

## €40 Penalty for Late Payment of Wages and Salaries by Employers

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### Penalty for late payment pursuant to § 288(5) of the German Civil Code (*Bürgerliches Gesetzbuch* – BGB)

Since § 288(5) of the German Civil Code went into effect on 29 July 2014, creditors have had the right to claim payment of a penalty in the amount of € 40 for late payment of invoices, except in the case of amounts due by consumers. The introduction of § 288(5) of the German Civil Code is based on the implementation of Directive 2011/7/EU on combating late payment in commercial transactions of 16 February 2011. The provision was originally intended to pertain only to amounts due after it entered into effect. Now, however, the provision also applies to debts that fell due prior to that date.

### Application in connection with labour law

Application of § 288(5) of the German Civil Code in the area of labour law or to the payment of wages and salaries is the subject of dispute in the scholarly literature on labour law, and both the Düsseldorf Labour Court (2 Ca 5416/15) and the Aachen Labor Court (1 Ca 2772/15 h) ruled against such application in the first instance. One argument against the application of the penalty emphasises that such a penalty for late payment is inconsistent with the legal system and therefore unacceptable because labour law – unlike general civil law – makes no provision for reimbursement of out-of-court expenses. This follows from the application of § 12a of the Labour Court Act (*Arbeitsgerichtsgesetz* – ArbGG). It is argued that the provision contained in § 12a of the Labour Court Act must therefore be considered a provision in a *lex specialis* that supersedes § 288(5) of the German Civil Code, thereby eliminating the possibility of recourse to § 288(5) of the German Civil Code in matters pertaining to labour law.

The Cologne Higher Labour Court (judgment of 22 November 2016 – 12 Sa 524/16) has now decided that an employer who fails to make timely or complete payment of wages or salaries must pay the corresponding employee a late penalty in the amount of € 40. According to the Higher Labour Court, such penalties are now also applicable in the area of labour law.

The Higher Labour Court applied the traditional approaches in its construction and justified the application of the penalty for late payment to claims for compensation under labour law first of all by looking at the literal wording of § 288(5) sent. 1 of the German Civil Code, which it argues supports application. According to the court, a historical interpretation of the section also does not lead to a different conclusion. According to the court, § 288(5) of the German Civil Code does serve to implement the EU Directive on combating late payment in commercial transactions (and therefore not really in the case of transactions between companies and consumers). However, the deliberate decision of the legislature (see on this Bundestag Publication 18/1309, p. 18) and as a result therefore the content of § 288(5) of the German Civil Code, which also covers creditors that are consumers, constitute “overfulfillment” of the requirements contained in the Directive. Furthermore, in the court’s view, the application of the methodological method of statutory interpretation, taking into account the intended purpose of § 288(5) of the German Civil Code, also cannot result in any other assessment. The court concluded that the existence of § 12a of the Labour Court Act, which prevents employees from claiming out-of-court expenses, does not automatically make payment of a fixed sum for late payment incompatible with the methodology of the Act, for the fixed sum of € 40 Euro is namely not a flat amount intended to cover the costs of legal enforcement, but rather a penalty imposed

on employers who fail to make timely payment of wages and salaries.

## Implications for practice

The courts are likely to have to deal with the question as to the applicability of § 288(5) of the German Civil Code to claims in connection with the payment of wages and salaries in the near future since the provision now also covers cases occurring after 30 June 2016 due to Art. 229 § 34 sent. 2 of the Introductory Act to the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch – EGBGB*). Employers are therefore advised to pay wages and salaries on a timely basis and in full in order to avoid unnecessary detriment and additional expense. In the case of actions brought to enforce payment of wages and salaries, payment of the penalty for late payment in the amount of € 40 is therefore likely to be sought. Opinions differ as to whether claims for

payment of the late penalty will apply to each individual instance of failure to make payment on time or in full (against cumulative monthly accrual: *Diller*, NZA 2015, 1095 and 1097; in favor of cumulative accrual: *Hülsemann* ArbRAktuell 2015, 146 and 148), which means that a fixed amount of € 40 that may at first seem trivial can amount to a significant sum in the case of several months' wages, especially when a large number of employees are affected. The Higher Labour Court has in fact not decided whether cumulative accrual will be allowed since this issue was irrelevant for the purposes of the case at hand.

The Higher Labour Court admitted an appeal.

## Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Lena Jordan on +49 221 33660-544 or by email to [ljordan@goerg.de](mailto:ljordan@goerg.de). For further information about the author visit our website [www.goerg.com](http://www.goerg.com).

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