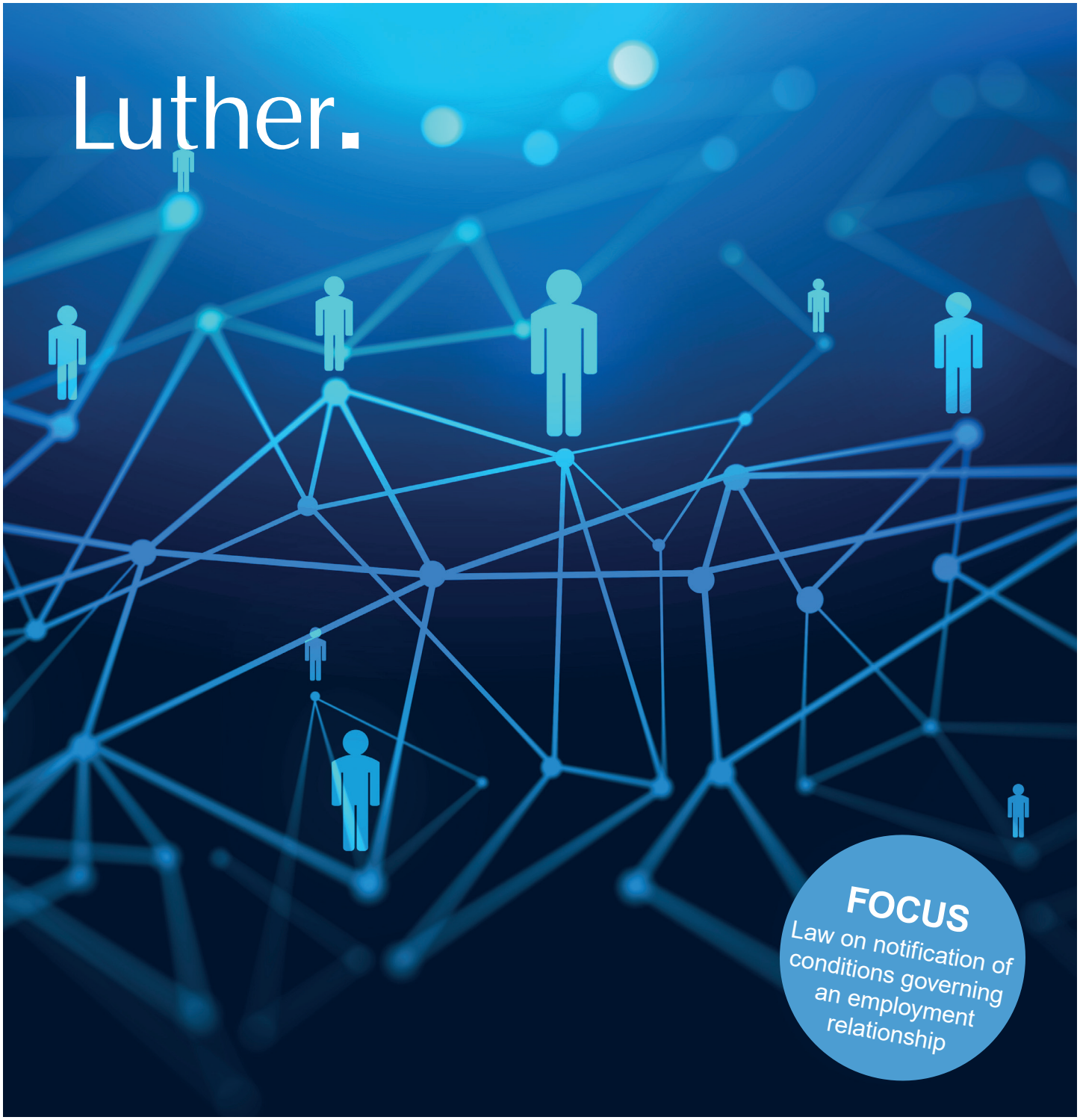

Special Newsletter
Labour & Employment Law

unyer GLOBAL ADVISORS

Dear Readers,

It's here: the law transposing the EU Directive on transparent and predictable working conditions in the European Union in the area of civil law. The Bundestag approved the relevant bill on 23 June 2022. The Law on the proof of the essential conditions applicable to an employment relationship (*Nachweisgesetz)* in particular is affected by the amendments. But other aspects, such as the duration of the probationary period under fixed-term employment relationships and the adding of the right of employees to submit a request for transition to another form of employment will also require a change in thinking with regard to labour law practice.

The law's envisaged entry into force on 1 August 2022 will result in an urgent need for employers to take action. Our special newsletter therefore is devoted to this topic, which is extremely relevant in practice. Paul Schreiner and Pia Schweers will look into the current situation and provide initial recommendations for action to be taken by employers.

The new law will pose major challenges for many companies in the coming weeks and months. This is particularly the case because many questions remain unanswered regarding the concrete implementation in practice of the amendments to the law. We will therefore be taking an in-depth look over the coming weeks at the implementation of the EU Working Conditions Directive and examining individual topics for you with a view to their implementation in practice.

Paul Schreiner and Pia Schweers kick things off in this issue. Further articles on this topic will follow in due course. It is therefore worth visiting our website on a regular basis.

We will also look in the coming weeks at how the requirements of the EU Directive have been implemented in other countries. We are very much looking forward to the insights of colleagues from France and Italy from our unyer network. Colleagues have already reported on current developments in labour law in recent issues of our newsletter.

In addition, a highlight will be the publication of our Digital Contract Guide, which can be used to provide evidence as defined in the *Nachweisgesetz* by simply selecting the relevant data. These will be interesting times!

With this issue of our special newsletter, we hope to be able to give you an initial insightful overview with helpful tips. Since this topic is currently a major concern for businesses, we would of course also be pleased to receive your suggestions and comments. If you have any further questions or need assistance, please do not hesitate to contact us.

Stay healthy and enjoy the summer!

Achim Braner Pia Schweers

What amendments does the EU Working Conditions Directive entail?

The EU issued the European "Directive (EU 2019/1152) on transparent and predictable working conditions" (hereinafter referred to as "WCD") on 20 June 2019. This is to be implemented in the Member States by 1 August 2022. The German legislature drafted a relevant bill (Bundestag printed paper 20/1636 - hereinafter referred to as the "bill") for this purpose, which was approved by the Bundestag on 23 June 2022. In particular, the bill provides for amendments to the Law on the proof of the essential conditions applicable to an employment relationship (*Nachweisgesetz,* in short "NachwG") and the Act on part-time work and fixed-term employment contracts (*Gesetz über Teilzeitarbeit und befristete Arbeitsverträge*, in short "TzBfG"). Whether the WCD is successfully implemented and what consequences the amendments will have for the practice of labour law are outlined below.

Amendments to the NachwG

The NachwG governs the requirements for setting out the essential terms of a contract in writing, so the amendment to the NachwG to implement the WCD should hardly come as a surprise. The bill provides for significant changes regarding the expansion of the employer's obligation to provide information as well as the relevant deadlines.

The new catalogue of Section 2 (1) sentence 2 NachwG contains the following additional obligations to provide proof regarding the

- duration of the probationary period,
- remuneration of overtime,
- separate disclosure of the components of the remuneration for work,
- method of payment for the remuneration,
- agreed rest breaks and rest periods,
- in case of agreed shift work: the shift system, shift rhythm and prerequisites for shift changes,
- in the case of working on call (*Arbeit auf Abruf*) under Section 12 TzBfG: the agreement that the employee has to perform work in accordance with the workload, the minimum number of hours to be remunerated, the time frame for the performance of work (determined by reference days and reference hours) and the period within which the daily working hours (*Lage der Arbeitszeit*) have to be notified by the employer in advance,
- if agreed: the possibility of ordering overtime and its conditions,
- any entitlement to training provided by the employer,
- in the case of company pension plans provided by a pension fund: name and address of the pension provider, unless the pension provider is obliged to provide this information,
- the procedure to be followed when terminating the employment relationship: at a minimum, the written form requirement and the deadlines for terminating the employment relationship and for bringing an action for protection against dismissal.

With regard to the obligation to specify the deadline for bringing an action for protection against dismissal in the new Section 2 (1) sentence 2 no. 14 NachwG, the effects on the subsequent admission of the action pursuant to Section 5 of the German Protection against Dismissal Act (*Kündigungsschutzgesetz, KSchG*) are uncertain as things stand at present. Under previous case law, the employee was required to inform himself/herself about the deadline for filing an action and was deemed to be at fault under Section 5 of the KSchG if he/she made a mistake. However, if the employer is now supposed to be legally obligated to provide correct information about the deadlines for filing an action for protection against dismissal, the employee cannot be obligated to do so at the same time. A change in case law is to be expected here.

The previously existing possibility of referring to collective bargaining agreements or laws is not significantly changed under the bill. It is also possible to replace certain information by referring to collective bargaining agreements or laws under Section 2 (4) NachwG and to specify the applicable collective bargaining agreements in the employment contract under Section 2 (1) no. 15 NachwG. The exemption from the obligation to notify changes to collective bargaining agreements or laws under Section 3 sentence 2 NachwG also remains in place. However, it should be noted that, taking into account the intention and purpose of the WCD, the standard must be interpreted in conformity with EU law. In this respect, the exception laid down in Section 3 sentence 2 NachwG can only apply insofar as the employee can recognise unequivocally the conditions that apply to his employment relationship. Accordingly, if a collective bargaining agreement is merely updated, notification should not be necessary. If, on the other hand, it is concluded for the first time, information regarding the change must be provided.

It should also be noted that the legislature missed the opportunity it had been given to introduce digitisation. This is because, despite the electronic form being explicitly allowed under the WCD, the German bill continues to require the written form. Why the German legislature did not take advantage of the room to manoeuvre provided is therefore particularly inexplicable since the WCD stipulates that the employee must be able to save and print out the document in the case of electronic transmission. Therefore, the requirement of the written form does not increase the protection of employees.

In future - in the event that fine proceedings are initiated - a fine of up to EUR 2,000 is stipulated as a legal consequence of the failure to provide the essential working conditions or not providing them correctly, in full, in the prescribed or a timely manner.

Amendments to the Act on part-time work and fixed-term employment contracts

Further amendments relate to the TzBfG. In particular, the possibility for the employee to submit a request for a transition to another form of employment was added, and new regulations were introduced regarding the duration of the probationary period in the case of fixed-term employment relationships.

The newly added Sections 7 (3) and 18 (2) TzBfG provide for the possibility of a “request for transition” to full-time/permanent employment for employees employed on a part-time or fixed-term basis. If the employer does not wish to comply with this request, he must give reasons for his decision in a written response. It remains to be seen what requirements are to be laid down regarding the content of these letters setting out the reasons. However, since the employee cannot derive any rights for himself from the written response, it is unlikely that the issue will be resolved in court.

It is also worth mentioning with regard to the transfer request that the German legislature has stipulated the text form for the employee’s request and the employer’s response. However, the WCD does not stipulate the form of the employee’s request for transition, so the question of compliance with the Directive arises. By stipulating the text form requirement for the request for transition, it could be argued that it makes it more difficult for the employee to assert his rights. In the case of a request for transition not made in writing, the relevant standard must therefore, in case of doubt, be scaled back in line with the Directive.

The second relevant amendment to the TzBfG concerns the requirements regarding the duration of the probationary period. In this respect, the WCD provides for a fundamental limit of a maximum of six months for the probationary period, which, however, has already been implemented in German law in Section 622 (3) of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*) The provision in Section 15 (3) TzBfG is new, under which the agreed probationary period in the case of a fixed-term employment contract must be in proportion to the expected duration of the fixed term and the nature of the work. The German legislature has left open how the permissible duration of the probationary period is to be determined. In the context of proportionality in relation to the nature of the work, it will be necessary to consider how complex the work is

and whether it requires a short or long training period. It remains to be seen what the first court decisions on the permissible duration of probationary periods will be in this respect. These can then be used to make a more reliable assessment of possible regulatory options.

Non-implemented provisions of the WCD in the context of protection against dismissal

The protection provisions provided for in Article 18 WCD regarding the notification of grounds for dismissal and the allocation of the burden of proof in proceedings for protection against dismissal have not been implemented by the German legislature as a whole.

With regard to Article 18 (1) WCD, which stipulates that Member States shall take the necessary measures to prohibit the dismissal or its equivalent on the grounds that workers have exercised their rights provided for in the WCD, this does not need to be transposed into German law, as Section 612a BGB already contains a standard that contains the equivalent regulatory content.

However, differences compared to German law can be found in Articles 18 (2) and (3) WCD. If workers consider that they have been dismissed on the grounds that they have exercised the rights provided for in the WCD, Article 18 (2) WCD stipulates that they may request the employer to provide duly substantiated grounds for the measures taken in writing. Article 18 (3) WCD also requires that the Member States provide for a reversal of the burden of proof to the detriment of the employer in the event that workers establish facts before a court from which it may be presumed that there has been a dismissal on the grounds that they have exercised the rights provided for in the WCD, as provided for in Article 18 (1) WCD.

According to the current legal situation, there is an obligation to provide grounds as laid down in Article 18 (2) WCD at the employee's request only in the case of extraordinary dismissals and dismissals for operational reasons (cf. Section 626 (2) sentence 3 BGB and Section 1 (3) sentence 1 KSchG). In addition, the employer must only submit the grounds for dismissal in the course of the proceedings for protection against dismissal. This does not apply to dismissals before the end of the probationary period under Section 1 (1) KSchG, as grounds for dismissal are not required in such cases. In this respect, it should be noted in particular that an employee will not assert his claim to be given the reasons for dismissal in isolation in court. This is because the employee will put a defence against the dismissal as a whole after receiving the notice of dismissal - taking account of the deadline laid down in Section 4 KSchG - and will therefore also find out about the grounds for dismissal during the course of the unfair dismissal proceedings. The implementation of Article 18 (2) WCD would therefore only have practical relevance in the event of dismissal before the expiry of the probationary period laid down in Section 1 (1) KSchG. Furthermore, the obligation to provide grounds would merely be brought forward in time.

However, the lack of a provision regarding the allocation of the burden of proof will in any event be relevant for employment law proceedings, as Section 612a BGB does not currently provide for a corresponding reversal of the burden of proof. Under the current legal situation, the employee must instead prove that he or she has been disadvantaged because of the assertion of his rights. It therefore remains to be seen how the courts will deal with the allocation of the burden of proof in the future if the employee refers to an alleged disciplinary action due to the exercise of his rights under the WCD.

Conclusion on the bill

In general, it can be said that a large number of the WCD provisions are already laid down in the applicable German law. However, the implementation is fragmentary in parts and has not made use of the room for manoeuvre provided. It would have been desirable for the German legislature to have taken advantage of the opportunity to introduce the electronic form in the NachwG instead of continuing to insist on the written form, which is not advantageous for any party to an employment contract. There is a lack of provisions regarding the determination of the appropriate duration of the probationary period within the meaning of Section 15 (3) TzBfG and the implementation of Article 18 (2) and (3) WCD. It remains to be seen how case law will deal with this.

Practical to-dos

Having read the above, most HR professionals are now likely to be left in a state ranging from disbelief to shock. But do not panic. Contrary to the rumours circulating, all employment contracts do not have to be redrafted on an ad hoc basis by 1 August 2022. However, the action that needs to be taken is also not trivial.

As a first step, each company should take steps to determine what the existing contractual situation is, i.e., which employees have in fact written employment contracts, which different employee groups there are (employees covered by collective agreements, employees not covered by collective agreements, employees with shift work, employees with pension entitlements) and which collective bargaining agreements may be in place. The next step will be to identify the employees that are subject to individual agreements and arrangements - an extremely time-consuming process. If an initial framework for action has been identified by the aforementioned steps the next step is to efficiently provide the relevant proof. It should be noted at this point that Section 2 NachwG stipulates the obligation to record the essential terms of the contract in written form. This written form does not necessarily have to be the employment contract. It is therefore also conceivable for the relevant information to be summarised in a separate document, which is to be signed (a prerequisite for the dreadful written form requirement) and handed over to the employee unilaterally. It is of course always advisable for evidentiary purposes to have the employee acknowledge receipt of such proof. Irrespective of these practical considerations, it is also worth mentioning that the implementation of the NachwG also offers the opportunity to clear up confusing contract structures and create new sample contracts.

With regard to the deadlines within which the proof must be provided, it should be noted that a distinction must be made here between existing employees and new employees hired as from 1 August 2022. The bill also makes a distinction between the different information required. For example, as of 1 August 2022, new employees must be provided with very basic information (contractual parties, remuneration, working hours) on their first day of work. Further information then must be provided within seven days or one month after the agreed start of the employment relationship. For existing employees, the proof need only be handed over upon request and - depending on the relevant number in Section 2 (1) sentence 2 NachwG - either no later than the seventh day or one month after receipt of the request by the employer.

Even if at first glance the implementation of the NachwG initially causes a stir, the other new provision contained in the TzBfG, the employee's request for transition, should not be forgotten. Admittedly, such requests are not to be expected immediately upon the law entering into force However, the employer will receive the first requests sooner or later. In this respect, it is advisable that, in the event that such a request is rejected, employers should take a particularly close look at the relevant reasons and quickly develop standard letters for the different particular circumstances.

What (further) difficulties will arise in the implementation of the WCD and what may also quickly blow over will become apparent in the coming months and perhaps even years. We will continue to follow up on this topic and keep you informed.

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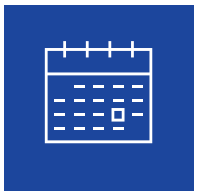
Events, publications and blog



You will find an overview of our events here.

You will find a list of our current publications here.

You will find our blog here.

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