

# *The Minimum Wage Act in detail*

*Objectives, application, implementation  
and control*



Federal Ministry  
of Labour and Social Affairs

MINIMUM  
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# Questions regarding Germany's statutory minimum wage

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### **Disclaimer**

The Federal Ministry of Labour and Social Affairs cannot provide any legally binding interpretation of the Minimum Wage Act. It can only offer an assessment in the form of general remarks from its standpoint as the lead ministry during the drafting of the bill. The Federal Ministry of Labour and Social Affairs is not qualified to provide legal advice regarding concrete cases.

# 1 *The objectives of the minimum wage/ How the minimum wage works*

## 1.1 **Why was a general statutory minimum wage introduced in Germany?**

A general statutory minimum wage was introduced to protect workers in Germany from unreasonably low wages. By doing so, the statutory minimum wage also contributes to fair and effective competition. At the same time it ensures greater stability in Germany's social security systems.

Additional information:

The introduction of a comprehensive statutory minimum wage protects workers from unreasonably low wages. At the same time, a minimum wage helps ensure that companies compete on the basis of better products and services rather than on the basis of increasingly lower wages at the expense of their employees. The lack of a minimum wage can lead to competition that is based on wage undercutting, also at the expense of our social security systems because non-living wages can be "topped up" by the government. Thus, a minimum wage protects the financial stability of our social security systems.

## 1.2 **How many people will benefit from the minimum wage?**

It is expected that some 3.7 million people will benefit from the minimum wage starting 2015. This minimum standard protects workers in the low-wage sector from wage dumping and thus reduces the number of workers who are dependent on social benefits despite the fact that they have a full-time job.

## 1.3 **How high will the minimum wage be?**

The minimum wage will initially be €8.50. Adjustments will be made starting 1 January 2017 and then every two years thereafter.

## 1.4 **Who will decide on adjustments to the minimum wage?**

A commission comprised of employer and trade union representatives (see also point 7 below) will review the level of the minimum wage. Trade unions and employers in the commission will consult for the first time in 2016 on how high the minimum wage will be as of 1 January 2017. When setting the level of the minimum wage, the commission will base its decision on how collectively bargained pay scales have been developing in Germany. It will conduct an overall assessment during which it will examine which level would offer adequate minimum protection for workers and enable fair conditions for competition without jeopardising jobs in the process. The law provides for the possibility of adjusting the minimum wage every two years starting 2017.

## 1.5 **Do any other EU Member States have a statutory minimum wage?**

A statutory minimum wage is already in force in 22 of the 28 EU Member States (including Germany). The exceptions are Austria, Cyprus, Denmark, Finland, Italy and Sweden. However in most of these countries, employers are much more strongly bound by collective agreements than is currently the case in Germany.

## **1.6 What financial implications will the minimum wage have for workers, employers and public finances?**

It is not possible to make a reliable estimate of how the minimum wage will affect the wage bill and, in turn, public finances. This would require a number of assumptions for which a sound foundation is lacking. This would include the reactions of entire sectors, individual enterprises, and workers plus assumptions regarding constellations in the marketplace and the competitive environment.

An initial rough guide for this is provided by a model calculation from the Federal Ministry of Labour and Social Affairs for the year 2015. Based on this calculation, introduction of the minimum wage would lead to increased wages for 3.7 million workers. Including social insurance contributions, introduction of the minimum wage would therefore involve €9.6 billion in wage costs for the entire economy. The total amount could also be less if sectors make use of the possibility of paying an extended sectoral minimum wage of less than €8.50. What initially sounds like a lot would increase the wage bill for Germany as a whole by just 0.7 per cent. By comparison, wages increased considerably more between 2012 and 2013, namely by 2.8 per cent.

For Germany's social security system, introduction of the minimum wage would lead to additional revenues totally some €3.2 billion.

At the same time, spending pursuant to Book II of the German Social Code would decline because "top-up benefits" for workers would be less.

## **1.7 What is the timetable for introducing the comprehensive statutory minimum wage in Germany?**

A minimum wage of €8.50 per hour will generally apply with effect from 1 January 2015. Wages of less than €8.50 per hour will be allowed until 31 December 2016 only when this has been provided for in a corresponding collective agreement between representative parties and has been made binding by means of an ordinance that is based on the Posted Workers Act or the Act on Temporary Employment Businesses for all employers based in Germany or abroad who fall within the scope of the collective agreement and their employees (see point 1.9). A special arrangement for newspaper deliverers which is similarly effective for a limited period is based on this stepwise introduction of the minimum wage (see point 5.10.). Starting 1 January 2017, the minimum wage for all employed persons will be €8.50 and will apply to all sectors. Effective 1 January 2018, the general statutory minimum wage that has been set by the Minimum Wage Commission will apply without restriction.

## **1.8 Why is there a transitional arrangement and who will be allowed to deviate from the minimum wage?**

During the transitional phase until 1 January 2017, parties to collective agreements have the option of setting for their respective sector a minimum wage level that deviates from the statutory level. This arrangement will permit them to temporarily allow for the specific earning capacity of businesses in the particular sector. It will make it possible to raise wage levels in stages until they reach the statutory minimum wage. This will give companies sufficient lead time to undertake any adjustment processes that may be necessary.

As a precondition for deviating from the minimum wage, the respective sector must conclude a nationwide, sector-level representative collective agreement that has been made binding in accordance with the Posted Workers Act or the Act on Temporary Employment Businesses for all companies based in Germany or abroad which fall within the scope of the agreement and for their employees.

### 1.9 Which sectors deviate from the minimum wage on the basis of the transitional arrangements?

The parties to collective agreements in the hairdressing sector, in agriculture and forestry, the horticultural sector and the textile and clothing industry applied for permission to extend by means of an ordinance pursuant to the Posted Workers Act their collective agreements that undercut the statutory minimum wage. The respective ordinances went into effect on 1 January 2015.

- In the *hairdressing sector* the following minimum wage levels apply from 1 January 2015 to 31 July 2015:

Western states: €8.00

Eastern states with Berlin: €7.50

The statutory minimum wage will apply nationwide in the hairdressing sector starting 1 August 2015.

- The collective bargaining parties in the *agriculture and forestry sector* and in the horticultural sector have signed a collective agreement in which the wage level will remain lower than the statutory minimum wage until 31 December 2016. The following levels apply:

	Starting 1 Jan 2015	Starting 1 Jan 2016	Starting 1 Jan 2017	Starting 1 Nov 2017
West	€7.40	€8.00		
East (eastern states including Berlin)	€7.20	€7.90		

- The collective bargaining parties in the *textile and clothing industry* agreed on the following wage levels which will be lower than the statutory minimum wage until 31 October 2016:

	Starting 1 Jan 2015	Starting 1 Jan 2016	Starting 1 Nov 2016	Starting 1 Jan 2017
West	€8.50	€8.50	€8.50	Statutory minimum wage
East (eastern states including Berlin)	€7.50	€8.25	€8.75	Statutory minimum wage, at least €8.75

As the result of existing ordinances pursuant to the Posted Workers Act, the wages paid in the following sectors were lower than the statutory minimum wage even before the Minimum Wage Act went into effect:

- The minimum wage for *laundry services* for commercial clients in Germany's eastern states and Berlin is currently €8.00; it will increase to €8.75 effective 1 July 2016.
- In the wage for *meat industry* the minimum wage is €8.00 nationwide. Beginning 1 October 2015, it will be €8.60.
- Pursuant to the Act on Temporary Employment Businesses, the following minimum wage levels apply to temporary agency workers in Germany's eastern states and Berlin: since 1 April 2014: €7.86; starting 1 April 2015: €8.20; starting 1 June 2016, entitlement is €8.50 per hour.

#### **1.10 Do the transitional arrangements also apply when a collective agreement has been declared generally binding pursuant to the Collective Agreements Act?**

As a rule, only provisions that are provided under collective agreements and have been extended pursuant to the Posted Workers Act or the Act on Temporary Employment Businesses, and minimum wage provisions for the nursing care field pursuant to the Posted Workers Act can fulfil the requirements set forth in section 24 of the Minimum Wage Act. Only special collective agreements in the construction industry proper or the construction-related trade that have been declared to be generally binding pursuant to the Collective Agreements Act also have the stipulated effect (first sentence of section 3 of the Posted Workers Act).

#### **1.11 Where can I find an overview of sectoral minimum wages in Germany:**

<http://www.bmas.de/DE/Themen/Arbeitsrecht/Mindestlohn/inhalt.html>

#### **1.12 What is the relationship between sectoral minimum wages and the general statutory minimum wage under the Minimum Wage Act?**

Sectoral minimum wages that have been made binding on the basis of the Posted Workers Act or the Act on Temporary Employment Businesses for all employers based in Germany or abroad who fall within its scope and their employees have priority over the provisions of the Minimum Wage Act when they are not lower than the general statutory minimum wage (see section 1 (3) of the Minimum Wage Act). In addition, until 31 December 2016, pay can be less than the statutory minimum wage. However, beginning 1 January 2017, the agreed sectoral minimum wage must be at least €8.50 per hour (section 24 (1) of the MWA).

Provisions deviating from the Minimum Wage Act can also apply to agreements – which are often tailored to the respective sector's needs – regarding payment due dates or working time accounts, when the agreement has likewise been extended by means of an ordinance.

#### **1.13 What applies when provisions in collective agreements are inconsistent with the statutory minimum wage?**

The minimum wage takes priority over collective agreement provisions that conflict with the minimum wage and are less favourable for workers (section 3 of the MWA). Exception: generally binding collective agreements that are based on the Posted Workers Act or the Act on Temporary Employment Businesses (see points 1.8, 1.9 and 1.11).

## 2 Scope of the Minimum Wage Act

### 2.1 To whom does the general minimum wage apply?

The general minimum wage applies to employees and certain interns. The following are not employees within the meaning of the MWA:

- Anyone who is a trainee under the Vocational Training Act, including persons who are enrolled in vocational training preparation measures.
- Anyone who works as a volunteer/ in an honorary capacity.
- Anyone who does voluntary service.
- Anyone who is enrolled in a measure that actively promotes their participation in the labour market.
- Anyone who is a home worker under the Home Works Act.
- Anyone who is self-employed.

### 2.2 Does the general minimum wage also apply to self-employed persons?

No. Because of their social dependence and their consequently weaker negotiating position, the protection afforded by the Minimum Wage Act applies only to persons in dependent employment. For this reason, only employees and interns fall within the scope of the MWA.

### 2.3 Does the minimum wage also apply to home workers?

No. Being persons in quasi-employment, home workers have no claim to being paid minimum wage.

### 2.4 Does the minimum wage also apply to voluntary services?

No. Work for the Federal Voluntary Service or similar voluntary services (more at point 2.5) does not constitute employment and therefore does not fall under the Minimum Wage Act.

### 2.5 Does the minimum wage apply to persons who work as a volunteer/in an honorary capacity?

The Minimum Wage Act does not regulate the remuneration of persons who work as a volunteer/ in an honorary capacity (section 22 (3)). Volunteer work is considered given when it does not serve to secure or improve the individual's economic livelihood but rather is an expression of the individual's inner attitude toward the common good and the concerns of others.

According to the German government's explanatory memorandum to its bill for the Minimum Wage Act, persons are also considered to be working in an honorary capacity when they perform voluntary service as defined by section 32 (4), first sentence, number 2, letter d of the Income Tax Act. Such voluntary services are:

- Federal Voluntary Service within the meaning of the Federal Voluntary Service Act,
- Year of voluntary work in the social sector within the meaning of the Act on the Promotion of Youth Voluntary Services,
- Voluntary Ecological Year within the meaning of the Act on the Promotion of Youth Voluntary Services,
- European Voluntary Service within the meaning of the Regulation (EU) No 1288/2013 of the European Parliament and of the Council of 11 December 2013 establishing 'Erasmus+': the Union programme for education, training, youth and sport,
- Services in foreign countries within the meaning of section 5 of the Federal Voluntary Service Act,

- The weltwärts development volunteer service within the meaning of the directive issued by the Federal Ministry for Economic Cooperation and Development on 1 August 2007 (Federal Gazette 2008 p. 1297),
- Voluntary service by all generations within the meaning of section 2 (1a) of Book VII of the German Social Code,
- International Youth Voluntary Services within the meaning of the directive issued by the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth on 20 December 2010 (Joint Ministerial Gazette p. 1778).

Ultimately, the question of whether an activity constitutes employment or volunteer work depends on an overall assessment of all relevant factors in the respective case. The type of contract is determined by the actual substance of the business. As a consequence, an activity that is called honorary or voluntary can constitute employment. When an overall assessment of all the circumstances in the respective case shows that the supposedly volunteer worker is actually an employee because, for example, he falls under his principal's extensive right to issue directions, the agreement that the work is performed on an honorary or voluntary basis has no legal force. Such cases are actually employment relationships that in legal terms do not differ from other employment relationships.

As a rule, the minimum wage also applies to so-called "pseudo voluntary services" (such as at charities) that are organised as internships or mini-jobs outside the scope of the Federal Voluntary Service Act. If these jobs are to remain exempt from the minimum wage, interested bodies would have to use the possibilities offered by the Federal Voluntary Service Act and offer more "genuine" voluntary services if necessary.

On the other hand, "quasi volunteers" – in other words, persons who have charitable reasons for their work but at the same time are registered – for tax or social security reasons – as mini-jobbers (marginally employed part-time workers) are usually employees (see also section 2 (2) of the Act on Part-Time and Fixed-Term Employment). See point 5.11.2 for more about work that is performed on an honorary or voluntary basis, the flat rate for trainers and mini-jobs.

## **2.6 Does the minimum wage apply to students?**

That depends. The minimum wage applies to employed students when they are 18 years of age or older or already have completed vocational training.

## **2.7 Are workers who are under the age of 18 and have already completed formal vocational training entitled to the statutory minimum wage?**

Yes. The exception specified in section 3 (3) of the Minimum Wage Act applies only to persons who are under the age of 18 and have not completed vocational training.

## **2.8 Does the minimum wage apply to pensioners?**

Yes. The minimum wage also applies to jobs held by pensioners.

## **2.9 Does the minimum wage also apply to employees of foreign companies whose place of work is located outside Germany and who work only briefly in Germany, such as drivers in transit through Germany or in cabotage transport?**

Yes. The obligation to pay minimum wage (section 20) also applies to workers who are employed only briefly in Germany. In other words, this obligation also fundamentally applies to drivers in transit through Germany and in cabotage transport, when they carry out their work on German territory.

Limited to the area of pure transit through Germany, the checks performed by state agencies to monitor compliance with the Minimum Wage Act will be suspended for the time until the issues arising under European law that concern the application of the Minimum Wage Act to the transport sector have been clarified. Proceedings for administrative offences pursuant to the Minimum Wage Act will not be instituted. In the event that proceedings have already been instituted, they will be discontinued. As long as the issues arising under European law that concern the application of the Minimum Wage to the transport sector are being examined, reports and/or duty rosters for the purely transit area and records based on the Minimum Wage Act or the respective ordinances do not have to be submitted and/or drawn up.

This suspension does not however apply to the area of cabotage transport or to cross-border road transport with loading or unloading in Germany. This transitional solution will apply until the issues under European law that concern the application of the minimum wage in the transit area have been clarified.

In addition, provisions have been made for exclusively mobile workers to ease reporting requirements and facilitate the generation and holding ready of documents (particularly through the Minimum Wage Reporting Ordinance from 26 November 2014 (Federal Law Gazette I, p. 1825)).

**2.10 Which rules apply to cross-border employment? Does a German carrier have to pay his lorry drivers the minimum wage of €8.50 only for travel within Germany's borders or also when they drive in other countries? In other words, does the obligation to pay minimum wage end at Germany's borders?**

There are no special rules for cross-border activities for workers employed in Germany. The legal obligation to pay minimum wage – which comes with a fine when violated – is however restricted to Germany. Employers however continue to be fundamentally bound by their contractual obligations towards their employees even when borders are crossed. These obligations include payment of minimum wage under sections 1 and 2 of the Minimum Wage Act.

**2.11 Does the minimum wage also apply to employment promotion measures, such as “one-euro jobs”<sup>1</sup>?**

No. Persons who participate in employment promotion measures are not employees. The aim of these measures is to reintegrate individuals into the labour market. To cover their living expenses, participants regularly receive support benefits pursuant to Book III of the Social Code (unemployment benefit) or Book II of the Social Code (basic security benefits for job-seekers).

**2.12 Does the minimum wage apply to persons with a disability who are employed in special workshops?**

That depends. Many disabled persons who work in a recognised workshop for persons with disabilities are likely to be in a legal relationship that is similar to that of a person in quasi-employment (see section 138 (1) of Book IX of the Social Code). For this reason, they are not subject to the minimum wage. The Minimum Wage Act applies only when they have a normal employment contract. Social firms within the meaning of section 132 (1) of Book IX of the German Social Code usually employ severely disabled persons on the basis of a normal employment contract. As a result, the MWA will generally apply in work integration social enterprises (social firms) starting 1 January 2015.

<sup>1</sup> Subsidised quasi-employment jobs aimed at reintegrating individuals into the labour market

**2.13 Is the minimum wage relevant when foreign companies are hired as subcontractors?**

When the subcontractor performs the work in Germany, either the Minimum Wage Act or the applicable sectoral minimum wage under the Posted Workers Act applies.

**2.14 What applies when part of the work is carried out in a foreign country?**

Entitlement to the minimum wage applies to all the work that is performed in Germany and to the work that is performed in foreign countries only when the individual's employment contract is subject to German labour law (for more, see point 2.10).

**2.15 Do exceptions apply to small companies?**

No. The minimum wage applies to all companies, regardless of size.

**2.16 Which employment and internship relationships are exempt from the minimum wage?**

The general minimum wage does not apply to:

- Youths who are under the age of 18 and,
- Long-term unemployed persons during the first six months of their employment (see also point 5.2.),
- Interns in (see also point 5.1.)
- compulsory internships,
- voluntary orientation internships lasting up to three months,
- voluntary internships lasting up to three months that are undertaken during vocational training or university studies,
- internships in connection with introductory training for young people.

## 3 Implementation of the Minimum Wage Act

### 3.1 Are pay models that are based on hourly wages all that are allowed now?

No. The Minimum Wage Act follows the principle that minimum wage is to be paid for each hour that is actually worked. However, all pay models that have been permissible to date will also continue to be permissible as long as this principle is observed.

### 3.1.2 Are monthly wages compatible with the statutory minimum wage?

Monthly wages are permissible even after the Minimum Wage Act goes into effect when it is ensured that the amount paid for the hours actually worked corresponds to the minimum wage.

### 3.1.3 Are piece work wages compatible with the statutory minimum wage?

Piece work wages are permissible after the Minimum Wage Act goes into effect when it is ensured that the workers receive the minimum wage for each hour that they have actually worked. This also applies to all other variable remuneration models, as the Federal Government's memorandum to the bill explains.

### 3.1.4 Is it allowed to pay equal monthly instalments when the hourly wage calculated over the entire year is equal to the minimum wage (set monthly income) or is it necessary to precisely calculate the wages for each month?

Under section 2 (1) of the Minimum Wage Act, employers must normally pay the minimum wage for each hour worked and pay this by the date specified by law. Under section 2 (2) of the MWA, as an exception the hours worked do not have to be paid with the minimum wage by the date specified by law. The prerequisites for this are the payment of a set monthly wage and a written agreement on keeping a working time account. In the case of set monthly wages it is possible that there are overpayments or underpayments of the minimum wage in individual months simply due to the varying number of working days per month – even though calculated over the entire year, the employer pays wages at least €8.50 per hour worked. In the view of the Federal Ministry for Labour and Social Affairs, a working hours account within the meaning of section 2 (2) of the MLA has already been agreed in writing in such cases when the employee and the employer have formally agreed on payment of a set monthly wage.

An example for a set wage without overtime:

A work week of 40 working hours on five workdays and a monthly wage of €1,473.33 have been agreed. This is paid irrespective of the fact that February has only 20 workdays with 160 working hours and July has 23 workdays with 184 working hours.

When a set monthly wage is paid, the only deviation allowed is from the payment due date. The principle that at least €8.50 is to be paid for each hour that is actually worked continues to apply. When a set monthly wage has been agreed and the individual's employment ends, any working hours that have not been paid with the set wage will become due so that any hours that have been worked but not yet paid are to be paid.

### 3.1.5 How is the set monthly wage calculated?

As a rule, the monthly wage and the number of weekly working hours are agreed. The number of weekly working hours is multiplied by a factor of at least “4,” <sup>3</sup>. The resulting value represents the set number of monthly working hours that is to be multiplied by the statutory minimum wage. The result is the set monthly wage that is necessary in order to meet the minimum wage requirement.

This can be illustrated with the following example:

The number of weekly working hours: 40 hours

$40 \text{ h} \times 4.3 = 173.3 \text{ hours/month}$  (set number of monthly working hours)

$40 \text{ h} \times 4.3 \times \text{€}8,50 = \text{€}1,473.33/\text{month}$  (set monthly wage necessary in order to meet the minimum wage requirement)

(A minimum wage calculator is available on the website of the Federal Ministry of Labour and Social Affairs.)

### 3.1.6 Is overtime already included in the set wage?

As a rule, no. The Minimum Wage Act is silent on the obligation to pay overtime and on the validity of flat-rate compensation agreements. However a set monthly wage does not change the fact that the minimum wage is an hourly wage for every hour that is actually worked. For this reason, a worker is entitled to payment of the minimum wage for all hours of overtime he or she has worked, even when they are not taken into account in the calculation of the set wage (point 3.1.4). Therefore any contractually agreed non-payment of overtime or consolidation of overtime into a lump sum is valid only when the payment is equal to the statutory minimum wage for each hour that was actually worked. If this is not the case, there has been a violation of the MWA.

### 3.1.7 Must the minimum wage be paid for periods of on-call duty?

The Minimum Wage Act does not explicitly exclude periods of on-call duty. Therefore, in keeping with general principles, minimum wage is to be paid for periods of on-call duty when case law deems that such periods constitute working hours for which minimum wage must be paid.

## 3.2 Minimum wage components

### 3.2.1 What determines whether pay components can be counted toward the minimum wage?

According to section 20 of the Minimum Wage Act and the explanatory memorandum to the Act, the minimum wage is a “minimum pay rate” within the meaning of section 2, number 1 of the Posted Workers Act. The rulings of the European Court of Law and the Federal Labour Court are authoritative on what this means. The backdrop to this in terms of European law is the Posting of Workers Directive (Directive 92/71 EC). According to this Directive, minimum wage regulations that are provided for in an EU Member State must apply to both foreign and domestic employers. Germany transposed this Directive into national law with the Posted Workers Act. Therefore, the criteria laid down by the European Court of Justice also determine which compensation components are to be included in the minimum wage.

With regard to the Posted Workers Act (which the provisions of the MWA conform to in this connection), the customs administration presents on its website the implications that the rulings of the European Court of Justice have for the individual compensation components:

[http://www.zoll.de/DE/Fachthemen/Arbeit/Mindestarbeitsbedingungen/Mindestlohn-Mindestlohngesetz/mindestlohn-mindestlohngesetz\\_node.html](http://www.zoll.de/DE/Fachthemen/Arbeit/Mindestarbeitsbedingungen/Mindestlohn-Mindestlohngesetz/mindestlohn-mindestlohngesetz_node.html)

### **3.2.2 Which employer payments have to be included when calculating minimum wage?**

As a rule, those employer payments that are paid in compensation for the employee's "normal work" are to be counted as components of the minimum wage. Payments that an employee receives as compensation for work beyond this may not be counted as part of the minimum wage.

### **3.2.3 Do wage allowances and supplements have to be included when calculating the minimum wage?**

That depends on what the allowances and supplements were paid for. If an employee works "more" or performs "higher-value" work at the employer's request, the additional pay for this does not pertain to the employee's "normal work" and for this reason cannot be taken into account (e.g. overtime supplements, piece-work bonuses and quality bonuses). Also to be left out when determining the minimum wage are the kinds of additional remuneration which entail work at special times (such as allowances or supplements for work performed on Sundays or holidays, supplements paid for night-time work, shift allowances). The same applies to payment for particularly unpleasant, physically demanding, emotionally stressful or dangerous work (such as allowances for dirty or hazardous work).

In contrast to this, allowances that the employer pays based on the rulings handed down by the European Court of Justice on 14 April 2005 (C-341/02) and on 7 November 2013 (C-522/12) can be credited toward the minimum wage when they do not change the relationship between the work the employee has performed and the compensation he has received (functional equivalence of the work to be compared). This is the case when the allowances and supplements are used together with other employer payments to remunerate the employee for work for which the minimum wage is to be paid ("normal work").

### **3.2.4 Are one-off bonus payments such as Christmas bonuses to be included in the minimum wage calculation?**

Due to the due-date rule, one-off bonus payments can at the most be counted toward the minimum wage in the month they were actually and irrevocably paid.

Moreover, a one-off payment can be made to count toward the minimum wage when it is proportionately spread over several months and it is actually and also irrevocably paid out to the employee on the respective relevant date for payment of the minimum wage. Christmas bonuses for example could be taken into account in the minimum wage calculation when they are irrevocably paid out in instalments of one twelfth of the total over the entire year with the monthly pay slips by the end of the following month at the latest.

### **3.2.5 What is the situation with profit-sharing payments and sales-based allowances?**

This type of profit sharing can be counted toward the minimum wage only under the following conditions: firstly, the amount must be paid on a regular, pro rata basis (in other words, in the case of an annual bonus, one-twelfth of the amount must be paid every month) on the relevant due date for payment of the minimum wage. Otherwise (in other words, particularly when payment is made on an annual basis), these sums could be taken into account right from the start in the month they were paid out. In addition, payment must be irrevocable. Secondly, payment may not depend on any further requirements or factors. In particular, it is not permissible to remain below the minimum wage when the employee falls short of the performance or sales level required for payment of the bonus.

**3.2.6 In the case of collectively or contractually agreed sales commissions, is it sufficient when the guaranteed wage and the percentage wage reach a total of €8.50?**

Yes. The employee must actually and irrevocably receive by the stipulated due date for payment of minimum wage a wage of at least €8.50 for each hour worked. This also applies when remuneration is split into guaranteed wage and sales commission. When the absolute minimum wage level of €8.50 is adhered to, this type of wage system is compatible with the Minimum Wage Act.

**3.2.7 Are expense allowances that the employer pays eligible for inclusion?**

No. This is because the minimum wage applies only to the work performed by the employee. When an employer reimburses an employee for costs which the employee specifically incurred because of the work he performed, this is not remuneration for the work performed and therefore cannot be counted toward the minimum wage. In the case of workers who are posted to Germany, this particularly applies to posting allowances when such allowances are intended to cover the costs actually incurred by the employee (e.g. travel expenses for the journey to and from the place of work).

When an expense allowance is not relevant to the minimum wage to be paid and the employer pays a sum total which includes amounts paid to settle the respective expenses, these amounts must be subtracted out of the total.

**3.2.8 Are the contributions employers make to employee saving schemes (vermögenswirksame Leistungen) eligible for inclusion?**

No. The contributions that employers make to employee saving schemes are not remuneration for work but rather a supplementary benefit that is not related to the employee's work performance. For this reason, contributions that an employer makes to employee saving schemes are also not eligible to be counted toward the minimum wage to be paid.

**3.2.9 Can board and lodging provided by the employer be included in the calculation of the minimum wage?**

The Minimum Wage Act established legal entitlement to payment of a gross minimum hourly wage. Based on the wording of this law, the statutory minimum wage is owed in monetary form. Even when the board and lodging provided by the employer have a value that can be quantified in monetary terms, they are not payments in cash but rather payments in kind and as such generally cannot be directly counted toward the minimum wage to be paid.

A special arrangement applies to seasonal work. Seasonal workers are temporarily employed by an employer based in Germany and perform work that is connected to a specific time of the year due to a recurring seasonal event or a recurring sequence of seasonal events during which the employer's need for labour significantly exceeds its requirements for its usual activities. This especially applies to seasonal harvest workers in the agricultural/forestry and horticultural sectors and to certain categories of employees in the tourism sector, particularly in restaurants and hotels and in companies which because of their nature are not open all year round or need significantly more labour during certain limited periods of time.

The real value that can be counted toward the minimum wage is calculated on the basis of section 107 of the Trade Regulation Act and the Social Security Remuneration Ordinance. The customs administration offers further information regarding this on its website.

### **3.2.10 Can fees for day care services for children that the employer reimburses be taken into account when calculating the amount of minimum wage paid?**

That depends. When this involves pay components that are paid for the employee's normal work, they can be counted as a component of the minimum wage (see more at point 3.2.). However, this issue is probably not of relevance in actual practice because employers must also pay the statutory minimum wage to employees who, for instance, do not have any children in a child care facility as part of their basic remuneration.

## **3.3 Working time accounts**

### **3.3.1 What is meant by the 50 per cent upper limit mentioned in section 2 (2) of the Minimum Wage Act? What applies in the case of part-time work?**

Section 2 (2) of the MWA provides for deviations in the due date for payment of the minimum wage in the case of overtime and thus enables flexible working hours in conjunction with the use of working time accounts. However clearly defined rules must be observed. These include that a maximum of 50 per cent of the contractually agreed number of working hours may be entered in a working time account. This rule applies to both full-time and part-time employees. For employees with a 20-hour work week, for example, overtime may not exceed ten hours.

### **3.3.2 Does the 50 per cent limit laid down in section 2 (2) of the Minimum Wage Act apply only to excess hours that may be entered in a working time account, or to shortfalls of working hours as well?**

The limit specified in the third sentence of section 2 (2) of the MWA expressly refers to overtime that has been worked. This provision aims to make it impossible to use unlimited flexibility in working time arrangements to circumvent entitlement to payment of minimum wage, and facilitates verification of whether the minimum wage is being complied with. There is no limit under MWA to store Shortfall of working hours in a working time account.

### **3.3.3 In the case of an agreed annual working time, how is the monthly working time to be determined in view of the 50 per cent limit laid down in section 2 (2) of the Minimum Wage Act?**

When an annual working time has been agreed, a notional monthly working time equal to one-twelfth of the annual working time applies. For example, when 600 hours have been agreed as the annual working time, 50 hours will apply as the notional monthly working time. As a result, up to 25 hours a month could be entered in the individual's working time account.

### **3.3.4 Does the general statutory minimum wage also apply to hours that have been worked but not yet paid and are instead managed with the help an overtime account when the overtime hours are used up in the time after 1 January 2015?**

The statutory minimum wage in the amount of €8.50 euros applies only to hours actually worked beginning 1 January 2015. For this reason, there are no special rules for working time accounts or using up overtime hours that were worked before the Minimum Wage Act went into force. However the agreements reached in employment contracts naturally continue to apply as do the rulings of the Federal Labour Court.

## **3.4 Deferred compensation: does the amount used for deferred compensation count as minimum wage?**

Deferred compensation can be counted toward the minimum wage so that employees who work for minimum wage can also make voluntary provisions for their retirement.

Deferred compensation is a form of occupational retirement provision. The individual employee finances this himself by foregoing part of his salary in exchange for a pension commitment. Compensation deferment has no effect on the amount of the gross minimum wage.

*Additional information: In order for deferred compensation to be considered occupational retirement provision that falls under the scope of the Occupational Pensions Act, it must involve a commitment of equal value. Only pay components that are due in the future may be deferred. Under section 1a of the Occupational Pensions Act, an employee may as a rule request his employer to defer payment of the equivalent of up to four per cent of the contribution assessment ceiling for statutory pension insurance from his future claims to remuneration and use this deferred compensation for his occupational retirement provision. Under section 17 (5) of the Occupational Pensions Act, compensation can be deferred for claims to compensation that are based on a collective wage agreement only when the collective agreement provides for or allows this.*

### **3.5 Record-keeping obligations**

#### **3.5.1 Does the obligation laid down in the first sentence of section 17 (1) of the Minimum Wage Act to make and retain records of working times apply to all employees of the companies concerned?**

This obligation applies (irrespective of sector) to all employees who are “marginal” part-time workers within the meaning of section 8 (1) of Book IV of the German Social Code (with the exception of employment in private households within the meaning of section 8a of Book IV of the German Social Code) and additionally to all employees who work in the sectors specified in section 2a of the Act to Combat Undeclared Work and Illegal Work. These currently include the construction industry, the hotel and restaurant industry, passenger transport, the forwarding, transport and associated logistics sector, the circus and fun-fair sector, the industrial cleaning industry, the meat sector).

#### **3.5.2 How are the documentation requirements in section 17 of the Minimum Wage Act to be understood? What must be documented?**

Employers must keep records of the start, the end and the duration of the individual’s daily working time. The precise duration and location of the individual breaks do not have to be recorded. Employers must have documented the working time by the end of the seventh calendar day following the day on which the work was performed (in other words, one week later). There are no requirements regarding the form of the records; handwritten records suffice. Neither the employer nor the employee must sign them. Employers can also have their employees keep records of their working time. In such cases, the employer must continue monitoring to ensure that the records are actually kept; he also continues to be responsible for the accuracy of the records. The records must be retained for at least two years.

Through an ordinance it issued pursuant to section 17 (4) of the Posted Workers Act (Minimum Wage Record-Keeping Ordinance ), the Federal Ministry of Finance limited this obligation to keep records for a special segment to recording just the duration of the daily working time. This applies solely to mobile workers who are not subject to requirements regarding their specific daily working time (start and end) and who manage their daily working time on their own responsibility (particularly persons who deliver newspapers, local advertising papers, parcels).

#### **3.5.3 Who is required to document employee working hours?**

In the case of marginal part-time employment (mini-jobs) within the meaning of section 8 (1) of Book IV of the German Social Code, but not in private households that are exempt from the obligation to keep records (section 8a of Book IV of the German Social Code), employers are

required to record the working times and to provide documentation for them upon request of the customs authorities during a check. Employers in the economic sectors designated in section 2a of the Act to Combat Undeclared Work and Illegal Work (construction, restaurants, industrial cleaners, etc.) must also furnish proof of their employees' working times. This also applies to user firms that employ workers in one of the economic sectors cited in section 2a of the Act to Combat Undeclared Work and Illegal Work.

**3.5.4 Is it sufficient when a tax accountant, payroll clerk or the like stores all the documents (section 17 (2) of the Minimum Wage Act)?**

Yes. According to section 16 (1), number 4 and section 16 (3), number 4 of the MWA, an employer may generally choose the location where the necessary documents are to be kept in the particular country. A tax accountant's office is frequently chosen for this. The monitoring authority's request pursuant to the second sentence of section 17 (2) of the Minimum Wage Act to hold the documents ready at the place of work as well is the exception. This may not be done purely for reasons of expediency. Instead, the customs administration must provide proper reasons for this.

**3.6 Cut-off periods/Forfeiture/Limitation**

**3.6.1 The last sentence in section 3 of the Minimum Wage Act states: "Forfeiture of entitlement is excluded." Forfeiture is not to be equated with limitation. We assume that entitlement is subject to a three-year limitation period (in accordance with section 195 of the German Civil Code). Does this "non-forfeiture" also mean that the cut-off periods and preclusive deadlines provided in employment contracts or collective agreements do not apply?**

The standard limitation periods pursuant to section 195 et seq. of the German Civil Code apply to entitlement to minimum wage. The standard limitation period under section 195 of the German Civil Code is three years. According to section 199 (1), number 1 of the German Civil Code, the standard limitation period commences at the end of the year in which the claim arose. Entitlement to minimum wage cannot be forfeited. Time limits stipulated by employment contracts and by collective wage agreements do not apply to minimum wage.

## 4 Monitoring

### 4.1 General

#### 4.1.1 Who will monitor compliance with the minimum wage starting 1 January 2015?

As has been the case in the past with sectoral minimum wages, the Customs units responsible for enforcing the law on illegal employment and benefit fraud are responsible for monitoring compliance.

#### 4.1.2 Are checks conducted as warranted or based on tip-offs, or is a profiling grid applied to all companies and sectors?

The Customs units responsible for enforcing the law on illegal employment and benefit fraud conduct checks using a risk-oriented approach. Compliance with the minimum wage is checked during all FKS audits.

#### 4.1.3 How often will companies be checked on average?

Data is not available on this because the customs authorities follow a risk-oriented approach. Frequency depends on the likelihood of a violation of minimum wage requirements.

#### 4.1.4 What penalties apply starting 1 January 2015 in the case of violations?

Violations of the obligation to pay minimum wage can be punished with a fine of up to €500,000. In addition, the respective company can be excluded from tendering for public contracts.

### 4.2 Contractor liability/Prime contractor liability

#### 4.2.1 What is the contractor liability/prime contractor liability?

The contractor liability arising from section 13 of the Minimum Wage Act is intended to ensure compliance with the statutory minimum wage even in those areas where a subcontractor has engaged other firms to perform the work. According to previous court decisions concerning a parallel provision in the Posted Workers Act, application of this provision requires that (1) an entrepreneur (2) has assumed a contractual obligation to perform work or render services and (3) has subcontracted another entrepreneur in order to fulfil this obligation. When this is given, section 13 of the MWA provides for the original entrepreneur to be liable for compliance with the statutory minimum wage. The original entrepreneur is also responsible for payment of the statutory minimum wage even when the entrepreneur he has subcontracted has engaged yet another entrepreneur to perform the work. Thus, the entrepreneur at the start of the chain bears the risk for the payment of the statutory minimum wage for all other entrepreneurs who were subsequently brought in further down the chain.

This provision refers to section 14 of the Posted Workers Act, which reads as follows: “An entrepreneur that contracts another entrepreneur with the performance of work or services is liable for the obligations of this entrepreneur, any subcontractor and any of the temporary work agencies contracted by the entrepreneur or a subcontractor to pay the minimum wage to employees or to pay contributions to a joint scheme for parties to a collective agreement pursuant to section 8 like a surety who has waived the defence of unexhausted remedies.”

#### **4.2.2 What aim are lawmakers pursuing with contractor liability?**

The contractor's liability as surety provided for in section 13 of the Minimum Wage Act is, in the lawmakers' opinion, necessary in order to strengthen the effectiveness of the minimum wage. This liability model protects employees by ensuring that the statutory minimum wage cannot be circumvented by using "chains of subcontractors" and employees are provided with yet another party against whom claims may be asserted with every additional subcontractor that is brought in. Here, by referring to section 14 of the Posted Workers Act, Germany's lawmakers fell back on an arrangement that has already proven its worth. In this case, the assignment of liability is based on the concept behind the "polluter pays principle". According to this principle, the one who involved an additional party in the performance of the work by passing his own 'contract' to another entrepreneur should bear his share of the risk for payment of the statutory minimum wage. For this reason, the contractor is also liable when the subcontractor pays less than the statutory minimum wage.

#### **4.2.3 In the case of several subcontractors who have been successively engaged, can employees take action against all upstream contractors?**

Yes. When several entrepreneurs have been subcontracted one after the other in a "subcontractor chain", employees have the right to choose which of these contractors they will make a claim on, provided that the conditions set forth in section 13 of the Minimum Wage Act have been met.

This follows from the wording of the law which states the "entrepreneur" and any subcontractor who passes the contract on to another subcontractor is liable for the minimum wage claims of the employees of all contractors involved "like a surety who has waived the defence of unexhausted remedies". This is a reference to the general provisions in the German Civil Code regarding contracts of suretyship. Here, the liability of a surety who has waived the defence of unexhausted remedies means that employees can make a claim not only on their employer but also on the contracting entrepreneur or, in the case of a "subcontractor chain", the contracting entrepreneurs. At the same time, the contracting entrepreneur cannot tell workers to first direct their demand for payment of the minimum wage to their employer and, if necessary, sue their employer for their claims and seek enforcement. In point of fact, workers can directly address the contracting entrepreneur(s) with their claims. When the entrepreneur pays, the workers' claims against the subcontractor (their employer) pass to the entrepreneur by operation of law. The entrepreneur can then take recourse against the subcontractor for the minimum wage he has paid.

#### **4.2.4 Is contractor liability compatible with Germany's constitution and European law?**

Yes. The Federal Constitutional Court already ruled the liability provision previously contained in section 14 of the Posted Workers Act was compatible with the Basic Law (the German constitution). The judges on the Federal Constitutional Court considered this provision to be particularly necessary in order to effectively enforce sectoral minimum wages under the Posted Workers Act. In this ruling the court also approved the lawmakers' decision to establish this type of liability system in addition to the direct state control exercised through the offices of the customs administration (Federal Constitutional Court ruling from 20 March 2007 – 1 BvR 1047/05). The European Court of Justice also confirmed that this provision is compatible with European law (ruling of the European Court of Justice from 12 October 2004 – C-60/03). Since the contractor liability laid down in the Minimum Wage Act is modelled on the contractor liability under the Posted Workers Act, there are no constitutional objections or concerns under European law by virtue of the above-mentioned rulings.

#### 4.2.5 Are there cases when legal liability under section 13 of the Minimum Wage Act applies?

According to the explanatory memorandum to the Minimum Wage Act, the lawmakers assume that the restrictive rulings regarding the contractor liability contained in the Posted Workers Act will also be referred to for section 13 of the Minimum Wage Act. Should this be so, section 13 of the Minimum Wage Act would not have been relevant in the first place to many of the cases that have been subject of public debate. A few examples:

##### **Example 1: A private person mails a personal letter at the post office. Is that person liable for payment of the minimum wage to the mail carrier who is employed by one of the post office's subcontractors?**

No. Here it can be presumed that the customer is the principal of a forwarding contract and the mail carrier is assigned to perform the contract. However the customer as a private person is not an "entrepreneur" within the meaning of the law, even without applying the restrictive rulings of the Federal Labour Court because the Federal Labour Court uses the definition of entrepreneur in section 14 (1) of the German Civil Code as its point of departure. According to this definition, an entrepreneur is any natural or legal person or a partnership with legal personality who or which, when entering into a legal transaction, acts in exercise of his or its trade, business or profession. The exercise of a trade, business or profession is missing here.

##### **Example 2: A manufacturing company hires a plumbing firm to fix clogged toilets in the company building. Does the company here have to ensure pursuant to the Minimum Wage Act that the plumbing firm pays its employees minimum wage? Does it also have to ensure that subcontractors of the plumbing firm (such as its tax consultant) pay minimum wage?**

No. In the case of the commissioning of plumbing services, a contractual obligation was not passed on to a contractor because the manufacturing company itself does not provide plumbing services. This is even more the case when the plumbing company engages other companies to carry out entirely different work or services, such as a tax accountant. There is no "chain of subcontractors" like the one envisaged by this provision because the identity of the original contract is missing (at least in part).

##### **Example 3: A manufacturer hands over goods to a forwarder for transport. The order is passed on to another carrier. A fourth carrier then actually transports the goods. The driver does not receive minimum wage and wants to sue the manufacturer or the forwarder for payment of the minimum wage. Is this possible?**

In this case too, a manufacturer who hires a forwarder to provide transport services usually does not pass on any of his own contractual obligations if he is not obligated by contract with an intermediate or end buyer of his goods to also deliver them. Consequently, the manufacturer is not an "entrepreneur" as defined by rulings of the Federal Labour Court. Thus the driver cannot sue him for payment of minimum wage.

The forwarder on the other hand passes the transport service he owes the manufacturer under the contract to another carrier by subcontracting it; this repeats itself every time the order is passed on to a further carrier in the "subcontractor chain". As a result, all the carriers who were subsequently subcontracted meet the criteria set forth in the provision. The driver can sue the forwarder for payment of the minimum wage.

**Example 4 (continuation): The forwarder hires, for example, a nursery to transport the goods. In this case, is the forwarder also liable for whether the nursery pays the minimum wage? Or does this liability begin only when the nursery hires a subcontractor?**

Yes, under certain conditions. The first condition: the forwarder hires the nursery to perform precisely that work or service for which he himself obligated himself by contract with another entrepreneur (in the initial example: the manufacturer). In addition, the other statutory criteria must also be met. In this case, the forwarder is liable also – and only – for the minimum wage claims of the nursery employees who carried out the transport for him. It is of no relevance here that the nursery normally transports only its own products and no others. The forwarder is not however liable for payment of the minimum wage to the nursery's employees who have nothing to do with his order. The same applies to the claims that employees of other subcontractors have for payment of the minimum wage.

#### **Further examples:**

- According to restrictive rulings handed down by the Federal Labour Court, an entrepreneur who as a client commissions construction work (example: an automobile manufacturer commissions the construction of a new factory building on its premises) is not covered.
- Also not covered is the master craftsman who has the coffee machine from his workshop kitchen repaired.
- (In continuation of example 1) Not covered is the attorney who hires a mail delivery service to deliver his bills.

#### **4.2.6 How can companies that subcontract their work to third parties limit their liability risk arising from section 13 of the Minimum Wage Act?**

The liability risk can be minimised when, in the case of “subcontractor chains”, entrepreneurs hire only reputable business partners with a corresponding reputation. The liability risk increases when a “low-cost provider” is subcontracted. For this reason, companies should choose their business partners carefully.

#### **4.2.7 Can companies that subcontract their work contractually limit the liability risk arising from section 13 of the Minimum Wage Act?**

Liability risk can be contractually limited in the internal relationship between the entrepreneurs involved. This means that corresponding indemnity clauses that redistribute the legal risk can be agreed between said companies. This of course applies only when the clause is in compliance with applicable law, and must be evaluated on a case-by-case basis. Contractual restrictions vis-à-vis employees are not however permissible and in any event invalid. As a result, in the case of subcontractor chains these workers will always have the same number of parties against whom they can assert claims.

#### **4.2.8 Do the liability provisions that are required by law also apply to the public sector?**

No. When the public sector is not under obligation – in connection with construction, for instance – to a contractual partner to carry out construction work, it is only a client who awards a contract for construction work. This follows from the restrictive case law of the Federal Labour Court regarding the definition of entrepreneur in section 14 of the Posted Workers Act. Further, according to section 97 (4) of the Act against Restraints of Competition, public contracts may be awarded only to law-abiding undertakings. Obedience to the law also particularly includes compliance with legislation governing minimum wage. Section 19 of the Minimum Wage Act

stipulates that tenderers on whom a fine of at least €2,500 has been imposed for a violation under section 21 of the Minimum Wage Act are to be excluded from participating in calls for tenders for supply, construction or service contracts until they can prove that they have re-established their trustworthiness.

# 5 Special features of occupation groups and sectors

## 5.1 Internships

### 5.1.1 Do interns receive minimum wage?

Yes. As a fundamental principle, interns are entitled to minimum wage. Exceptions apply to compulsory internships, i.e. especially to internships that must be completed by virtue of secondary education regulations, vocational training regulations or university regulations. In the case of voluntary internships that do not last longer than three months, the individual is not entitled to minimum wage when the internship serves career orientation or is undertaken parallel to his vocational training or studies. Minimum wage is to be paid starting the first day of an orientation internship that lasts longer than three months or of an internship that is completed parallel to the individual's vocational training or studies and lasts longer than three months. In addition, the minimum wage does not apply to internships undertaken in connection with an introductory training programme conducted pursuant to Book III of the German Social Code or measures offered in connection with training preparation schemes pursuant to the Vocational Training Act.

### 5.1.2 Key questions regarding internships

#### 5.1.2.1 What activities are classified as internships “within the meaning of section 26 of the Vocational Training Act”?

The third sentence of Section 22 (1) of the Minimum Wage Act targets persons who for a limited time acquire practical knowledge and experience in preparation for a career, without enrolling in formal vocational training or entering into an employment relationship. The focus is thus on being integrated into work processes for educational purposes. The activities falling under this vary from case to case and cannot be generalised. Germany's lawmakers however work on the assumption that whenever individuals are integrated into operational processes, this is either for an internship, for employment or vocational training.

#### 5.1.2.2 Until now, voluntary interns who are over 18 years of age and whose internship lasts more than two months have been subject to compulsory social insurance. What is the situation now that the new minimum wage system has been introduced? Does this time limit still apply or will it be brought into line with the three-month rule?

Existing social insurance provisions will remain unaffected by the Minimum Wage Act.

#### 5.1.2.3 How much time must an individual allow to pass between the end of one internship and the start of another so that these periods are not counted together?

The Minimum Wage Act makes it possible to undergo different types of internships – such as an orientation internship, followed by a compulsory internship – at the same company without minimum wage having to be paid as long as the relevant conditions have been met. For example, a compulsory internship within the meaning of section 22 (1), number 1 of the MWA can be followed by a voluntary internship that is completed during vocational training within the meaning of section 22 (1), number 3 of the MWA without requiring payment of the minimum wage.

However, according to section 22 (1), number 3 of the MWA, it is not allowed to complete at the same company several internships parallel to vocational training or university studies, even if there has been a substantial amount of time between them.

#### **5.1.2.4 Dependent operating units of a German company that are located in another country employ interns. Does Germany's minimum wage apply to these units as well?**

Employees as well as interns who are not employed in Germany are entitled to payment of the German minimum wage only when their employment contract or internship contract was agreed under German law.

#### **5.1.3 Compulsory internships (section 22 (1), number 1 of the Minimum Wage Act)**

##### **5.1.3.1 What requirements does the Minimum Wage Act place on secondary education regulations, vocational training regulations, university regulations and a college of advanced vocational studies that is regulated by law?**

The regulations of the above institutions must make this type of internship part of their training and, at the same time, specify the type and duration of the internship. This also applies to comparable regulations of foreign establishments. It also applies to comparable recognised educational institutions when they similarly prescribe internships as part of a comprehensive vocational training scheme, continuing education and training scheme or study programme. Continuing training regulations that are issued by individual employers or their associations and that target only the practical vocational training provided in the respective company probably do not fulfil the above criteria.

##### **5.1.3.2 What requirements have to be fulfilled by the proof that the individual has undergone an internship by virtue of a requirement for secondary education or university studies?**

Are the school regulations/study regulations sufficient for this? How are foreign study regulations to be handled?

The Minimum Wage Act does not stipulate how a compulsory internship must be proven in the individual case. Regarding an intern's entitlement under civil law to payment of minimum wage, the second sentence of section 22 (1) of the MWA ("unless") assigns the employer the burden of proving that an exception to the minimum wage applies. This does not automatically apply in the case of proceedings for administrative fines. An employer has probably met his obligations when he has the intern submit the certificate confirming training (particularly, proof of matriculation) and the relevant provision regarding the obligation to complete the internship (the study regulations in particular) and subsequently puts them on file.

##### **5.1.3.3 Can a compulsory internship be combined with a voluntary internship at the same company?**

That depends. The Minimum Wage Act does not preclude that an internship completed parallel to one's vocational training as set forth in section 22 (1), number 3 of the Minimum Wage Act can follow a compulsory or orientation-related internship done in the same company. An internship completed parallel to the individual's vocational training is excluded from the requirement to pay minimum wage only when "this type of internship relationship with the same trainee did not previously exist". In this case, "this type" of internship relationship refers only to internships that are completed parallel to vocational training within the meaning of section 22 (1), number 3 of the MWA. When the relevant requirements are met, other types of internships can still be done at the same company following an internship that was completed parallel to the intern's vocational training within the meaning of section 22 (1), number 3.

The criteria set forth in section 22 (1), number 1 (compulsory internship) and number 2 (orientation internship) are however probably mutually exclusive. An internship is either a compulsory internship that is part of vocational training that the individual has already begun or it is an orientation internship that is conducted prior to the individual's vocational training. It is conceivable that a compulsory internship in accordance with section 22 (1), number 1 of the MWA is followed by an internship that is completed parallel to the individual's vocational training in accordance with section 22 (1), number 3 of the MWA.

<b>First internship</b>	<b>Second internship at the same company</b>	<b>Obligation to pay minimum wage?</b>
<b>Compulsory internship</b>	<b>Compulsory internship</b>	<b>No (when 2 compulsory internships are provided for)</b>
<b>Compulsory internship</b>	<b>Orientation internship lasting less than 3 months</b>	<b>Yes, remuneration must be paid for the second internship</b>
<b>Compulsory internship</b>	<b>Parallel internship lasting less than 3 months</b>	<b>No</b>
<b>Orientation internship lasting less than 3 months</b>	<b>Compulsory internship</b>	<b>No</b>
<b>Orientation internship lasting less than 3 months</b>	<b>Parallel internship lasting less than 3 months</b>	<b>No</b>
<b>Orientation internship lasting less than 3 months</b>	<b>Orientation internship lasting less than 3 months</b>	<b>Yes, the employer is obligated to pay remuneration for both internships</b>
<b>Parallel internship lasting less than 3 months</b>	<b>Compulsory internship</b>	<b>No</b>
<b>Parallel internship lasting less than 3 months</b>	<b>Orientation internship lasting less than 3 months</b>	<b>Yes, the employer is obligated to pay remuneration for both internships</b>
<b>Parallel internship lasting less than 3 months</b>	<b>Parallel internship lasting less than 3 months</b>	<b>Yes, the employer is obligated to pay remuneration for both internships</b>

#### **5.1.3.4 What happens when, during the course of the compulsory internship, the intern decides not to go to university?**

The conditions for exemption from minimum wage must be satisfied when the internship begins. When, for example, an intern decides during the course of a compulsory internship within the meaning of section 22 (1), number 1 of the MWA that he does not want to go to university, the internship is nonetheless not subject to payment of the minimum wage. The same applies when, for example, a student's name is taken off the university register (exmatriculation).

#### **5.1.4 Voluntary internships (section 22 (1), numbers 2 and 3 of the Minimum Wage Act)**

##### **5.1.4.1 When a voluntary internship lasts longer than three months, is the minimum wage to be paid starting the first day or the fourth month?**

This pertains to orientation internships or parallel internships within the meaning of section 22 (1), numbers 2 and 3 of the MWA. Minimum wage does not apply for such “voluntary internships” lasting less than three months. When this type of internship lasts longer than three months, the entire internship is subject to minimum wage, and minimum wage is to be paid from the first day on. This applies not only when it is known from the start that the internship will last longer than three months but also when a three-month internship is extended beyond three months.

##### **5.1.4.2 When the internship in question began in 2014, will the time during 2014 be taken into account when determining the three-month limit?**

Yes. The Minimum Wage Act does not ignore “old contracts”. Thus, when an internship within the meaning of section 22 (1), numbers 2 or 3 began before 1 January 2015 and lasted a total of more than three months, the minimum wage is to be paid for the period beginning 1 January 2015.

##### **5.1.4.3 Are orientation internships without minimum wage possible for the individual’s occupation/ studies when he already has educational qualifications?**

After having completed his vocational qualification, an individual wants to study at university; a university graduate wants, for example, to complete a second degree or vocational training. As a rule, the professional orientation phase is completed once the individual has received a degree or vocational qualification (see Bundestag printed paper 18/2145, p. 23). Therefore, the conditions set forth in section 22 (1), second sentence, number 2 of the MWA are probably no longer satisfied as a rule. This has no effect on assessments of individual cases.

##### **5.1.4.4 Does the ban on previous employment also apply to orientation internships?**

In contrast to the provision regarding voluntary internships that are completed parallel to employment as defined in section 22 (1), number 3, the exemption provided for in section 22 (1), number 2 of the MWA for orientation internships does not contain any explicit “ban on previous employment”. However, when several orientation internships are completed at the same company, they probably no longer serve orientation purposes. This would particularly be the case when an internship at the same training provider is supposedly to provide orientation in the same training field or discipline. In this case the minimum wage would apply.

##### **5.1.4.5 Do exceptions apply to Bachelor’s programmes as well as to Master’s programmes?**

Following completion of a Bachelor’s degree, the professional orientation phase has been completed as a rule (see Bundestag printed matter 18/2145, p. 23). For this reason, exceptions to the minimum wage pursuant to section 22 (1), second sentence, number 2 of the MWA are probably not given as a rule. This has no effect on assessments of individual cases.

##### **5.1.4.6 Is it possible to complete several voluntary internships at different companies without minimum wage being paid?**

Yes. Under the Minimum Wage Act, it is possible to complete an internship parallel to one’s vocational training as set forth in section 22 (1), number 3 of the MWA after having completed a compulsory or orientation internship. However a three-month internship during vocational training is exempted from minimum wage only when “an internship relationship of this kind

has not previously existed with the same training provider”. For this reason it is possible to complete at different companies several internships that last a maximum of three months and are conducted parallel to one’s vocational training as long as the instructional purpose is clearly the main focus.

### **5.1.5 Special types of internships**

#### **5.1.5.1 One-year directed internship (as a prerequisite for university admission) – does the minimum wage apply?**

The decisive question here is whether the internship is covered by the exemptions listed in section 22 (1), numbers 1 to 4 of the Minimum Wage Act. What the legal relationship is called is irrelevant here. When the internship is a prerequisite for university admission, it could be a compulsory internship within the meaning of section 22 (1), number 1 of the MWA. The question of whether this is the case with these programmes, must be decided on a case-by-case basis.

#### **5.1.5.2 Dual study courses: are the practical phases in dual study courses compulsory internships or must minimum wage be paid? Is the minimum wage to be paid for periods of in-company work practice that are undertaken without a vocational training contract?**

According to section 22 (1), second sentence, number 1 of the Minimum Wage Act, the MWA does not apply to practical phases that are part of dual study courses (see Bundestag printed paper 18/1020 (new), p. 25).

#### **5.1.5.3 A chamber of industry and commerce offers, for example, qualification programmes/trainee programmes for university graduates, or schemes for university drop-outs and people re-entering the labour market. These programmes entail internships that last several months (no study regulations). Does the minimum wage have to be paid?**

The bodies providing the training must make the internship part of the training content, with details specifying the duration of the internship and what is to be learned during the internship. This must be laid down in the programme regulations in order to satisfy the requirements for a compulsory internship within the meaning of section 22 (1), number 1 of the MWA. The question of whether this has been done for the said programmes must be determined on a case-by-case basis. When this involves voluntary internships, the three-month limit applies.

#### **5.1.5.4 Do interns from other EU countries who do an internship in Germany that the EU funds with €1,000 per month receive minimum wage?**

That depends on the type and duration of the internship. Funding received from third parties has no bearing on the question of whether minimum wage must be paid.

#### **5.1.5.5 As part of the Danish-German Collaborative Training initiative, Danish trainees undergo practical vocational training in German enterprises. Internship contracts are concluded pursuant to section 26 of the Vocational Training Act. According to accounts by chambers of crafts, this training is comparable to ‘dual’ vocational training provided under the Vocational Training Act. The only difference is that the training is conducted in two countries. How are such internships to be classified in legal terms?**

Foreign regulations governing internships are to be recognised when they are comparable and analogous to German regulations. The question of whether this is the situation with the above programmes must be decided on a case-by-case basis.

#### **5.1.5.6 Dual studies: in Baden-Württemberg students undergoing dual study programmes do not have a training contract like their counterparts in other German states do. Does the minimum wage apply to the practical phases?**

According to section 22 (1), second sentence, number 1 of the Minimum Wage Act, the minimum wage does not apply to practical phases in dual study programmes (see Bundestag printed paper 18/1020 (new), p. 25).

#### **5.1.5.7 What about Hospitants<sup>2</sup> (in the culture industry, for example), many of whom are not remunerated. Are they on the same footing as interns?**

The Minimum Wage Act does not use the term ‘Hospitant’. When Hospitants are not employed on the basis of an employment relationship or an internship relationship within the meaning of section 26 of the Vocational Training Act, they do not fall under the MWA. However, it is not the designation but rather the actual content and structure of the training that is important here. In other words, it is not enough to label someone a “Hospitant” in order to exempt him from payment of the minimum wage.

#### **5.1.5.8 Does the minimum wage apply to Volontärs?**

The term ‘Volontariat’ (period of training by a Volontär) is not defined by law. The difference between employment, training, internship and Volontariat in the proper meaning of the word must be examined on a case-by-case basis according to generally applicable principles. The prevailing view is that a Volontär in the strict sense is a person who receives training without the intention of undergoing and completing professional training for a recognised occupation that requires formal vocational training. In this case a Volontariat is a legal relationship within the meaning of section 26 of the Vocational Training Act. In such cases, section 17 of the Vocational Training Act – and not the Minimum Wage Act – governs remuneration.

### **5.2 Long-term unemployed persons**

#### **5.2.1 What can be used as proof for long-term unemployment? Is a statement by the individual sufficient?**

The Minimum Wage Act does not specify how long-term unemployment within the meaning of section 22 (4) of the Minimum Wage Act is to be proven in the individual case. Workers may not declare themselves to be long-term unemployed persons. As a rule, long-term unemployed persons receive an appropriate certificate about the duration of their unemployment from the competent employment agency or job centre. It should suffice when the worker provides his employer with a certificate indicating his status as a long-term unemployed person.

<sup>2</sup> A Hospitant is a person who spends time as a quasi-guest in a company or school in order to learn about working processes or to deepen his knowledge. A Hospitant does not perform any work of economic value and is not integrated into the company’s work processes. Although some compensation may be paid, there is no personal dependency or any obligation to pay social insurance contributions because this activity does not fulfil the social insurance criteria for employment.

**5.2.2 The minimum wage does not apply to long-term unemployed persons during the first six months of employment (section 22 (4) of the Minimum Wage Act). Does this also apply when the individual switches to another employer within six months, even though he was not unemployed “directly” before the second job?**

The exception provided for in section 22 (4) of the MWA applies only to long-term unemployed persons within the meaning of section 18 (1) of Book III of the German Social Code. Here, long-term unemployed persons are defined as persons who have been unemployed for more than one year. Only participation in a measure pursuant to section 45 of Book III of the German Social Code and periods of illness or other labour inactivity up to six weeks do not constitute an interruption in the duration of the individual’s unemployment. Individuals who take up employment with more than 15 working hours per week end their unemployment and lose their status as a long-term unemployed person. Consequently, when they later switch to another employer, these workers are to be paid minimum wage.

**5.2.3 Are long-term unemployed persons with a side-line job entitled to the statutory minimum wage?**

The exemption of unemployed persons pursuant to section 22 (4) of the Minimum Wage Act requires a case-by-case review of each job.

For example, when a job-seeker who is unemployed on a long-term basis takes up permissible side-line employment with less than 15 working hours per week, this employment will be subject to payment of the minimum wage starting only the seventh month.

When the employee subsequently takes up an additional job with 15 or more working hours per week, the minimum wage will apply to this second job starting with the seventh month as well. (The first job did not discontinue the individual’s status as a long-term unemployed person because it involved less than 15 working hours per week.)

However, in the event that the individual converts the side-line job (less than 15 hours/week) that he has held to date during his long-term unemployment into a job with the same employer and at least 15 working hours per week or more, he will be paid minimum wage beginning the seventh month after the date on which he first took up work. Since the employment relationship remained consistent, “previous periods of employment” (in this case, the side-line job) are also to be counted.

**5.2.4 Is someone who was previously unemployed on a long-term basis and has served in the Federal Voluntary Service in the interim subsequently deemed to be a long-term unemployed person within the meaning of the Minimum Wage Act?**

No. The exemption provided for in section 22 (4) of the MWA applies only to long-term unemployed persons within the meaning of section 18 (1) of Book III of the German Social Code (see point 3.2.2). Persons who do voluntary service are not unemployed – and therefore are not long-term unemployed. For this reason they cannot be exempted from minimum wage after they have completed their voluntary service.

**5.2.5 Does the exemption for long-term unemployed persons (section 22 (4) of the Minimum Wage Act) also apply to foreign workers?**

Yes. The MWA applies to all workers who are employed in Germany, irrespective of whether they are German nationals or foreign nationals.

### **5.3 Mini-jobs**

#### **5.3.1 How is the minimum wage to be paid in the case of marginal part-time work (mini-jobs)?**

The statutory minimum wage of €8.50 per hour is a gross hourly wage. The employee pays only his share of the contribution to the statutory pension insurance, in the amount of 3.7% of his wages; he can obtain exemption from this. The employer's share of the contributions to social insurance are not taken into consideration when calculating the minimum wage. The employer bears the contributions to statutory health insurance (13%) and to statutory pension insurance (15%) to be paid in connection with the mini-job – in addition to paying the gross hourly wage. When a corresponding agreement has been made, the employer may pass on to the employee the standardised flat-rate tax amounting to 2% of the employee's pay. As a result of this, the gross wage remains unchanged but the net wage decreases.

#### **5.3.2 Does the record-keeping obligation for marginal part-time workers ("mini-jobbers") also apply when they work in a private household?**

No. Marginal part-time workers in private households, as defined in section 8a of Book IV of the German Social Code, are not covered by the record-keeping obligation set forth in the MWA. The obligation to pay minimum wage naturally also applies to persons holding a mini-job in a private household.

#### **5.3.3 In what form must mini-jobbers' working time be documented?**

As long as they are verifiable, the type of records used to document the working hours is not important. The general rules apply to the obligation to keep records for marginal part-time workers (more at point 3.5.). What is important is that the start, duration and end of the working time are recorded. The frequency and duration of breaks are not important. According to the law, the record must be generated at the latest by the end of the seventh calendar day following the day of performance (in other words, one week later). These records must be kept for at least two years.

#### **5.3.4 Many small business owners (e.g. kiosk operators) are dependent on (student) help. Do exceptions apply here?**

No. The minimum wage also applies to students who, for example, work on a marginal part-time basis.

#### **5.3.5 Does the minimum wage have any effect on the marginal earnings threshold for low-income workers? Won't working hours have to be reduced every time the minimum wage is increased?**

No. No provision has been made to automatically raise the threshold for low-income workers every time the minimum wage is increased. When the €450 threshold remains constant, the number of hours that can be worked decreases whenever the minimum wage increases. Exceeding the marginal earnings threshold goes hand-in-hand with the loss of one's status as a marginal worker. In other words, the job would no longer be considered marginal employment.

#### **5.3.6 Do mini-job contracts that have not contained any details to date regarding working hours have to be adjusted and the number of working hours be explicitly included?**

It must be possible to prove that minimum wage is paid for each hour the individual actually works. The €450 threshold inherently implies a maximum number of working hours per month (52.9 hours).

#### **5.4 “Upgraders” (supplement benefit recipients)**

##### **5.4.1 How do “Hartz IV upgraders” benefit from the minimum wage?**

In some cases, the minimum wage will help individuals earn enough so that they no longer need the supplementary unemployment benefit II for long-term unemployed persons. However, the question whether an individual has to “top up” depends on many things, particularly on the question whether the individual is working part-time or full-time and how many people he has to support with his earnings.

#### **5.5 Taxi industry**

##### **5.5.1 What effects will the minimum wage have in sectors such as the taxi industry that have paid considerably less to date? The industry association fears that up to 70,000 jobs will be lost as a result of the minimum wage.**

The minimum wage will not ruin anyone who has a viable business model. With the minimum wage it will no longer be possible in the future for companies to survive only because they pay their employees poorly. The minimum wage is particularly intended to prevent wage dumping as a business model. This is also in the interest of job security for the employees of companies that pay fair wages.

The taxi industry is however an example of a sector where decent wages could lead to higher prices in some cases. The local and county governments set the taxi rates and are responsible for ensuring adequate rates. This has been and is currently being negotiated at local level.

#### **5.6 Transport sector**

##### **5.6.1 Does the Minimum Wage Act also apply to employees of foreign firms whose place of work is located abroad and who work only briefly in Germany, such as drivers who work in transit or cabotage transport?**

The Minimum Wage Act applies to all workers while they work in Germany, irrespective of whether their employer is based in Germany or abroad (see sections 1 and 20 of the MWA). Therefore, based on the MWA, the minimum wage also applies in the transport sector for each hour that an employee works in Germany.

Limited to the area of pure transit through Germany, the checks performed by state agencies to monitor compliance with the Minimum Wage Act will be suspended for the time until the issues arising under European law that concern the application of the Minimum Wage Act to the transport sector have been clarified. Proceedings for administrative offences pursuant to the Minimum Wage Act will not be instituted. In the event that proceedings have already been instituted, they will be discontinued. As long as the issues arising under European law that concern the application of the Minimum Wage to the transport sector are being examined, reports and/or duty rosters for the purely transit area and records based on the Minimum Wage Act or the respective ordinances do not have to be submitted and/or drawn up.

This suspension does not however apply to the area of cabotage transport or to cross-border road transport with loading or unloading in Germany. This transitional solution will apply until the issues under European law that concern the application of the minimum wage in the transit area have been clarified.

According to section 16 of the MWA, employers in certain sectors, who are based abroad and employ one or more workers in Germany, are obliged to submit a written notification in German ahead of each work or service performed. The freight forwarding sector, the transport sector and the associated logistics sector are among the sectors where such a reporting requirement applies.

### **5.6.2 How are companies with transit and cabotage transport to fulfil their record-keeping and documentation obligations?**

The Federal Ministry of Finance has issued an ordinance modifying the reporting obligations for certain groups of workers (Minimum Wage Reporting Ordinance). This ordinance was promulgated on 4 December 2014 in Part I of the Federal Law Gazette, No 55. The ordinance eases the reporting obligations for employers based abroad in several types of cases, particularly for exclusively mobile work. Section 2 (4) of the Minimum Wage Reporting Ordinance stipulates that the transportation of goods and passenger transport are sectors whose activities are exclusively mobile. Employers that are based abroad and employ workers to perform an exclusively mobile activity are obliged to submit a duty roster which can cover a period of up to six months. In addition, section 3 of the ordinance eases the obligation to report deviations from the duty roster, and even eliminates this obligation for exclusively mobile activities.

Notifications pursuant to section 16 of the MWA or the Minimum Wage Reporting Ordinance must be made to the Bundesfinanzdirektion West. Information on the notification procedure and the required notification forms are available on the website of the customs administration. Information will also be made available in English and French in the near future.

With regard to the obligation to record the start, end and duration of the daily working day, which also applies in the freight forwarding, transport and associated logistics sectors (section 17 of the MWA), the Federal Ministry of Finance has issued an ordinance having the force of law which eases the record-keeping obligations for certain groups of mobile workers (Minimum Wage Record-Keeping Ordinance). This ordinance was promulgated on 4 December 2014 in Part I of the Federal Law Gazette, No 55. However, this ordinance applies only to those mobile employees who are not subject to any requirements regarding their daily working time and who manage their daily working time on their own responsibility.

In addition, the Federal Ministry of Labour and Social Affairs issued an ordinance pursuant to section 17 (3) of the MWA which provides for an exemption from the obligation to record working hours for workers whose regular gross monthly pay exceeds €2,958 and for whom the employer in fact meets his obligations under section 16 (2) of the Working Time Act to record working hours and retain these records. This ordinance was published in the Federal Law Gazette on 29 December 2014 and came into force on 1 January 2015.

### **5.6.3 In the freight forwarding business, the taxi industry and in other areas, a lot depends on the drivers' working hours being correctly recorded. Who checks to ensure that no one cheats?**

Section 17 of the Minimum Wage Act contains statutory obligations regarding record-keeping and documentation for numerous sectors and marginally employed persons with regard to the number of hours actually worked. Compliance with these obligations is monitored by the customs units responsible for enforcing the law on illegal employment and benefit fraud (FKS). This also covers the passenger transport business and the freight forwarding sector, the transport sector and the associated logistics sector. Fines can be imposed for violations of these obligations. An employer who does not pay minimum wage is punishable by fine. The relevant authorities already monitor compliance with record-keeping obligations. They will continue to do so in the future as well.

## **5.7 Domestic workers**

### **5.7.1 Domestic workers live, for example, in a senior citizen's household and are paid a monthly wage. How is the minimum wage calculated and complied with?**

Minimum wage is to be paid for every hour that is actually worked. The general principles apply to the calculation and supporting documents.

## **5.8 Restaurant and catering sector**

### **5.8.1 In the restaurant and catering sector, employees who are subject to compulsory insurance are paid an agreed gross wage. A board allowance that is calculated by the social authorities is added to this, taxed and then deducted from the net wage again. Mini-jobbers are paid an agreed hourly wage. This is paid every month for the actual number of hours worked, albeit without any offsetting of the board allowance. This leads to the question of how the board allowance is taken into account when calculating the statutory minimum wage for these two groups.**

The statutory minimum wage was conceived as a gross hourly wage. Other employer benefits that are unrelated to the individual's performance of the work but are granted solely due to the work are generally not to be counted toward the minimum wage (see point 3.2 regarding benefits that can be counted and point 3.2.9 regarding room and board).

### **5.8.2 Can tips be counted toward the minimum wage?**

No. Tips are not remuneration that an employer pays his employees for their work. They are a gratuity that third parties give to employees for good service. According to court rulings, they are to go to the individual employee (or the respective group of employees, as the case may be) and thus cannot be counted.

## **5.9 Agriculture**

[work in progress]

## **5.10 Newspaper deliverers**

### **5.10.1 Which rule applies to newspaper deliverers?**

To facilitate the introduction of the minimum wage in this sector as well, the Minimum Wage Act provides for a stepwise introduction for newspaper deliverers. Starting 1 January 2015 newspaper deliverers will receive at least 75% and starting 1 January 2016 at least 85% of the applicable minimum wage. From 1 January 2017 until 31 December 2017 the minimum wage will be €8.50 and starting 1 January 2018 newspaper deliverers will be paid without any restrictions the minimum wage set by the Minimum Wage Commission.

### **5.10.2 Does the exemption provided for in section 24 (2) of the Minimum Wage Act also apply to those newspaper deliverers who deliver leaflets in addition to newspapers?**

According to the second sentence in section 24 (2) of the MWA, newspaper deliverers are persons who, as employees, exclusively deliver periodical newspapers to end customers. This also includes persons who deliver free advertising papers with editorial content. With respect to determining exclusivity, what matters is that the newspapers are a press product. This also includes inserts and supplements when they are part of the press product. The question of whether this criterion is met must be decided on a case-by-case basis. The press product's design (e.g. the use of a list of inserts, etc.) in itself can provide evidence for proving that inserts are part of the press product.

## 5.11 Sports clubs

### 5.11.1 Does the minimum wage apply to sports clubs as well?

Beginning 1 January 2015, people who work in sports clubs are also entitled to the statutory minimum wage. The question of who an employee is is determined on the basis of general principles. The Minimum Wage Act does not however govern the remuneration of persons who work on an honorary or volunteer basis in a sports club. During the legislative process preceding the passage of the Minimum Wage Act, the coalition parties declared that volunteer trainers and other persons working as volunteers or in an honorary capacity in sports clubs do not fall under the Minimum Wage Act when the individual does not work in expectation of receiving adequate financial compensation but rather is motivated by the desire to serve the community

### 5.11.2 What applies when an individual not only works on a volunteer basis or in an honorary capacity but also has a mini-job?

When the work is performed as marginal part-time work in the form of a mini-job, it is to be assumed that it involves an employment relationship and falls under the Minimum Wage Act. This does not necessarily preclude working on a volunteer or an honorary basis in addition to the marginal job. The employment contract must however specify the activities and the amount of these activities that are part of the mini-job. It should be possible to clearly distinguish work that is done in on a volunteer or honorary basis and goes beyond the mini-job from the type and content of the work done for the mini-job (otherwise there could be reason to suspect that the minimum wage liability is being evaded).

#### Example: volunteer work and a mini-job

A trainer works evenings with a youth team in a sports club. He also – based on an employment contract for a mini-job – cleans the rooms at the same sports club. Is it possible to hold both jobs in parallel with one another? Where does the minimum wage apply?

It is possible to hold a mini-job and do volunteer work in parallel with one another as long as the contractually defined activities covered by the mini-job and the corresponding number of working hours foreseen for them can be differentiated from the other, volunteer activities. Therefore, in the example here, the minimum wage applies only to the cleaning activities that were contractually agreed on a mini-job basis. The minimum wage does not apply to the work done in an honorary capacity or on a volunteer basis for which an expense allowance or a fixed trainer fee can be paid. In this case the number of hours worked does not have to be recorded and there is no limit on the number of working hours.

#### Example: fixed trainer fee and a mini-job

A trainer receives €650 a month in a sports club as lump-sum remuneration for his work there which in addition to training and overseeing athletes, also includes maintaining the materials and equipment and checking the facilities. This sum consists of a €200 fixed trainer fee and €450 as remuneration for the mini-job. There is no employment contract that differentiates between these activities. What does the minimum wage apply to in this case?

Here too, it is possible to hold a mini-job in parallel to doing work in an honorary capacity or on a volunteer basis. However, the content and scope of the work to be done for the mini-job must be clearly defined, allowing for a clear-cut differentiation between the two functions. Therefore treating volunteer work and marginal employment the same – as has been common practice to date – cannot automatically be continued. When there is an employment relationship in the form of a mini-job, the terms of the employment relationship should be clearly defined. Further activities that go beyond this

and are performed in an honorary capacity or on a volunteer basis can however be compensated through an expense allowance or a fixed trainer fee.

### **5.11.3 What applies in the case of amateurs who are under contract?**

Amateur and contract athletes do not fall under the definition of “employee” when the focus is on their voluntary sports activities and not on the financial compensation for their work (Bundestag printed paper 18/2010 (new), p. 15). Persons who pursue sports also typically do not follow any financial interests with the use of their athletic abilities, but rather primarily want to support the objectives of their sports club through their performance.

When an individual performs work in the course of marginal part-time employment in the form of a mini-job, it is to be assumed that this is employment for which minimum wage is to be paid. The lump-sum payments for social insurance and income tax are however of advantage to sports clubs.

Amateurs who are under contract constitute a hybrid of amateur and professional athlete. For this reason, it must be determined on a case-by-case basis whether the individual is an employee. This decision depends on the provisions of the contract and the amount of the remuneration. It is however clear that the minimum wage must be applied when the remuneration exceeds the usual expense allowance, which would suggest that a financial interest predominates.

## 6 Hotline

### 6.1 When will the information centre with a hotline service (as noted on the website of the Federal Ministry of Labour and Social Affairs) be set up? Who will be responsible for it?

The Minimum Wage Hotline began operation on 23 October 2014. From an organisational standpoint, the hotline is part of the information centre and therefore falls under the responsibility of the Minimum Wage Commission (section 12 (1) and (3) of the MWA). However, the Federal Government/Federal Ministry of Labour and Social Affairs is responsible for how the MWA is interpreted, insofar as this is permissible in connection with a general public information service. As long as the Minimum Wage Commission has not yet been appointed and there is no secretariat/information unit as provided for in section 12 of the MWA, the hotline along with its telephone number will be attached to the ministry's helpline. The Minimum Wage Commission is responsible for deciding where the hotline will be located once the secretariat takes up its work.

### 6.2 What services will the Minimum Wage Hotline offer?

The hotline will provide information about the Minimum Wage Act and the associated obligations to document and report employment relationships. The hotline will answer concrete questions on a general basis, albeit without providing any legal advice. In the event of violations, it will pass callers on to the competent customs authorities as necessary.

### 6.3 Can violations be reported to the hotline? Can complaints or charges be made to the hotline?

The hotline also accepts complaints and reports of violations and evaluates them for the Minimum Wage Commission. The hotline additionally informs callers that it can be necessary to sue in a court of law in order to receive minimum wage. In addition, the individual might have called to report a minimum wage violation. The FKS – the customs units responsible for enforcing the law on illegal employment and benefit fraud – is responsible for prosecuting violations of the law.

What happens when violations are reported to the customs authorities? Who checks them and decides whether the FKS should be sent in?

The FKS is responsible for checking whether the minimum wage has been paid and for punishing minimum wage violations. The relevant Main Customs Office accepts information regarding possible minimum wage violations. This customs office also decides whether an investigation will be conducted. The FKS on the other hand is not responsible for helping individuals realise their own wage entitlements. Individuals must enforce their claims – irrespective of the minimum wage violation – in a labour court.

### 6.4 What are the hotline hours?

The hotline can be reached from 8:00 a.m. until 8:00 p.m., Monday through Thursday.

### 6.5 How is the hotline personnel trained?

Hotline staff have already received general training regarding labour law issues and on questions pertaining to sectoral minimum wages under the Posted Workers Act. They also received training regarding the Minimum Wage Act after it went into effect.

## 7 Minimum Wage Commission

### 7.1 Where does the Commission have its offices?

The independent Minimum Wage Commission has its offices at the Federal Institute for Occupational Safety and Health in Berlin.

### 7.2 What exactly does the Commission do?

The Commission will decide every two years – for the first time in June 2016 – whether to adjust the minimum wage. In the course of an overall assessment, the Minimum Wage Commission will examine which level would help ensure adequate minimum protection for workers, enable fair conditions for functioning competition and, at the same time, not jeopardise jobs. The Minimum Wage Commission will use the development of collectively bargained pay scales in recent years as the basis for its decisions.

### 7.3 Who are the members of the Minimum Wage Commission and when will the Commission take up its work?

The Commission is comprised of a chairman, six members with voting rights and two advisory members (experts). The Federal Government appoints the chairman on the basis of a joint recommendation by the umbrella organisations for labour and management. In addition, the two umbrella organisations each propose three voting members and one advisory member. These members are also appointed by the Federal Government.

The first members of the Minimum Wage Commission were appointed for a five-year term on 17 December 2014:

- Dr Henning Voscherau, retired lord mayor,

was appointed chairman of the Minimum Wage Commission on the basis of a joint recommendation by the Confederation of German Employers' Associations (BDA) and the German Confederation of Trade Unions (DGB).

On the employer side, standing members of the Minimum Wage Commission with voting rights are

- the Managing Director of the Confederation of German Employers' Associations (BDA), Dr Reinhard Göhner,
- the Managing Director of the Employers' Association of the Food and Beverage Industry and of the Federal Association of the Food Services Industry, Valerie Holsboer, and
- the Managing Director of the German Confederation of Skilled Crafts, Karl-Sebastian Schulte.

On the employee side, standing members of the Minimum Wage Commission with voting rights are

- the head of the IG Bauen-Agrar-Umwelt (Construction-Agriculture-Environment) trade union, Robert Feiger,
- the Member of the Executive Board of the Confederation of German Trade Unions (DGB), Stefan Körzell,
- and the Chairman of the Nahrung, Genuss, Gaststätten (Food, Beverages, Catering) trade union, Michaela Rosenberger.

Advisory members from the research field are

- the Deputy Managing Director of the Institute for Work, Skills and Training, Dr Claudia Weinkopf, for the employee side
- and the President of the Centre for European Economic Research (ZEW), Professor Clemens Fuest, for the employer side.

The Commission will hold its first meeting in early 2015.

#### **7.4 Who decides when there is no majority?**

The Commission has a quorum when at least half of its voting members are present. In other words, when three or more voting members are present. The two advisory members have no voting rights. The Commission will take decisions with a simple majority of the voting members who are present. The chairman initially abstains from voting. In the event that a majority of votes is not reached, the chairman will submit a proposal for a compromise. When, after further deliberations regarding the proposed compromise, a majority is not reached, the chairman will exercise his right to vote and cast the deciding vote.

#### **7.5 Is the Commission autonomous in its decisions?**

The Commission is bound only by the requirements of the law. It is otherwise autonomous in its decisions.

#### **7.6 What is the process for adjusting the minimum wage?**

The Federal Government can make the adjustment proposed by the Commission binding for all by issuing an ordinance having the force of law. The minimum wage can be adjusted on the basis of a Commission decision for the first time as of 1 January 2017.

#### **7.7 When will the minimum wage be raised for the first time?**

This will be decided by the Commission. Raising the minimum wage will be possible for the first time with effect from 1 January 2017. The question of whether the Commission will use this option depends on current economic developments which the Commission must take into consideration.

#### **7.8 How large a staff will be necessary for the Commission's work (in addition to the members of the Commission)?**

A secretariat with a staff of approximately eight people will assist the Commission with its work.

#### **7.9 What will the establishment of the Minimum Wage Commission cost the federal budget?**

Approximately €1.6 million will be available in 2015 for financing the secretariat and necessary research.