Obligation to carry out a Salary Equality Analysis

Following the expiry of the referendum period for the revision of the Gender Equality Act (GEA) and no request for referendum having been made, the obligation to conduct an internal salary equality analysis for companies with at least 100 employees will enter into force on 1 July 2020. The amendment to the law shall effectively implement the constitutional right to equal pay. This article intends to provide an overview of the newly introduced obligation to carry out an internal analysis of pay equality.

1. Legal Basis of the Right to Equal Pay

The equality of rights between men and women is set out in Article 8 para. 3 of the Federal Constitution. According to this provision, the law shall ensure their equality, both in law and in practice, most particularly in the areas of family, education and work. The right to equal pay for work of equal value is explicitly stated.

In order to effectively implement the constitutional right to equal pay for men and women, the new section 4a GEA (Articles 13a et seq.) concerning the salary equality analysis and review as well as the related Ordinance on the Review of the Salary Equality Analysis of 21 August 2019 will both enter into force on 1 July 2020.

2. Who is affected by the revision?

Companies in the private and public sector that employ 100 or more employees at the beginning of the year are obliged to conduct an internal salary equality analysis for the calendar year in question. The relevant element is the number of employees, regardless of their workload. However, apprentices and staff seconded to the company are not taken into account.

Companies receiving subsidies or subject to pay equality controls under public procurement regulations are exempt from the obligation to carry out such analysis. Companies which can prove that they meet the requirements for equal pay based on a previous review are also exempt, provided that such review was carried out within the previous four years (i.e. not sooner than July 2016).

3. Objective of the Salary Equality Analysis

The objective of the new obligation to carry out a salary equality analysis is to satisfy the constitutional right to pay women and men equal salaries. To this end, the analysis shall reveal any systematic gender-related salary discrimination in the company and thus enable it to be eliminated.

4. Timelines for Implementation

The first salary equality analysis must be carried out not later than by 30 June 2021.

If a salary discrimination is established, the analysis shall be repeated every four years. If the number of employees falls below the minimum threshold in the meantime, the analysis is only to be carried out again once the number of 100 employees has been reached again.
5. Applicable requirements

The salary equality analysis must be carried out in accordance with a scientifically recognised and legally compliant method. For this purpose, the Federal Government provides a standard analysis tool ("Logib"), which meets the necessary requirements, free of charge.

The "Logib" analysis tool is based on a statistical regression analysis that can be used to assess the gender-specific salary situation in a company. The analysis tool enables to determine whether a gender is systematically disadvantaged in terms of pay. Existing salary differences are compared by means of personal qualification characteristics such as education, potential work experience, years of service and job-related characteristics, such as the level of competence and professional position. Under otherwise equal conditions, it can thus be determined whether part of an existing salary difference between gender cannot be explained by salary-relevant, objectively non-discriminatory factors.

The discovery of an individual salary discrimination within the meaning of the GEA or salary discrimination against certain groups (based on ethnicity, religion, etc.) is not the objective of this analysis. The resulting salary inequality can therefore only be an indication of a prima facie evidence of individual salary discrimination and may be refuted.

6. Evaluation of the Result

The salary equality analysis will lead to a determination on whether or not there is gender pay discrimination in the company. The company must have this result verified by an independent body. Licensed audit companies are authorised to carry out such controls.

If a company in the private sector uses the Federal Government's standard analysis tool, it may alternatively commission an employee representative body appointed in accordance with the Participation Act to review the result of analysis.

The external auditor verifies whether (i) the salary equality analysis has been carried out in a formally correct manner and within the prescribed period using a scientifically recognised and legally compliant method, and (ii) all employees have been properly accounted for, together with their personal and job-related characteristics and all salary components. The company provides the necessary documents and information for this purpose. The verification is therefore limited to a plausibility check and does not imply a duplication of the analysis. The accuracy and reliability of the result depend on the quality of the provided data. Within one year of carrying out the equal pay analysis, the auditor should draw up a report for the attention of the management.

If the salary equality analysis report is examined by the employee representative body, the company concludes an agreement with it regarding the procedure for the review and reporting to the management.

7. Consequences in the Event of Identified Salary Inequalities

The law does not specify sanctions in the event that a salary discrimination is established. However, if such discrimination is revealed but not eliminated by the company, this can have a negative impact on the company’s reputation and may also encourage staff turnover (see also the information obligations in section 8 below).

Individual cases of discrimination may be asserted by means of a claim based on Article 5 GEA. The analysis report confirming salary inequality within the company may support the claim by serving at least as a refutable indication of the individual’s own salary discrimination (see section 5 above, last paragraph). The same applies in the opposite case: if the salary equality analysis shows that there is no gender-specific salary discrimination, this does not per se exclude the possibility that in an individual case a person is not discriminated on grounds of her gender - usually a woman - with regard to salary.
8. Further Obligations

In addition to repeating the analysis after four years if salary inequalities are found, employers are obliged to inform their employees of the result of the salary equality analysis no later than one year after the review is completed. Listed companies must also publish the result of the salary equality analysis in the annex to their annual financial statements.

9. Limited Validity Period

The obligation to carry out the salary equality analysis comes into force on 1 July 2020 for a limited period of 12 years. Accordingly, both the amendment to the GEA and the related Ordinance will automatically cease to apply after 30 June 2032 (so-called sunset clause) – subject to further amendments of the law at a later date.

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