

Spotlight on the gender pay gap in Germany

GENDER PAY GAP SERIES - NO. 6

In this article, we look at the new legal framework in Germany, which aims to promote pay equality by encouraging pay audits, requiring pay equity reports and providing a new right to information on comparative pay.

The Transparency of Pay Act

As discussed in previous articles in our series, the growing desire to have a non-discriminatory remuneration system is a global phenomenon. The external pressure for companies has also intensified, even in countries with existing laws demanding equal pay. The German Government responded to this development and passed the Transparency of Pay Act in 2017. It aims to promote gender equality in pay. To achieve this, the Act imposes various obligations on companies requiring them to disclose salary information and take other action. However, right from the beginning, the scope of these obligations and the consequences of non-compliance remained unclear, and are only expected to be further refined by case law.

The law has been in effect since July 2017 but has imposed obligations on employers to take action only as of January 2018. Here, we outline the key provisions of the Transparency of Pay Act and reflect on its success in promoting gender equality in pay to date.

The provisions of the Transparency of Pay Act at a glance

There are three central aspects to the Act:

1

individual right to information about the remuneration paid to peers of the other gender and the criteria used to determine remuneration in the company — relevant for establishments with regularly more than 200 employees

2

(voluntary) pay audit — for companies with regularly more than 500 employees

3

(compulsory) gender equality/pay equity reports — for companies with regularly more than 500 employees, which have to file a status report according to sections 264 and 289 of the German Commercial Code

Furthermore, the law contains several other provisions that apply to all employers, regardless of the size of the company or establishment.



Individual right to information

Employees working in establishments with regularly more than 200 employees have a right to the following information in order to verify the gender equality of their remuneration:

- disclosure of the monthly average remuneration that employees of the other gender receive for comparable work
- breakdown of this information for up to two specified wage components (e.g., base salary, bonus payments)
- information on the relevant criteria for the determination of their own remuneration as well as the remuneration for the same/comparable work

The right to obtain this information has been available since 6 January 2018. Information requests can be lodged with the company or the works council, if any. However, the works council is only competent unless and until the company claims exclusive jurisdiction over information requests, which is recommended as only the company would have the relevant salary information to respond to the request. Once a request is lodged, the deadline to provide the requested information is three months.



Pay audits

The law encourages companies with regularly more than 500 employees to conduct pay equity audits. While this was initially drafted as a legal obligation, companies can now decide whether they want to conduct an audit voluntarily.

However, should companies decide to conduct a voluntary audit:

- employees must be informed about the results (section 20 (2) sentence 1 Transparency of Pay Act)
- the company audit has to be reported on during works council meetings (section 20 (2) sentence 2 Transparency of Pay Act and section 43 (2) Works Constitution Act)

These obligations exist regardless of when the audit was conducted and whether the company had any opportunity to resolve any potentially identified discrimination in pay. By disclosing a negative audit result, however, companies may prepare the ground for litigation for salary adjustment. This applies even for employees who do not exercise their right to information about comparative remuneration under the new law. To avoid this, companies have to evaluate whether at all and in which form a company audit should be conducted.



Reporting obligation

Companies with regularly more than 500 employees, which have to publish a status report according to sections 264 and 289 of the German Commercial Code, are further required to publish a report regarding gender equality and equal pay in the German Federal Gazette. This report extends to measures on promoting gender equality and their results as well as measures taken to achieve equal pay.

For companies that are bound by or apply collective bargaining agreements, these reports have to be prepared every five years. For all other companies, a period of three years applies (section 22 (1), (2) Transparency of Pay Act). In future, the report must cover the preceding five or three years respectively. However, as a transitional measure, the first report need only cover the preceding year (section 25 (2), (3) Transparency of Pay Act).



Consequences of possible pay discrimination

Entitlements to a salary adjustment, i.e., to adjust the salary to the relevant comparative remuneration, were already recognized by the courts before the Transparency of Pay Act was passed. These entitlements derive from the principle of equal treatment and the provisions of the Equal Treatment Act. Employees can claim a salary adjustment if comparable employees are compensated differently and this difference is based on gender. The claimant must prove this to be the case. However, as with other EU Member States, Germany operates the principle of a reverse burden of proof in situations where the claimant proves facts from which it may be presumed that discrimination has occurred. If the burden of proof has shifted, it will be up to the companies to prove that there is no difference in pay, that the difference is not based on gender or that the differential is objectively justified by valid reasons.

The Transparency of Pay Act does not codify this case law but does provide that the burden of proof will shift where the employer does not meet its obligations to provide the required information in response to an employee request according to the law (see under 1 above).



Practical implications of the “individual right to information”

The individual right to information has had a quiet start so far. Employees are exercising their rights, but the widely feared overrun with requests did not occur. Time will tell if German employees just need to get used to this new law or if the great desire for information on remuneration of colleagues is simply not there.

From an employer’s perspective, the biggest challenge should have already been overcome: the implementation of the bureaucratic structures inside the company that are necessary to respond to requests by employees. We are also recognizing a trend where works council members are using their information rights to verify that their employer is capable of handling its new responsibilities according to the Transparency of Pay Act. For those employers that have not yet taken any steps to prepare for information requests, we recommend doing so ASAP. While the current interest in information requests may be lower than initially expected, the deadlines for providing the information are tight — especially if one is unprepared and needs to start “from scratch” with identifying what information is needed and where to find it.



Conducting pay audits in Germany

Generally, the reporting obligation regarding gender equality and equal pay only exists for companies that meet certain requirements (see under 3 above). Nonetheless, globally active companies are increasingly conducting equal pay/pay equity audits for each country they are operating in — irrespective of whether they are obligated to do so. There are many benefits of doing so, as outlined in a previous article in our series.

However, it is imperative to note that the Transparency of Pay Act in Germany has strict legal requirements for a lawful audit — even if the audit is done completely voluntarily (see under 2 above). While the legal consequences of non-compliance remain unclear in many respects, non-compliance may open the door to conflict with the works council. As a result, global players are currently struggling to adapt to the new legal framework in Germany. On the one hand, leading employers are determined to eliminate unjustified pay differences, but on the other hand, they are concerned about creating unnecessary legal risks. We are regularly advising on balancing these considerations and, in our experience, it is important to weigh these issues up front to minimize risk.

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Our gender pay gap series

The Baker McKenzie Gender Pay Gap series will be spotlighting gender pay gap regulations in key jurisdictions and exploring the central issues, including how to narrow the gap.

For more on the global picture and how our global network of over 700 labor and employment lawyers are helping clients address this issue, see our [Gender Pay Gap series](#).

Next in the series:

Spotlight on the gender pay gap in Latin America

