

What to expect when you are expecting

Major changes and open questions regarding the German Maternity Protection Act

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The new German Maternity Protection Act has been in place since January 1, 2018, with several sections of the act changed. One of the most relevant changes for employers concerns the fact that it is now statutory to carry out risk management assessments specific to each type of work conducted within a company. Further changes concern the scope of maternity protection and modifications to the protection periods. Some regulations intended to ensure more flexible work options during pregnancy were also included.

Broadening the scope

The act itself brought some further changes in 2018. Now, not only are employees covered by the act — so are apprentices, interns and students as well as dependent freelancers and so on. As a result, all these workers are not only protected against dismissal, but also are covered in case of an occupational ban. Managing directors are still not explicitly mentioned. Because section 1 paragraph



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1 of the Maternity Protection Act refers to section 7 paragraph 1 of the Social Code IV, it could be argued that managing directors are covered, as section 7 states that all persons are considered employees if they are performing an activity according to instructions and are integrated into the work organization of the company. In general, these criteria apply to most managing directors. The German Parlia-

ment, however, has declared that managing directors are not protected under the act because they cannot be considered to be employed. A comparison was made to housewives, who likewise are not considered to be employed. Whether that is a good example is immaterial here—in the end, the question will be answered by the courts. Arguments currently exist for both views.

Changes were also made regarding working hours. To ensure further flexibility, female employees can now work during the night if they declare themselves willing and the relevant public authority approves. This also applies to work performed on Sundays and public holidays (where no approval from the authorities is necessary). These changes could be considered employer-friendly in addition to giving potential mothers more autonomy, as each expecting employee can choose whether they want to work during the night, on Sundays or on public holidays.

Previous regulation regarding risk assessment

Under the prior statutory regulation, it was sufficient for employers to do a maternity-specific risk assessment after being informed by an employee that she is expecting. This was referred to as event-dependent risk management and was mandatory. As a result, there were no specific requirements to be observed by the employer regarding the Maternity →

Protection Act prior to a pregnancy. Because the Occupational Safety Act was already in effect, there was no need for further scrutiny of any workplace.

Changes made by legislation

This changed, however, with the introduction of the nonspecific special maternal protection risk assessment (§ 10 Abs. 1 S. 1 Nr. 1 MuSchG), which applies to existing workplaces as well as new ones. Moreover, this assessment concerns all work spaces within a company, not only those occupied by a pregnant employee. Each employer is compelled to comply with this law, even those who do not employ women. Since January 1, 2019, non-implementation of this assessment can result in a fine of up to €5,000. In 2018, employers had the opportunity to adjust to these new circumstances. Now, non-compliance can be fined.

Each workplace needs to be analyzed for potential hazards for pregnant or nursing employees. This applies even if no woman is ever expected to perform such a duty. If potential hazards for pregnant or nursing women are found, the employer must determine whether it is necessary to take protective measures or reorganize working conditions. The act itself is silent on precisely how employers ought to

comply with such requirements. The analysis should be conducted as follows:

- Review all duties carried out within the company. It is sufficient to examine one work space if several employees are carrying out the same type of work. It is essential that every type of work performed within the company is recognized.
- Scrutinize which risks result from the work performed with respect to pregnancy. A risk exists if, in the process of carrying out her work, a pregnant or nursing woman would endanger the health of her unborn child or the child she is still nursing.
- If hazardous conditions for pregnant or nursing women are found, the employer must devise protective measures to fully avert or at least prevent any exposure to danger.
- Lastly, the employer must document the result of the risk assessment and inform all potential employees. This includes not only pregnant or nursing women, but also all male employees, since these protective measures must be communicated to them as well.

The underlying idea is that employers should to be prepared for employees to become pregnant and therefore ready to take the necessary steps to protect them, which have already been outlined once an assessment has been conducted. The government intends to prevent occupational bans within companies by mandating these prior protection-specific risk assessments. Employers must comply with the stricter documentation requirements now that fines are in effect. If a company has not yet adopted the relevant measures, this should be addressed immediately. ←



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