

# The Minimum Wage is on its way – with consequences for all!

From 1<sup>st</sup> January 2015 a blanket minimum wage will apply in Germany. *“The gross rate of the minimum wage from 1<sup>st</sup> January 2015 shall be EUR 8.50 per hour.”* Sounds straightforward – and many employers believe the minimum wage doesn’t concern them. This isn’t true. The Minimum Wage Law applies to all employers, even those who pay their workers more or indeed much more than the minimum wage of EUR 8.50 per hour.

## Contents

- Basic Principles
- Minimum Wage Components
- Minimum Wage Per Hour
- Minimum Wage Due Date
- Overtime and Working Time Accounts
- Mandatory Nature of the Minimum Wage Law
- Marginal Employment
- Piece Wage and Task-Based Pay
- Contractee Liability
- Employers Based Abroad
- Monitoring and Enforcement by Authorities
- Generation and Storing Documentation
- Undercutting the Minimum Wage
- Penalties
- Required Modifications

## Basic Principles

Under Section 20 of the Law on the Regulation of a General Minimum Wage – Minimum Wage Law (*Mindestlohngesetz* – “MiLoG”), all (private and public) employers based within or outside Germany are obliged to pay workers employed in Germany a wage that is equal to or above the relevant applicable minimum wage in accordance with Section 1 para. 2 MiLoG. They must do so within the deadline set down in Section 2 para. 1 sentence 1 no. 2 MiLoG. Section 22 para. 1 sentence 1 MiLoG sets out the sphere of personal applicability: it includes all employers, including those who pay wages above the minimum wage. It also applies –

with some limitations – to interns, a move which has been the subject of much public debate.

Under the approach devised by the legislature, where an employer pays more than the minimum wage, the wage must be divided into a base payment amount, which is subject to the Minimum Wage Law, and a further amount which is not covered by that legislation.

The following discussion will set out what effects the unrestricted applicability of the Minimum Wage Law will have and the kinds of resultant problems now facing all employers.

## Minimum Wage Components

“The gross rate of the minimum wage from 1st January 2015 shall be EUR 8.50 per hour.”

Common systems of remuneration in Germany provide for a broad range of different remuneration models, pay elements, payment conditions and regulations on payment due dates. The narrow formulation in the Minimum Wage Law means that these varied approaches must be examined and potentially altered to ensure compatibility with the law.

The first difficulties are encountered in determining which pay elements may

be taken into account when calculating the minimum wage. The legislature's insistence on payment of the minimum wage "*per hour*" means that at least a large portion of the payments made by the employer that are independent of individual logged hours or beyond the relevant due dates for payment cannot be taken into account when assessing the rate of the minimum wage.

This applies in particular to commission payments as well as to common one-off payments such as the 13<sup>th</sup> month pay, Christmas or holiday pay and other special annual gratifications – these may only be taken into account when assessing the rate of minimum wage when (and in the month in which) they have actually been paid out at the applicable due date set out in the Minimum Wage Law.

Also excluded from consideration are payments made for social or operational reasons or which serve some further employer-related aim, such as corporate anniversary pay-outs, child allowances, capital-forming benefits, employer contributions to a company pension plan, but also non-cash benefits such as company cars, job tickets, food or petrol vouchers, payments in kind, etc. Such payments must be made in addition to the minimum wage. The same applies to payments that are not granted irrevocably.

Payments in compensation for particular hardships or cost outlays must also be excluded from consideration. This applies for example to overtime allowances, bonuses for work on Sundays, public holidays or nights, work that is particularly dangerous or dirty, (alternating) shift work, task-based and premium pay, commuter and travel subsidies, flat-rate travel

allowances, and payment for clothing or cleaning.

## Minimum Wage Per Hour

Under the Minimum Wage Law the minimum wage rate is measured according to the payment made "*per hour*" (Section 1 para. 1 MiLoG). What is unclear, however, is whether an averaged assessment is permitted or whether it must actually be determined that the minimum wage has been paid for each individual hour worked.

It can also be difficult to establish what represents "time worked" for the purposes of the minimum wage. It is for example unclear whether the full minimum wage must in future be paid for stand-by duty or whether, as was the case until now, it will be possible to pay less than the amount due for full service due to the lower demands on the employee during these times. The same question applies to on-call duty, which does not qualify as time worked for the purposes of the Working Hours Act (*Arbeitszeitgesetz*) but which often also carries a lower rate of remuneration. In every case the minimum wage must be paid for hours during which the employee was actually working. Ultimately it is unclear whether employers must now pay the minimum wage for preparatory or subsequent work or commuting and travel time that to date neither qualified as time worked for the purposes of the Working Hours Act nor triggered compulsory payments.

## Minimum Wage Due Date

According to the Minimum Wage Law, the minimum wage must be paid out at the latest on the last banking day of the month following the month in which the work was carried out (Section 2 para. 1 sentence 1 MiLoG).

As a result, in cases in which the employee is entitled to payment above the minimum wage but the payment is not due until a later date, the employer must pay at least the minimum wage by the applicable due date and therefore pay out earlier than usual or than contractually agreed.

## Overtime and Working Time Accounts

The last banking day of the following month is the due date for payment at the minimum wage rate not only for the agreed working hours, but also for all hours actually worked. Exceptions are only permitted where the hours worked are logged on a working time account that has been agreed upon in writing (Section 2 para. 2 sentence 1 MiLoG). A written agreement is given also in cases in which the working time account is regulated in a company or works agreement or in a collective bargaining agreement that applies by virtue of legal provisions or by way of written reference. Even in such cases, the working hours logged in the working time account must be compensated within twelve calendar months of their monthly logging through paid time off or payment of the minimum wage, insofar as the entitlement to the minimum wage for

the hours worked has not already been fulfilled through payment of a regular base wage. Furthermore, the amount of hours worked logged on the working time account each month may not exceed 50 percent of the contractually agreed working hours.

A consequence of this is that only those employers who pay rates that are significantly above the minimum wage can be certain that the entitlement to the minimum wage for all hours worked is already covered by the regular base wage. Since the Minimum Wage Law's provisions on the base payment amount apply to every employment relationship, in future employers would be well-advised in borderline cases to set up two separate working time accounts for the remuneration elements that lie below and above the minimum wage. Any company or collective bargaining agreements not (fully) complying with the new law must be altered accordingly.

## Mandatory Nature of the Minimum Wage Law

Agreements that fall short of or limit or exclude the application of the entitlement to the minimum wage are “*to this extent*” void (Section 3 MiLoG). The minimum wage may only be waived by an employee through a court agreement, i.e. not merely through the employee's failure to enforce it or by way of settlement forms or termination agreements.

A forfeiture or expiration, e.g. on the basis of agreed forfeiture clauses or expiration periods, will not take effect insofar as it affects the minimum wage. Only the general statutory regulations on the statute of limita-

tions remain applicable and unaffected.

For this reason, appropriate agreements should be set down distinguishing between the remuneration that is subject to the Minimum Wage Law and further remuneration that is not subject to the Minimum Wage Law.

## Marginal Employment

Marginally employed employees (*Geringfügig Beschäftigte*), i.e. persons whose monthly wage does not exceed EUR 450 or whose employment activity does not exceed two months or 50 workdays within a calendar year, are also subject to the provisions of the Minimum Wage Law.

During the course of this year employers should therefore examine whether, after the introduction of the minimum wage, the monthly pay of marginally employed employees will exceed EUR 450 on the basis of the contractually agreed or actual number of hours worked. This will be the case on reaching a figure that is above 52 working hours per month. From the 1st of January 2015, exceeding the maximum number of hours worked will require not only the additional payment for each additional hour worked but will also trigger a change to a form of employment subject to social security with all the accompanying legal consequences.

For many employers with marginally employed employees, the introduction of the minimum wage will therefore mean that they must reduce the number of hours worked and monitor the strict adherence to this lower number of hours on a monthly basis and in

good time to ensure that they can react if and when necessary.

## Piece Wage and Task-Based Pay

Following the introduction of the minimum wage, it will still be possible to conclude agreements on piece wage or task-based pay but only where the employer ensures that the minimum wage is reached for each hour actually worked. The employer will therefore effectively need to convert the piece wage or task-based payment rates into a gross hourly wage taking into account the time worked by each individual employee.

The aim behind many piece wage or task-based payment agreements is to encourage employees to work at a faster pace or to fix a set amount of remuneration regardless of the employee's speed of work. It is however no longer possible to pursue this aim in the same way, since in cases where the converted hourly rate for piece or task-based work lies under the minimum wage, employees have an entitlement to a top-up payment to allow them to reach the minimum wage. Piece or task related payment can remain a useful option when it represents solely a kind of bonus on top of the minimum wage.

## Contractee Liability

Contractees of services and work are liable for the payment of the minimum wage by the companies they commission, particularly by general contractors and subcontractors (Section 13 MiLoG). In this situation the contractee is liable not only on a strict liability basis regardless of culpability,

but also to a much further extent, namely like a guarantor who has waived the defence of unexhausted remedies. This means not only that the contractee may be held liable for domestic and foreign subcontractors that may not even be known to him, but also that their employees may have direct recourse to the contractee without the possibility for the contractor to first refer the matter to their employers.

It can be difficult to determine how the term “contractee” is to be understood in this context. It undoubtedly includes typical cases involving general contractors. What is unclear, however, is how to assess contracts for service and work concluded for an entity's own purposes (e.g. office cleaning, management of vehicle fleet or canteen).

To limit the risk of liability, contractees should – before concluding the contract – ask the contractees the appropriate questions and (arrange to) examine or confirm the adherence to the requirements of the Minimum Wage Law. Contracts for service or work should also include further protections for the contractee such as requirements of proof, rights of termination in cases of violation of the Minimum Wage Law (without notice), monitoring rights, limitations on engaging subcontractors, indemnification rights, contractual penalty rules, and, where possible, the provision of sureties since the contractee's contractual claims would be worthless in the case of insolvency on the part of the contractor. Furthermore, regular spot checks should be carried out to test whether the contractee is in fact adhering to the agreed rules.

## Employers Based Abroad

The Minimum Wage Law applies not only to employers that are based in Germany. The minimum wage or above must be also be paid by employers based abroad to employees involved – even just temporarily – in work within Germany. This can be problematic as it is unclear exactly when such employees are “temporarily” involved in work within Germany (e.g. motorists from abroad driving through Germany on their way to another country?).

Foreign employers and those hiring out temporary staff must also register with the relevant customs authorities the names and detailed employment information of any employees employed by them in the industry areas named in Section 2a of the Act to Combat Illegal Employment (*Schwarzarbeitsbekämpfungsgesetz* – “*SchwarzArbG*”) (the construction industry, the restaurant and hospitality industry, passenger transportation, haulier, transport and related logistics industries, the travelling carnival industry, forestry companies, industrial cleaning, companies involved in the construction and dismantling of conventions and exhibitions, the meat industry). On registering, employers must include an assurance that they are paying employees working within Germany a remuneration that is in accordance with the Minimum Wage Law.

## Monitoring and Enforcement by Authorities

For all employers with employees in Germany, customs authorities are responsible for examining adherence to employers' obligations. They are entitled, among other measures, to access the employment contracts, records under Section 2 of the Evidence Law (*Nachweisgesetz*) and other business documents that might provide direct or indirect information on adherence to the Minimum Wage (Section 15 MiLoG). In accordance with Sections 2 – 6, 14, 15, 20, 22, and 23 of the *SchwarzArbG*, the employer is also subject to extensive obligations involving tolerating and cooperating with the checks on persons or documentation that may be carried out at any time. Under these provisions the appropriate authorities and their aides are entitled to enter the business premises and property of employers and contractees of self-employed persons as well as of those hiring temporary staff during the working hours of the persons present. In doing so they are also entitled to

- gather from them information on their employment status or their work, and
- view any documents they may have where there is cause to believe that these will provide or help deduce information on the extent, type or duration of their employment or activities.

Corresponding powers also exist where the persons in question are engaged in providing services or work for third parties.

The appropriate authorities and their aides are also permitted to

- check the personal details of persons working within the business premises or on the property of the employer, contractee or third party as well as of those hiring temporary staff,
- to enter, during business hours, the business premises and property of the employer and contractee of services or work as well as of those hiring temporary staff and to view there documents relating to pay and registration, books, and other business files that could provide or help deduce information on the extent, type or duration of employment relationships.

Where such inspections lead to chance discoveries that point to other regulatory offences or crimes, such discoveries may also be assessed and used as the basis of further investigations.

## Generation and Storing Documentation

Under the Minimum Wage Law, employers are under further obligations concerning the generation and making available of documentation (Section 17 MiLoG). Under this provision, every employer must, for marginally employed employees under Section 8 para.1 of Book Four of the Social Security Code (*Viertes Buch Sozialgesetzbuch*) or those employed in the industries or branches named in Section 2a of the *SchwarzArbG*, log the beginning, end and duration of the daily time worked by each of these persons by the latest by the end of

the seventh day following the day on which the work was carried out. These logs must be stored for at least two years starting from the point in time that is relevant for the log. The same obligations apply to those hiring temporary staff to work in one of the industries named in Section 2a *SchwarzArbG*. According to the wording of the law, these obligations concerning the logging of time worked extends not only to employees who receive only the minimum wage, but also to all other employees.

This will affect in particular employers who have previously eschewed time logs for their marginally employed employees because these had been in receipt of piece wage and task-based payment (e.g. the commonly cited example of the newspaper delivery person). In future these employers will have to develop and maintain appropriate time logging systems in order to ensure adherence to the requirements of the Minimum Wage Law.

## Undercutting the Minimum Wage

Wage agreements that undercut the minimum wage are invalid. It is unclear, however, whether in this case employees are entitled only to the payment of the statutory minimum wage or whether they are entitled to payment of the usual remuneration (Section 612 German Civil Code (*Bürgerliches Gesetzbuch*)).

In the latter case, the employee's entitlement to usual remuneration would by no means be limited to the minimum payment of EUR 8.50 under the Minimum Wage Law. The usual payment that would then be owed is calculated instead by establishing what other persons doing similar work

in the same place in the same or similar industries or professions would usually be paid. In doing so, regard must always also be had to the personal situation of the individual employee (age, family status, number of children, professional experience, seniority).

This will commonly involve pay rates regulated by collective wage agreements and wage levels potentially far above the statutory minimum wage. Where it is not possible to determine the usual remuneration, the rate will be determined by equitable discretion and in some cases by a court decision.

## Penalties

Breaches of the Minimum Wage Law represent regulatory offences. Deliberate or even merely negligent breaches on the part of the employer can be punished with fines of up to EUR 500,000 being imposed against its legal representatives (managing director, board members, or other organs authorised to represent the entity) or the so-called *willed representatives*, those who are entrusted with the partial or total leadership of the business or who take on responsibility for duties attaching to the business owner (such as a manager, chief representative, or authorised proxy).

Employers who breach the Minimum Wage Law can also be excluded for an appropriate period from participating in public tenders for delivery, construction or other services until such time as their trustworthiness has been re-established.

Where the employer has undercut the minimum wage, the related non-payment of contributions owed to social security will also lead to scope for personal criminal liability of the

legal representatives or responsible managers for the non-payment and misuse of wages and salaries under Section 266a of the German Criminal Code (*Strafgesetzbuch* – “StGB”) and for usury under Section 291 StGB. Where the minimum wage is undercut by subcontractors engaged by the contractee, the legal representatives or responsible managers of the contractee could be criminally liable for aiding a crime.

## Required Modifications

The Minimum Wage Law will have significant effects on a range of business and collective wage models as well as on time logging and other business systems. The necessary changes must be determined as soon as possible. Modifications will need to be negotiated and agreed upon and in

some cases it may be necessary to undertake precautionary terminations of existing agreements.

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