

(Sound) Compensation @ Nachweisgesetz 2022

The modified requirements for the notification of the remuneration components in the Nachweisgesetz

The new version of the Act on Notification of Employment Conditions (Nachweisgesetz, "NachwG 2022") came into force on 1 August 2022. In practice, the implementation has so far primarily focused on the first under the NachwG 2022 regulated obligations to provide evidence (including the instruction to work overtime, the probationary period, work on call and the procedure in the event of termination of the employment relationship). In addition, the NachwG 2022 contains expanded requirements regarding the obligation to provide evidence of the remuneration components granted in an employment relationship (including the operational pension scheme). In this Client Alert, we discuss the relevant practical implications.

With the NachwG 2022, the legislator implements the corresponding requirements of Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union ("[EU-Notification-Directive-II](#)"). The EU-Notification-Directive II had replaced the original EU-Notification-Directive (91/533/EEC), which had served as the basis for the earlier version of the Act on Notification of Employment Conditions ("NachwG I"). The German legislator published a draft of the NachwG 2022 on 2 May 2022 (please refer to [Deloitte Legal Client Alert](#)) and enacted the NachwG 2022 on 20 July 2022.

1. Obligations to provide evidence of remuneration under the NachwG I - First time that their violation is subject to a fine under the NachwG 2022: The tiger now has teeth...

The Act on Notification of Employment Conditions in its previous version (Sec. 2 para. 1 s. 2 no. 6 NachwG I) already stipulated the obligation to provide evidence for the remuneration components granted in the employment relationship, specifically on the composition and amount of the remuneration including supplements, bonuses, premiums, and special payments as well as other components of the remuneration and their due date. This was done, in light of the law's purpose, to provide the parties to the employment contract, and especially the employee, with legal certainty and clarity regarding the relevant remuneration components. In accordance with Sec. 2 para. 3 of the NachwG I, the employer may only deviate from this requirement for remuneration components granted pursuant to a collective bargaining agreement or an operational/service agreement by citing the applicable collective-law regulation.

In practice, the requirements of the NachwG I were not always implemented as intended by the legislator, as the employer wanted to maintain the flexibility it desired, particularly in the case of voluntarily granted benefits, at the expense of proving the content-related parameters of the specific remuneration component. The employer faced no material legal consequences for failing to comply with the statutory duty to provide evidence: Aside from his claim for evidence of the working conditions, according to the case law of the Federal Labour Court (Bundesarbeitsgericht, BAG), the employee could only assert a claim for damages against the employer if he was unable to assert the remuneration component, which was unwritten and subject to a (minimum three-month) cut-off period, within the cut-off period due to lack of knowledge. In practice, however, the employee was often unable to conclusively demonstrate the necessary causality between the violation of the duty to provide evidence and the damage - which lay in the monetary equivalent of the remuneration component - so that corresponding lawsuits were risky for employees and were rarely filed. In practice, therefore, the obligations to provide evidence under NachwG I were frequently viewed as a 'toothless tiger'.

The legislator recognised this and, in accordance with Article 19 of the EU-Notification-Directive-II, declared the violation of the obligation to provide evidence as an administrative offence in Sec. 4 of the NachwG 2022, which states that a violation of the obligation to provide evidence of the (individual) remuneration components, among other things, can

result in a fine of up to EUR 2,000. Only intentional violations are subject to a fine (Sec. 10 Administrative Offences Act, Ordnungswidrigkeitengesetz, "OWiG"). A negligent violation of the obligation to provide evidence (even in the event of a subjectively culpable error on the part of the employer regarding the content/scope of the individual remuneration packages to be provided) is irrelevant for the imposition of a fine. In cases of doubt, employers should therefore document the considerations made for the denial of the obligation to provide evidence for the specific remuneration parameter (paper trail) to avoid allegations of an intentional violation of the obligation to provide evidence.

2. ... (And) The tiger already had teeth: Requirements for the transparency of the content-related structuring of the remuneration: Terms and Conditions Control, Sec. 13 of the Remuneration Ordinance for Institutions (Institutsvergütungsverordnung, "InstitutsVergV")

In addition to the formal obligations to provide evidence, the content-related structuring of the individual remuneration components granted by virtue of the employment contract, or the overall commitment is already subject to the requirements of terms and conditions control under Secs. 305 et seq. of the German Civil Code (Bürgerliches Gesetzbuch, or "BGB"), taking into account the case law on (general) terms and conditions established by the Federal Labour Court. Particularly, the transparency requirement of Sec. 307 para. 1 s. 2 BGB requires employers to regulate and document the conditions of the individual remuneration component in a manner that is understandable to the employee, especially if flexibility is intended (e.g., by means of a revocation clause or by means of a discretionary determination of the reason and/or amount). In addition, special legal provisions applicable to individual employers determine additional documentation requirements, such as Sec. 13 of the InstitutsVergV for credit institutions and financial services institutions with respect to the content-related parameters of the individual (variable) remuneration components. These requirements exist concurrently with the formal requirements of NachwG 2022.

3. The catalogue of verifiable remuneration components

In the NachwG 2022, the legislator updated the catalogue of remuneration parameters that must be documented and added the parameters of the category of payment and the separate disclosure of the individual remuneration components. For the individual parameters, this results in information that must be verified, e.g.

- on the composition and amount of the remuneration: The remuneration comprises all remuneration components (including non-cash benefits). The amount of the agreed-upon gross remuneration must be stated; the corresponding amount of the net remuneration is only relevant in the case of a net remuneration agreement. The amount of remuneration must generally be stated as an amount in euros (Sec. 107 para. 1 German Industrial Code, Gewerbeordnung, "GewO"); if the parties have agreed upon a different currency (e.g., USD, GBP) in the employment contract, the obligation to provide evidence is fulfilled with the remuneration agreement in the employment contract.
- on the separate disclosure of the individual remuneration components: This requirement, which was first stipulated in the NachwG 2022, aims to ensure that the employee can claim legal certainty and legal clarity regarding the prerequisites and the amount for each individual remuneration component. In practice, a general documentation is available for the remuneration components granted to the (relevant) employees according to the same parameters, to which the employer refers in the individual information of the employee.
- on the category of payment: This requirement, which is also stipulated for the first time in the NachwG 2022, requires a specification of the concrete benefit content of the individual remuneration component. Typically, the employer will grant the monetary remuneration components by transferring them to the employee's bank account. In the case of non-monetary remuneration components, the category of payment is usually already apparent from the content-related nature of the remuneration component (example: granting private use of a company car, granting restaurant vouchers, etc.).
- on the due date: The due date refers to the legal due date as the point in time at which the employee can request the specific remuneration component from the employer for the first time. In practice, this evidence requirement is regularly fulfilled by announcing the time of payment in the evidence documentation.
- on the remuneration of overtime: The (explicit) specification of overtime remuneration will be stipulated for the first time in the NachwG 2022. For certain employee groups, a corresponding specification in the employment contract (indirectly) already resulted from the AGB case law on overtime remuneration,

according to which it must be recognisable for employees which portion of their overtime is also covered by the fixed remuneration. The (formal and more comprehensive) evidence requirement for the remuneration of overtime is flanked by Sec. 2 para. 1 s. 2 no. 10 NachwG 2022, which stipulates the possibility of ordering agreed-upon overtime and its preconditions.

- on bonuses and supplements: These include, in particular, hardship supplements for work under special circumstances (night/weekend/holiday supplement; hazard pay). In the case of credit institutions and financial services institutions, the supplements also include function supplements and foreign supplements according to Sec. 2 para. 6 s. 3 and 4 InstitutsVergV. For these, the employer regularly fulfils the obligation to provide evidence already for supervisory reasons (Sec. 2 para. 6 s. 2 no. 3 InstitutsVergV) in order to be able to qualify them from a supervisory perspective as fixed remuneration within the meaning of Sec. 2 paras. 1 and 6 InstitutsVergV.
- on premiums: These mainly comprise one-off payments that are linked to the occurrence of the relevant condition precedent (e.g., service anniversary, acceptance of an improvement proposal by the employer).
- on special payments: These mainly include fixed (i.e., unchanged in amount) special payments such as Christmas and/or holiday bonuses and variable remuneration components, including information on the voluntary nature of the individual payments (see also section 5 for details on variable remuneration components). If the special payment is to be granted with a reservation of revocation, the employer shall include the reservation of revocation (including the reasons for revocation) in writing.
- on other remuneration components: These include all other remuneration components that have not already been verified with the above-mentioned information, including benefits from the operational pension scheme. In the NachwG 2022, the legislator additionally required the employer to provide evidence of the (external) pension provider for the operational pension scheme (for more details, please refer to section 4).

Only actually agreed-upon supplements, bonuses, premiums, special payments and/or other remuneration components are to be stated. The obligation to provide evidence does not include a negative statement by the employer.

In Sec. 2 para. 4 s. 1 NachwG 2022, the legislator has also continued the employer's option to provide evidence for remuneration components granted on the basis of a collective bargaining agreement or an operation-al/service agreement by referring to the relevant collective-law regulation. The Federal Labour Court had already ruled on the identical provision of Sec. 2 para. 3 NachwG I that in the case of remuneration components under collective bargaining agreements the employer already fulfils the obligation to provide evidence by referring to the relevant collective bargaining agreement and therefore does not have to provide a concrete explanation (/subsumption) of the relevant substantive parameters for the concrete remuneration component in the documentation (BAG ruling of 8 June 2005, 4 AZR 406/04: In this case, the employer is not required to refer to the relevant classification features with regard to the classification of the employee under the collective agreement for the fixed remuneration - the statement of the relevant collective agreement group is sufficient).

The essential contractual conditions (including the remuneration components granted in the employment relationship) must be set down in writing by the employer within the specified time limits pursuant to Sec. 2 para. 1 s. 1 and s. 4 NachwG 2022, and the signature must be provided and handed over to the employee. The NachwG 2022 retains the reference that evidence of the essential terms and conditions of the contract in electronic form is excluded. The need-based way of fulfilling the obligation to provide evidence by concluding the employment contract containing the essential contractual conditions is thus not possible if the employer has the employment contract electronically signed. In this case, the employer must also summarise the terms and conditions in writing and send it to the employee within the specified time limits. It remains to be seen whether a more appropriate way of documentation can be found in practice - also taking into consideration the formal legal requirements.

4. Extended obligations to provide evidence for occupational pension commitments: (Only) support fund

The extended obligations to provide evidence refer to occupational pension commitments which the employer implements in an external way (direct insurance, pension plan, pension fund, support fund) and for which he has to prove the name and address of this pension provider to the employee (Sec. 2 para. 1 s. 2 no. 13 NachwG 2022). The abolition of the obligation to provide evidence in the case of an independent obligation to provide

information on the part of the external pension provider, which is also stipulated in Sec. 2 para. 1 s. 2 no. 13 NachwG 2022, covers the pension plan (for which there is an independent obligation to provide information on the part of the external pension provider according to Sec. 234m of the German Insurance Supervision Act (Gesetz über die Beaufsichtigung der Versicherungsunternehmen, "VAG")), pension fund (Sec. 237 para. 1 s. 1, 234m VAG) and direct insurance (Sec. 144 para. 1, 234m VAG). As a result, only occupational pension commitments in the implementation channel of the support fund are covered by the extended obligation to provide evidence.

5. Obligation to provide evidence in relation to performance-related variable remuneration

For these, the employer fulfils the obligation to provide evidence unchanged by a general statement of the performance parameters and their determination.

If the performance parameters are determined by an agreement on objectives or unilateral setting of objectives by the employer, a general reference to this is sufficient; the obligation to provide evidence does not include the individual agreement on objectives or setting of objectives for the specific reference period.

In the case of a discretionary determination, the employer fulfils his obligation to provide evidence by pointing this out; at the same time, for material labour law reasons, he will announce the discretionary parameters to the employee in the individual case; this procedure also follows from Sec. 13 InstitutsVergV. If the discretionary right includes the determination of the amount of the variable remuneration component, this must be included in the evidence - the employer is not required to provide additional information on the amount of the remuneration.

6. Conclusion: Readjustment of the evidence documentation... and/or content-related modification of individual remuneration components

Employers must assess the documentation for evidence of the remuneration components granted in the employment relationship for compliance with the NachwG 2022 and make any necessary readjustments. Individually, it may make sense, if not be required, to use the readjustment of the evidence requirements directly for content-related adjustments of the individual remuneration component, thereby making the remuneration system "future-proof".

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