

## LEGAL UPDATE ARBEITSRECHT

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# Gender neutral remuneration: The EU Pay Transparency Directive

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After the high-profile judgment of the Federal Labour Court (Bundesarbeitsgericht, BAG) on gender neutral remuneration and the Transparency in Wage Structures Act (Entgelttransparenzgesetz, EntgTranspG) at the beginning of 2023 (see our Legal Update dated 24/02/2023), the EU have in the meantime gone a step further in issuing the Pay Transparency Directive. The Directive contains significantly stricter regulations for employers than the EntgTranspG that currently applies. The German legislature now has until 7 June 2026 to implement these regulations into German law. Even though the changes will not apply straight away, employers should nevertheless start now to ensure their remuneration systems will satisfy the new requirements (in good time).

### The foundation: The EntgTranspG in its current version

In its current version the EntgTranspG fundamentally contains four obligations for employers:

- Remuneration discrimination based on gender is prohibited (section 3 EntgTranspG), remuneration systems must be designed to be free of discrimination (section 4 EntgTranspG),
- Employees in establishments with more than 200 employees may request disclosure on the criteria and practices used to determine their own remuneration as well as the (average) remuneration of a reference activity named in advance (section 10 et seqq. EntgTranspG),
- Employers with more than 500 employees are called upon to use their internal company evaluation procedures to assess their remuneration provisions (section 17 EntgTranspG) and
- Employers with more than 500 employees who are required to file a management report pursuant to sections 264 and 289 of the German Commercial Code (Handelsgesetzbuch, HGB) are obligated to file a 'Report on Gender Equality and Equal Pay' which outlines, in particular, the measures to promote equality between women and men, as well as the measures to create equal pay for women and men (section 21 EntgTranspG).

## Changes resulting from the Pay Transparency Directive

The implementation of the Pay Transparency Directive will significantly expand these obligations. The Pay Transparency Directive includes groups of persons and employers who until now were not covered under the EntgTranspG and in addition also creates completely new obligations.

### Current pay transparency for applicants

Art. 5 of the Pay Transparency Directive imposes an obligation upon employers to provide information about pay during the ongoing application process. Employers are obligated to provide all applicants unprompted with 'the initial pay or its range, based on objective, gender-neutral criteria, to be attributed for the position concerned'. This information must be made available before the employment contract is concluded so that the applicant is able to negotiate their pay based on this information.

### Pay transparency in ongoing employment relationships

#### Unprompted information about the criteria for pay setting and pay progression

Employers' obligations to provide information in ongoing employment relationships have been significantly extended. In accordance with Art. 6 of the Pay Transparency Directive, in future all employers, regardless of number of employees, will be obligated to unprompted provide their employees with information about the (objective and gender-neutral) criteria used to determine pay, pay levels and pay progression. Member states may put exemption regulations in place for employers with less than 50 employees and

exempt employers from this obligation. It remains to be seen whether Germany will make use of this option.

#### Expanding the right to information

Employees' right to information which is currently regulated in section 10 et seqq. EntgTranspG will be considerably expanded. The provision restricting this right to information to employers with more than 200 employees will no longer apply. In addition, under Art. 7 of the Pay Transparency Directive employees will no longer have to first name a reference activity in order to obtain the information about pay. The implementation of the Pay Transparency Directive will impose more obligations on the employer to provide employees seeking information, in particular requests about gender-segregated data about the average pay increases for all groups of employees which do the same work or work of equal value as the employee seeking information. Employees should also be given the opportunity here to assert their right to information via employee representation.

#### Obligation to provide reports about the pay gap

The employer's obligation to provide reports about the pay gap within its company will likewise be significantly expanded. After implementation of the Pay Transparency Directive all employers with more than 100 employees will be obligated to produce a report on the existing pay gap in their company for the responsible public authority (yet to be determined). The content of the report will also go beyond that required by the current obligation under section 21 EntgTranspG and must contain the following information:

- The gender pay gap

- The gender pay gap in complementary or variable components
- The median gender pay gap
- The median gender pay gap in complementary or variable components
- The proportion of female and male employees receiving complementary or variable components
- The proportion of female and male employees in each quartile pay band
- The gender pay gap between employees by categories of employees broken down by ordinary basic wage or salary and complementary or variable components

### Joint pay assessment

If this report finds a difference in the average pay level between female and male employees of at least 5% in any category of employees and the employer is not able to justify or remedy this within six months, a joint pay assessment shall be carried out with employee representatives (Art. 10 of the Pay Transparency Directive). This pay assessment should jointly analyse the existing pay situation and determine measures to rectify the existing pay differences. The results of this joint pay assessment must then be sent to the appropriate monitoring body by the employer. The responsible Labour Inspectorate or Equality Body may be called on to assist with rectifying the pay differences.

### Right to compensation and judicial enforcement

When implementing the Pay Transparency Directive member states shall further ensure that employees who have been discriminated

against due to their gender with regard to their pay have the right to claim and obtain 'full' compensation and they are placed in the position in which they would have been if they had not been discriminated against. Compensation shall at least include the 'full recovery of back pay', Art. 16 of the Pay Transparency Directive.

It shall be made easier for the courts to enforce such claims by the introduction of a group action (Verbandsklage) Art. 15 of the Pay Transparency Directive. The member states must ensure when implementing the Pay Transparency Directive that 'associations, organisations, equality bodies and workers' representatives or other legal entities' are able to engage in any administrative procedure or court proceedings regarding an infringement of the principle of equal pay or are even able to act on behalf of the employee in such proceedings. Member states must also implement regulations permitting the courts, even when dismissing a claim, to examine whether an unsuccessful claimant had 'reasonable grounds' for bringing a claim for an infringement of the principle of equal pay. If such reasonable grounds do exist, the unsuccessful claimant should not be required to pay for the costs of the proceedings. Implementing judicial processes will significantly facilitate the enforcement of claims for equal pay.

### Outlook

Even if the provisions of the Pay Transparency Directive are not of direct effect employers should soon take measures to assess whether and to what extent their current pay system satisfies the requirements of the Pay Transparency Directive and to sufficiently prepare themselves for the implementation of the Pay Transparency Directive.

**Hinweis**

Dieser Überblick dient ausschließlich der allgemeinen Information und kann konkreten Rechtsrat im einzelnen Fall nicht ersetzen. Sprechen Sie bei Fragen bitte Ihren gewohnten Ansprechpartner bei GÖRG bzw. die Autorin Sandra Felicia Schramm unter +49 40 500360 755 oder [sschramm@goerg.de](mailto:sschramm@goerg.de) an. Informationen zum Autor finden Sie auf unserer Homepage [www.goerg.de](http://www.goerg.de).

Wir verwenden das generische Maskulinum und sehen von einer Nennung aller Geschlechtsidentitäten ab, damit dieser Text besser lesbar ist, und meinen damit ausdrücklich jeden in jeder Geschlechtsidentität.

## Unsere Standorte

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