the executive and supervisory board compensation of companies listed on the Dax, MDax, SDax and TecDax at the reporting date of December 31, 2021. The new disclosure of compensation in accordance with section 162 of the German Stock Corporation Act (AktG) is taken into account. The regulations will apply to reporting beginning on December 31, 2020.

According to section 162 of the German Stock Corporation Act (AktG), the "compensation granted" generally corresponds to the compensation actually received. However, this can be interpreted in two different ways. Accordingly, the disclosure of "compensation granted" is deemed appropriate if:

1. compensation is only disclosed in the compensation report for the financial year in which it actually accrues and thus becomes part of the assets of the board member (Interpretation 1)

2. a remuneration is already stated in the remuneration report for the financial year in which the activity on which the remuneration is based (one or more years) has been performed in full (interpretation 2).

The "remuneration owed" is the remuneration which is based on a legal payment obligation, but which has not yet been fulfilled.

As the "compensation granted and owed in accordance with section 162 of the German Stock Corporation Act" with its various interpretations only applies from 2022, a comparison with compensation from previous years is no longer possible. However, in addition to the disclosure types under section 162 AktG, many companies continue to disclose target compensation, which can still be compared with the data from previous years.

In general, the analyses show that company size (index membership) is one of the main drivers of compensation levels in all types of disclosure. For example, total compensation for board members in the Dax is significantly higher than in the MDax or SDax. Due to its composition, total compensation in the TecDax tends to

lie between the MDax and SDax. Another driver of compensation levels is the function within the board. For example, an executive or supervisory board chair of an index generally earns more than other executive or supervisory board members of the same index.

Compared with the previous year, the total target compensation for both executive board chairmen and other board members fell in all indices except the TecDax. The decrease is highest in the SDax, at 40% for Executive Board chairmen and 11% for other Executive Board members. Unfortunately, due to the lack of comparability of the disclosure method with the previous year, no corresponding analysis of compensation development can be made for the Supervisory Board in the first year of application.

You can find further exciting analyses, including on the proportions of the genders within the boards or on the gender-specific differences in remuneration, in the PwC Management Board and Supervisory Board Remuneration Study of Dax Families 2022 and our Board Remuneration Analyser, which provides dynamic insights into the remuneration analyses with its divergent filter options. If you have any questions or are interested, please get in touch with the contact persons listed below or find out more here on our PwC website.

The insights from the compensation studies are used in conjunction with our expertise to provide evidence-based advice to our clients. In addition to compensation consulting, for example in the form of appropriateness reports or benchmarks of executive compensation, the review and revision of compensation systems, EQUAL-SALARY certification on the topic of equal pay, or consulting in the area of compensation regulations for financial institutions, P&O offers additional capabilities (e.g. leadership, labor law, payroll tax, social security) within PwC, which enable a holistic HR consulting approach. We would be happy to advise you on all aspects of compensation so that you can position yourself competitively in the long term.

From Jannick Dietz, Paul Geschinski, Pia Pleines-Müller und Jonathan Zelz

Reward & Benefits

PwC Public Sector Compensation Study 2022 - Executive Management

The new PwC study on executive remuneration in the public sector has been published.

In addition to the study on executive and supervisory board compensation of the Dax-160 companies, PwC has been preparing market comparisons and compensation reports for executive and management positions in both the private and public sectors for years. Every two years, PwC collects the compensation data of executive boards of public companies and compares them with the development of the previous years. This data is relevant for public companies due to the shortage of

skilled workers and the regulatory requirements of the Public Corporate Governance Codex (PCGK). However, it should be noted that the PCGK is only partially binding, as companies can deviate from the requirements if they explain these deviations. This follows the so-called "comply-or-explain" principle. Nevertheless, there is clear relevance of the PCGK model codex, which stipulates appropriate compensation considering the comparative environment. In addition, an attractive compensation system increases a company's competitiveness in the war of talent for top executives.

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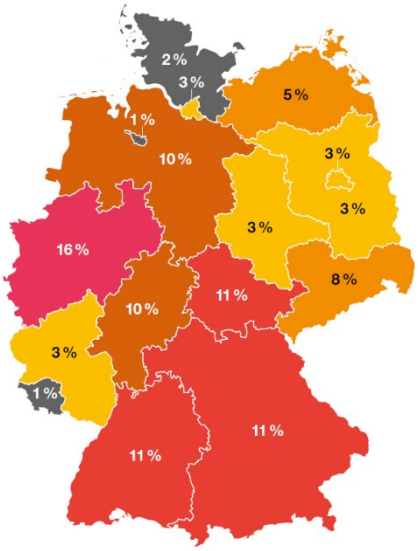

Distribution of study participants by state

However, it should be noted that the PCGK is only partially binding, as companies can deviate from the requirements if they explain these deviations. This follows the so-called "comply-or-explain" principle. Nevertheless, there is clear relevance of the PCGK model codex, which stipulates appropriate compensation considering the comparative environment. In addition, an attractive compensation system increases a company's competitiveness in the war of talent for top executives.

The current version of the compensation study for public sector executives for the survey year 2022 includes data from companies in all German states, which are divided into small, medium-sized and large companies according to turnover. Fixed compensation, short- and long-term variable compensation, fringe benefits and company pension plans are examined in detail. In addition, this year also records corona-related effects on compensation management and the questionnaire will be supplemented by specific questions relating to the topic of ESG in variable compensation.

It can be clearly observed that the remuneration of the CEO and other members of the Executive Board often differ in terms of the remuneration level. In large public sector companies, for example, the median salary of the CEO is almost 20,000 euros higher than that of the other members.

The trend toward a higher proportion of variable compensation can be observed not only in the private sector, but also in the public sector.

A key component of executive compensation continues to be the company pension plan and the provision of a company car. As the size of the company increases, so does the prevalence of pension plans. The most common form of pension is the defined contribution plan. Company cars are granted to management in four out of five companies.

Further information on the study can be found here on the PwC website. If you have any further questions or are interested in the study, please get in touch with one of the contact persons listed on the Website https://www.pwc.de/de/strategie-organisation-prozesse-systeme/aktuelle-verguetungsstudien.html.

From Jannick Dietz, Paul Geschinski, Pia Pleines-Müller und Jonathan Zelz

Social Security

Short-time allowance

Audit and risk of recovery

Current developments continue to cause economic planning uncertainty in many sectors, which means that the issue of short-time allowances is no less topical. As a result, the period of validity of the Short-Time Workers' Allowance Ordinance has been extended until December 31, 2022. The final audit on short-time allowance is now coming to all companies that use or have used this protective shield to cope with the crisis. The Federal Employment Agency will examine all evidence and documents previously submitted, as short-time allowance is generally only provisionally approved and paid out. In its history, however, the Federal Employment Agency has never had to carry out such a large number of checks as it is doing now with the Corona crisis.

I. Procedure of the test

Companies are now faced with different questions. Have you properly and completely checked all legal and organizational requirements? Have the payments been calculated correctly and made in accordance with the application? Which regulations must be observed in connection with the upcoming audits by the employment agency?

In the first step of the final examination, the Employment Agency requests companies in writing to submit certain documents. For example, the following documents are requested:

- Time sheets and working time account
- Payroll accounting (salary or wage accounting)
- Letters of termination and/or termination agreements, etc.

Afterwards, the employment agency will look through all the documents and check whether they are complete.

For example, it is checked whether

- The target and actual charges, as well as charges for public holidays, have been calculated correctly,
- unprotected working time credits and vacation were initially used up to avoid short-time working,
- short-time allowance was settled for persons whose employment relationship ended.

With the audits, the Employment Agency wants to ensure that benefits have been paid out in the correct amount.

Upon completion of the final examination, a degree certificate will be issued.

II. Possible consequences and risks of the audit

1. Correction of the payroll

The final audit by the Employment Agency may reveal that payroll accounting must be corrected (payroll tax and social security). This may result in additional payments or refunds. If an automatic correction by the payroll accounting program is no longer possible, the information must be changed "by hand" and reported.

2. Repayment of short-time allowance

If too much short-time allowance was paid out, the Employment Agency will reclaim the amount from those affected. The amounts received and the reimbursed social security contributions must also be repaid in full. However, under certain conditions, payment relief may be considered.

3. Subsequent payment of short-time allowance by the Employment Agency

If, on the other hand, too little short-time allowance was paid out, the Employment Agency will contact the companies concerned and pay the amount due in arrears as part of a correction application.

4. Criminal consequences

Financial risks may not be the only ones. Since the beginning of the pandemic, the Federal Employment Agency has already received several thousand tips about fraud involving short-time allowances. The Federal Employment Agency wants to follow up on every single tip and reports the facts to the main customs office. This is especially true in the case of suspicions that arise during subsequent audits. The employees concerned are not protected from criminal charges either. Once the investigation is underway, the competent authority questions the role played by the employee in the employer's possible fraud and initiates the investigation here as well. The resulting risks under criminal tax law due to a possible reduction in income tax must also be taken into account.

If your company is now also affected by a final audit for short-time allowance and you have questions regarding the final audit by the German Federal Employment Agency, our interdisciplinary team, consisting of consulting, tax and law colleagues, will be happy to support you.

After an intensive review, you will receive a visual statement/result presentation from us with corresponding recommendations. With the help of our dynamic tool for recalculating the short-time allowance (scenarios, wage structures, etc.), we quickly and reliably quantify for you the financial risks you will face as a result of the audit.

We help you with innovative, automated and user-friendly solutions.

From Natalia Römer-Koshcheeva

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