

German Employment Law is said to be complex and employee-friendly. However, if understood and used wisely, its rules can offer chances for an entrepreneur in the German market.

Selected Issues



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German employment law is based on a variety of sources. Typical for the German legal system, it is a dynamic area of law under constant revision by jurisdiction and legislation. German employment law aims to provide the basis for a fair and productive co-operation of employers and employees in the light of the constitutional idea of a social market economy (*soziale Marktwirtschaft*).

Knowledge of the key principles of German employment law is essential for every player in the German market. This publication is meant to provide an overview on the most important rules and provisions. It can, of course, not substitute for in-depth legal advice, but shall serve instead as a starting point for those interested in the German marketplace.

Sources of German Employment Law

The sources of German employment law can be divided into two main categories: Individual employment law and collective employment law.

Individual Employment Law

Individual employment law is based on a small number of key provisions set out in the German Civil Code together with a vast body of case law which has fleshed out these provisions and extended the application of employment law principles well beyond the original statutory framework.

In addition, there are numerous statutory provisions and regulations for the safety and welfare of employees as well as for the protection of employees against unfair dismissal, discrimination, transfer of business sites, etc. Disputes arising in connection with such matters are generally dealt with in special labor courts.

Collective Employment Law

The principles of collective employment law allow for the establishment of works councils and comprise the law applicable to collective bargaining agreements (*Tarifverträge*). These apply primarily where the employer is a member of the respective employers' association and the employee is a union member. In practice, collective bargaining agreements often stipulate provisions for minimum wages and salaries, wage categorizations, holidays, redundancy schemes, and various other additional benefits.

Classification of Employees

Employees

An employee is an individual who is working for another person in a personally dependent and not self-determined way on the basis of a private law contract and who is bound by an employer's instructions, in particular as to time, place and content of work. If someone qualifies as an employee, taking into account the overall context and circumstances of the case (including the implementation and actual performance of the contractual relationship), the labelling of the underlying private law contract is not decisive.

Employees may be employed part-time, for job-sharing purposes, by two employers, or as leased employees, on the basis of an unlimited contract or a contract with a fixed term. Employees with such employment conditions are basically protected in the same way as full-time employees.

Subject to certain exceptions, managing directors (*Geschäftsführer*) and board members (*Vorstandsmitglieder*) are not deemed employees and are not subject to employment laws. Special provisions apply to trainees and apprentices. Similarly, particular provisions also govern employees in public services and civil servants.

Freelance Staff

Staff who take entrepreneurial risks, who are able to determine their place and time of work and who are not subject to instructions are normally considered to be freelance staff (*freie Mitarbeiter*). The often difficult distinction between employees and freelance staff is subject to an evaluation of all the facts of the individual contractual relationship. This distinction is crucial as an employer is legally obliged to deduct wage tax and social security contributions for its employees, whereas freelance staff are responsible for themselves as regards their tax and social security matters. Furthermore, mandatory employment law rules such as dismissal protection regulations do not apply to freelancers.

Labor Administration

The Federal Employment Agency (*Bundesagentur für Arbeit*) acts through ten regionally authorized offices (*Regionaldirektion*), which preside over more than 150 county employment agencies (*Arbeitsagenturen*) with a large number of local employment offices (*Geschäftsstellen*).

The principal functions of local employment offices are to administer the payment of unemployment benefits, to regulate the labor market, and to approve and carry out job and promotional measures.

Works Councils

A works council is an employee representation body elected by the employees of a specific business site (*Betrieb*). The rights and the general role of the works council are defined in the Works Constitution Act (*Betriebsverfassungsgesetz*).

Establishing Works Councils

The Works Constitution Act applies to all business sites situated in the Federal Republic of Germany, irrespective of the employer's or employee's nationality. This means that under the law, business sites of foreign corporations in Germany are placed on the same footing as business sites of companies domiciled in Germany.

If requested by the employees, a works council must be established, provided the business site in question employs at least five employees on a regular basis, three of whom must have worked for the business site for at least six months. However, there is no legal obligation for either the employer or the employees to establish a works council. The employer's only obligation is to refrain from any action that could impede or interfere with the formation of a works council. As a practical matter, almost every sizeable business site eventually establishes a works council.

In determining whether the prerequisites for the formation of a works council are satisfied and how many members it should have, the legal representatives of the company, i.e., managing directors (*Geschäftsführer*), members of the management board (*Vorstandsmitglieder*) and senior executives (*Leitende Angestellte*) do not count as employees. Senior executives may vote for a separate body of representation, a so-called speaker committee (*Sprecherausschuss*).

Works councils can be established not only on a local level at the individual business site but also on the company (*Unternehmen*), the group (*Konzern*), and possibly even on the European level (*Gesamt-, Konzern- und Europäischer Betriebsrat*). Each of these works councils has special competencies.

Works Councils' Rights

If established at a particular business site, a works council's rights and duties are far-reaching in matters such as hiring of staff, termination of employment, and working conditions. The works council acts by way of co-determination or information and consultation rights.

Several important rights of the works council apply only to companies (*Unternehmen*) employing more than 20 employees on a regular basis. For example, at business sites that belong to a company employing more than 20 employees on a regular basis, the employer is required to notify the works council and obtain its approval for hiring employees, transferring them to another position, etc.

At business sites with up to 20 employees entitled to vote, the functions of the works council are performed by one employee. At larger business sites, the number of works council members gradually increases in relation to the number of employees.

Form of Employment Contracts

Subject to possible exceptions, under German law, employment contracts can be validly entered into without complying with any formal requirements. Thus, even if there was no expressive written or oral agreement, an employment contract may be considered to be in effect if it can be argued that the circumstances imply a respective agreement.

However, an employer is required by law to provide the employee with a written statement of the respective terms and conditions of employment within one month after commencement of employment. This requirement does not establish a formal requirement for entering into a written employment contract. If an employer does not comply with the duty to provide such written statement, an employee may be able to claim damages that are caused by lack of information that the written notice should have contained.

Prohibition of Discrimination

The Anti-Discrimination Act (AGG), entered into force on 18 August 2006, implements four European Directives into national law. It aims to “prevent or eliminate disadvantageous treatment on the grounds of race or ethnic origin, gender, religion or secular belief, a disability, age or sexual identity.” Under the Anti-Discrimination Act, both direct and indirect discrimination are prohibited. Contractual provisions that are in violation of the Anti-Discrimination Act’s rules are invalid. In addition, a discriminated-against employee may claim damages and compensation.

General Hiring Conditions and Background Checks

In particular with regard to hiring procedures, it should be ensured that any job advertisements and applicant selections are free of anything that could be construed as discriminatory treatment. Above all, the selection of new hires should be carefully documented to be able to prove that the statutory anti-discrimination rules were complied with.

Employers with 20 or more regular employees must meet a quota requirement of five percent for handicapped employees. If the employer fails to meet this requirement, an annual handicapped contribution will become payable (currently between EUR 125 and EUR 320 per month for each unoccupied position falling within the quota requirement).

Employers are only allowed to carry out background checks in Germany if the information might be relevant for the role. For instance, inquiries regarding illness are permitted to the extent that such illness could permanently or periodically affect the applicant's suitability for the job and to the extent they are not discriminatory on the grounds of disability. Questions regarding pregnancy are always prohibited. Criminal records can only be requested insofar as the respective crime is connected to the position to be filled. Thus, an applicant for a position in the financial industries can be asked about property and an applicant for a truck-driver position about traffic crimes.

If a question is not permitted, the applicant is entitled to answer such questions incorrectly, with the consequence that the employment relationship (if the applicant is subsequently employed) cannot be terminated for such reason.

Work Permit

EU citizens can be employed subject to routine residence requirements. They do not require a visa to enter or work in the Federal Republic of Germany.

Access to the labor market for third-country nationals, i.e., non-EU, non-EEA, and non-Swiss nationals, however, is strictly regulated. Respective German visa and working-permit rules are complex and depend upon the individual's country of origin and profession. Third-country nationals must, as a rule, apply for a work visa at the German mission abroad prior to coming to Germany and obtain a residence title (*Aufenthaltstitel*). For the avoidance of doubt, third-country nationals (including, e.g., asylum seekers) who are already in Germany without residence title still require this title.

As an exception, Australian, Canadian, Israeli, Japanese, South Korean, New Zealand and US citizens may travel to Germany without a visa and acquire a residence permit from the competent German foreigners' authority after their arrival in Germany. They may not, however, start work until they have obtained the relevant permit.

In the context of the refugee crisis, rules aiming at a faster integration of refugees in the German employment market are currently being discussed. At this stage, refugees do generally require a residence title, which will be granted upon positive completion of the asylum proceedings. In certain circumstances only, and subject to approval of the Federal

Employment Agency, refugees without residence title (i.e., whose asylum proceedings are still pending or have been dismissed) may obtain a work permit at the local German immigration authority.

Social Security System

The statutory social security system provides for five kinds of social security insurance: Health, nursing-care, accident, pension, and unemployment insurance. With the exception of the statutory accident insurance, which is financed solely by the employer, the social security system is financed by contributions from employers and employees. The contributions are based proportionally on the individual employee's salary up to statutorily determined contribution ceilings (*Beitragsbemessungsgrenzen*). If an employee's income exceeds these contribution ceilings, the portion of the income above the ceiling will not be taken into account for the calculation of the contributions. There are two different contribution ceilings: one for the statutory pension insurance and unemployment insurance and one for the statutory health insurance and nursing-care insurance. Both contribution ceilings are increased every year. Since 1 January 2017, the following rates and ceiling amounts have applied:

	Percentage of Aggregate Amount	Ceiling Amount (per month)	
		West German States	Former German Democratic Republic
Statutory Pension Insurance Contribution	18.7%	EUR 6,350	EUR 5,700
Statutory Unemployment Insurance Contributions	3.0%	EUR 6,350	EUR 5,700
Statutory Health Insurance Contributions	reduced 14.0% / general 14.6% + additional contribution	EUR 4,350	EUR 4,350
Statutory Nursing-Care Insurance Contributions	2.55% with children; 2.80% without children	EUR 4,350	EUR 4,350

In general, the above-mentioned social security contributions are borne by the employer and the employee in equal parts¹.

In addition, employees earning above certain maximum ceiling amounts for one year and presumably also the following year can opt out of the state security system as far as health insurance is concerned and take out private insurance. This general opting-out ceiling (*Versicherungspflichtgrenze*) is also increased each year. For 2017, it has been set at EUR 57,600 annual gross income. A lower ceiling applies to employees who have already been exempt before 1 January 2003.

Pensions

State Pensions

The great majority of employees take part in the German statutory pension insurance scheme, an insurance scheme financed by contributions of employers and employees on a pay-as-you-go basis.

Pension benefits are calculated by reference to earnings during periods of insured employment and are provided to the insured or their surviving spouses and dependent children. Membership in the statutory pension insurance scheme as part of the social security system is almost always mandatory for employees. German law provides for different scenarios as to when an employee is entitled to old-age pensions, depending on age, duration of membership in the statutory pension fund, waiting period, and other conditions.

The German social security system furthermore provides for pensions in cases of an inability to work.

Non-State Pensions

Pensions under the social security system are often complemented by private pension savings or company pension schemes. Non-state pension provisions have been substantially promoted by government support within the last years.

¹ The additional contribution to the statutory health insurance is borne by the employee alone. The amount depends on the respective health insurance provider. In addition, there is a special rule regarding nursing-care in Saxony whereby the cost is split between employee and employer in the ratio of 1.775% to 0.775% rather than 1.275% to 1.275% as in the other federal states.

An employer is free to introduce individual pension promises or pension schemes, subject to the general principle of equal treatment of employees. However, once the employer has promised or introduced pension benefits, certain aspects are mandatory that are regulated by the Company Pensions Act (*Betriebsrentengesetz*).

Employers can either commit themselves to pay direct pension benefits or opt for an indirect way of financing pensions and use a separate legal entity for this purpose, such as a pension fund. Company pensions may also be provided by means of a so-called direct insurance, i.e., the employer enters into a life insurance contract to the benefit of the employee. Pure defined contribution schemes, however, are currently not recognized by the German company pensions law. The employer always guarantees a minimum benefits volume.

The traditional German pension scheme is a direct pension promise financed by book reserves set aside in the employer's balance sheet. As these book reserves are usually not backed by segregated assets, they are generally considered to be unfunded liabilities under international accounting standards. However, there are certain possibilities to restructure such pension schemes that will lead to a full recognition of these book reserves as funded liabilities.

Minimum Wages / Salaries

A statutory minimum wage came into effect as of 1 January 2015. At present, it amounts to Euro 8.84 per working hour and – subject to very few exceptions – is binding for all employment relationships. Exceptions may apply to certain groups of employees (e.g., students, interns, people without complete vocational training, long-term unemployed). Certain other exceptions provided for by statutory transition rules until 31 December 2017 are of rather limited relevance.

If employment contracts provide for a salary below the minimum wage, this will result in a salary adjusted to the relevant minimum wage. However, the employment contract will remain valid. Furthermore, violations constitute administrative offenses and can lead to fines up to EUR 500,000.00.

Working Time

Working time during workdays (*Werktage*) is restricted to a maximum of eight hours per day by the Working Time Act (*Arbeitszeitgesetz*). Workdays are defined as Monday to Saturday. The daily working time can be extended to ten hours per day if, on average, it does not exceed eight hours per day over a period of either six calendar months or 24 weeks. Employees must be given a rest break of 30 minutes if they work more than six hours, and a rest break of 45 minutes if their working time exceeds nine hours in total. These periods can be split into several separate breaks of 15 minutes at a minimum each.

Stricter regulations must be adhered to regarding employees under the age of 18.

The general rule prohibiting Sunday and holiday work is modified by numerous exceptions. However, 15 Sundays per year must be work-free, and Sunday work must be compensated for by an additional day off.

Where a works council has been elected, several co-determination rights must be complied with in the context of working time. For instance, an agreement with the works council must be found regarding the beginning and end of daily working time as well as the distribution and timing of breaks.

Holidays

Minimum holiday requirements are set out by the Federal Holiday Act (*Bundesurlaubsgesetz*).

The minimum statutory holiday is 24 workdays per calendar year, including Saturday as a workday but excluding Sunday or other legal holidays. Thus, for employees working five days a week, the statutory claim to paid holiday amounts to 20 days per year. However, a higher number of days can be agreed upon, particularly in collective bargaining agreements or in the individual employment contract. In practice, therefore, holidays of 25 to 30 workdays per year are common in Germany.

Maternity / Parental Rights

The Maternity Protection Act (*Mutterschutzgesetz*) protects pregnant women and mothers against work-related health hazards, providing, inter alia, for certain minimum periods during which deployment of women is prohibited (subject to certain exceptions, this period amounts to six weeks before and eight weeks after delivery). During pregnancy, deployment can be prohibited or restricted if and insofar as the mother's and/or baby's life and health could be endangered. The Maternity Protection Act also generally prohibits the termination of the employment relationship with pregnant women and women who have given birth recently. A termination is only possible with the competent public authority's permission and for reasons not connected to the employee's pregnancy.

Employees' entitlement to parental leave (*Elternzeit*) is regulated by the Act on Parental Benefits and Parental Leave (*Bundeselternzeit- und Elternzeitgesetz*). Both parents can take parental leave for the same child for a period of up to three years. Employees on parental leave are entitled to work part-time for a maximum of 30 hours per week during their leave, subject to certain statutory preconditions. An employer may terminate the employment relationship with an employee who has requested or is on parental leave only under limited circumstances and with the permission of the competent public authority.

Non-Compete Rules

During the term of employment, employees are subject to a statutory non-competition obligation.

After the end of the employment relationship, there is no general non-competition obligation on the employee. Such post-contractual non-competition obligation may, however, be agreed upon. In order to be enforceable, a post-contractual restriction on competition must comply with certain conditions, inter alia, with respect to its duration (with a maximum period of two years), material scope and geographical extent. Insofar as these requirements are not met, the prohibition of competition is not binding. Furthermore, a post-contractual non-competition obligation is only valid if set forth in writing and if the employer is obliged to pay compensation to the employee for the duration of the restriction amounting to at least 50 percent of the contractual remuneration last received. If the compensation falls short of this amount, the employee can choose to either comply with the non-competition obligation by accepting the lower compensation or to disregard the non-competition obligation.

Confidentiality

Employees are obliged not to disclose the business and trade secrets of their employer. This obligation applies during and – at least if stipulated in the employment contract – also after termination of the employment relationship. Post-contractual confidentiality obligations must, however, not restrict the employee's professional activity unreasonably.

Equal Pay

The entitlement of men and women to equal pay for equal work is a fundamental principle of German employment law and EU law. In recent times, courts appear to have been more apt to enforce this principle if called upon to do so.

At the end of March 2017, the German parliament (*Bundestag*) has ratified the Act on Remuneration Transparency (*Entgelttransparenzgesetz*). Under this new legislation, employees in business sites with more than 200 employees will have a claim to information about the average remuneration of employees of the other sex who perform the same tasks or tasks of the same value.

Sick Pay

German law requires that employees are paid 100 percent of their salary or wages by their employer during the first six weeks of sickness unless the sickness was self-inflicted. Where an employee subsequently falls ill due to the same underlying illness, the six-week period will recommence if six months have elapsed since the end of the last sick leave, or if twelve months have elapsed since the beginning of the first sick leave. If the underlying cause of illness is a new one, the six-week period automatically commences anew.

Employee Inventions

Employees who create an invention during the term of their employment must notify their employer in accordance with the provisions of the Act on Employee Inventions (*Arbeitnehmererfindungsgesetz*). In exchange for the right of the employer to claim the invention, the employee inventor is entitled to reasonable compensation in accordance with the provisions of the Act on Employee Inventions and the guidelines for the compensation of employee inventors.

Contracting-Out Provisions / Choice of Law

Employer and employee can choose foreign law as the governing law for the employment relationship. However, such contracting-out provisions are invalid insofar as they exclude or limit employees' rights that are considered mandatory. It does not matter whether said employees' rights are codified or not.

Fixed-Term Contracts

Fixed-term contracts are generally not permissible unless the term is justified by a reasonable ground. For instance, a fixed-term contract can be justified by the need to hire a replacement for an employee on maternity or parental leave, by the need to hire support for a fixed-term project, in cases of seasonal work, or during an employee's probationary period.

By way of exemption to this rule, statutory provisions contained in the Act on Part-Time and Fixed-Term Employment (*Gesetz über Teilzeitarbeit und befristete Arbeitsverträge*) allow fixed-term employment relationships of a maximum duration of up to two years without the need for a justification as outlined above. Such fixed-term employment contracts, however, may not be entered into with employees who were already previously employed by the same employer. The initially agreed fixed-term period may be extended up to three times if the contract period as a whole does not exceed two years.

Conclusion of fixed-term employment contracts is also facilitated during the first four years after the start-up of a company. During this time, employment contracts may be entered into on a fixed-term basis for a period of up to four years as a whole. Reasonable grounds justifying the term are not required. This rule, however, does not apply to newly created legal entities if they were created due to restructuring and reorganization within a company or within a group of companies.

The fixed-term arrangement is only effective if agreed upon in written form.

Part-Time Contracts

Part-time employment is also governed by the provisions set forth in the Act on Part-Time Employment and Fixed-Term Employment (*Gesetz über Teilzeitarbeit und befristete Arbeitsverträge*). Most importantly, this Act provides a statutory claim of employees who have been continuously employed by the same employer for more than six months to reduce their working hours, provided that the employer employs more than 15 employees on a regular basis, and that no compelling business reasons argue against the requested working time reduction.

Employee-Leasing

Employee-leasing (*deployment of temporary employees*) is restricted by the German Act on Employee-Lease (*Arbeitnehmerüberlassungsgesetz*). Employee-leasing requires a special permit to be granted by the German Federal Employment Agency. Employee-leasing without such permission is illegal. The most recent legislation amendment that came into effect as of 1 April 2017 established additional regulatory requirements for employee-leasing. In order to reduce intended misleading, the lender and the hirer are required to explicitly label the lease of employees as “employee-leasing” in their contract, and to individually specify each person to be leased in advance. Furthermore, the maximum period for leasing the same employee to the same hirer is generally restricted to 18 months. Periods of deployment of the same employee that have taken place less than three months previously must be taken into account.

Violations of the aforementioned requirements can lead to the invalidity of the employment contract between the employee and the lender. Instead, an employment relationship between the hirer and the leased employee will be presumed unless the leased employee objects. In addition, both hirer and lender can be fined up to EUR 30,000.

The leased employees are generally entitled to the same employment conditions as the hirer’s regular employees working in comparable positions from their first day of deployment.

By way of or on the basis of collective bargaining agreements, and subject to certain conditions, deviations from both the maximum deployment period and the equal treatment claim are possible.

Termination of Employment – Legal Requirements

Formal requirements

Any termination of an employment contract, whether by notice of dismissal or mutual separation agreement, is statutorily required to be in written form. Facilitations of this formal requirement are excluded. Subject to certain exceptions, the reasons for the termination do not need to be stated in the notice letter. Stricter formal requirements may be agreed upon in collective bargaining or works council agreements, but will usually be ineffective if stipulated in employment contracts.

In general and subject to certain exceptions, there is no obligation to state the reasons for the termination in the notice letter.

Notice Periods

Statutory minimum notice periods apply. These minimum notice periods prevail against any contractual notice period if the latter is disadvantageous for the employee.

Termination without Notice for an Important Cause

An employment contract can be terminated due to an important cause without the need to observe a notice period (*fristlose Kündigung*), provided that the termination notice is served within a period of two weeks after the terminating party became aware of the important cause. An important cause requires that the party giving notice cannot reasonably be expected to continue the employment relationship until the end of the notice period. Whether this threshold is met must be determined by considering all facts of the particular case.

In case of a termination without notice, there is no requirement to include the reasons for the termination in the notice letter, either. However, the employer has to inform the employee in writing about the reasons for the termination without undue delay if the employee requests such information.

Dismissal Protection

Employees in business sites with more than ten² regular employees (part-time employees being counted on a specified pro-rata basis) who have been continuously employed for six months by the same employer have a statutory right not to be unfairly dismissed under the Act Against Unfair Dismissal (*Kündigungsschutzgesetz*).

Under the Act Against Unfair Dismissal, an employee's dismissal must be justified by one of the following reasons:

- Grounds of personal capability; for example, the inability to perform the contractual duties;
- Conduct-related grounds; for example, a breach of contract; or
- Compelling business grounds; for example, because there is no longer a need for the employee's position.

All terminations are considered to be improper if the employee could be employed in the same or another business site within the employer's company, or if the employee could be continuously employed under reasonably altered employment conditions, such as different duties or in another position.

In addition, special requirements for the justification of a termination apply, depending on the reasons for the termination. For instance, even if a dismissal is per se justifiable on grounds of the employee's conduct, the termination will in most cases be considered unfair if the employer did not provide the employee with an expressive (written) warning (*Abmahnung*) explaining that this kind of misconduct will lead to a dismissal for breach of contract if repeated in the future. And even if a dismissal can, in principle, be justified on valid operational grounds, the termination will be considered unfair if the employer conducted a socially improper selection of the employee to be dismissed. The selection has to be based on a valuation of all comparable employees' tenure, age, statutory payment obligations for dependents, and disability, and only the employee in least need of protection with regard to these aspects may be terminated.

In general, it may be said that terminations of employees protected under the Act Against Unfair Dismissal are very difficult to be validly effected, as each case requires close examination of its particular facts and usually some preparation beforehand.

² Until 31 December 2003, this threshold was five employees instead of ten. For employees who have already been employed by their employer at this point in time, the lower threshold can, under certain circumstances, continue to apply.

Special Dismissal Protection

Certain categories of employees, such as disabled employees, pregnant women or employees on maternity and parental leave, are covered by special dismissal protection rules. Their employment relationships may only be terminated after an approval by specific authorities.

Works Council Participation

If a works council has been established, it must be notified in advance of every intended dismissal of an employee, even a dismissal without notice or in cases where the Act Against Unfair Dismissal does not apply. In such notification, the employer needs to identify the employee, the type of termination (with or without notice), the time at which the termination takes effect, and the reason for the proposed dismissal.

German courts place great emphasis on the correctness and completeness of such notification. The works council must be given an opportunity to comment before a notice of termination. A termination given without the required proper hearing is null and void. The works council may object to a termination under certain circumstances, e.g., if the employee could be continuously employed in a different position at the same or another business site within the employer's company. If the works council objects, the employer can be obliged to continuously employ the employee even after termination of the notice period until a court has reached a final decision on the validity of the termination. However, an objection will not have an impact on an otherwise valid dismissal.

Mass Dismissals

In the case of large-scale dismissals, the employer must comply with special provisions of the Act Against Unfair Dismissal. Dismissals are considered to be large-scale or mass dismissals if

- more than five employees are dismissed in a business site where more than 20 and less than 60 employees are employed;
- more than 25 employees or more than 10 percent of the regular work force are dismissed in a business site where at least 60 and less than 500 employees are employed;
- or
- 30 employees or more are dismissed in a business site where 500 or more employees are employed,

in each case within any given period of 30 calendar days. To be dismissed refers not only to employees being given notices of termination, but also to all other terminations initiated by the employer. The period of 30 calendar days refers to the point of time at which the employee is notified of the dismissal, not the point of time at which the employment relationship terminates.

In case of planned mass dismissals, a number of special notice requirements must be fulfilled before the employees are notified; otherwise the dismissals are null and void. In particular, the works council must be consulted, and employer and works council must discuss the intended mass dismissal with a view to preventing or limiting terminations and mitigating their effects. In addition, the Federal Employment Agency must be notified about the mass dismissal in advance.

Termination of Employment – Legal Consequences

Mutual Obligations

Mutual good faith obligations continue after the employment relationship. The employees are obliged to return all equipment, including documents and copies thereof, that they received for purposes of carrying out their employment obligations.

Employees' Rights on Termination by Employer

Employees may file a complaint alleging invalid termination with the employment court within three weeks of the date on which they received the written termination notice. As a general rule, courts are bound to consider reinstatement of the employees before compensation. This means that, if the termination is found to have been invalid, the employers will not only be obliged to pay the employees' salary and other benefits until the day of the judgment, but they must also reinstate the employees into their former jobs and positions.

Only in specified and rare cases will the employees and employers be able to apply for dissolution of the employment contract even though a termination was invalid. The employee will need to demonstrate that, despite the termination being invalid, he or she cannot reasonably be expected to continue the employment relationship. Similarly, the employer will need to demonstrate that conducive cooperation with the employee for the

purposes of the business cannot be expected in the future. In these types of cases, the employees are awarded compensation by the court.

Unless expressly agreed otherwise, employees have a right to continue working until the end of the notice period. In specific cases, in particular if the works council has objected to the termination as outlined above, the employees must remain employed until the employment court reaches a final decision on their unfair dismissal claim. These rights may be enforced by the employees by way of a preliminary injunction.

Separation Agreements

Because of the difficulties and risks involved with a termination of an employee who is protected under the Act Against Unfair Dismissal, employers often try to reach a mutual separation agreement (*Aufhebungsvertrag*) with the employee.

In such agreements, the employee usually agrees to the termination of the employment contract against a severance payment by the employer. Such severance payments are freely negotiated, often along the lines described below. If reaching an agreement is the only possible way for an employer to terminate an employment contract, the severance payment offered may have to be higher in order to make the employee accept the offer.

Termination with Severance Offer

Employees typically do not have a statutory right to severance payment. However, a claim to a severance payment can arise if

- the dismissal is based on compelling business reasons,
- the employees did not file complaints against their dismissal within the three weeks period laid out above, and
- the employer notifies the employees in the termination notice of the termination being due to compelling business reasons, and of the possibility to opt for a severance payment instead of filing a complaint.

The amount of the severance payment is calculated upon the tenure of the dismissed employee: The employer must offer an amount of 0.5 monthly salaries for each year of the employment relationship, with a period of more than six months being rounded up to a full year.

Professional Reference

Irrespective of the manner of termination, the employer must provide the employee with a proper letter of reference.

Employers' Rights on Termination by Employee

If employees terminate the contract with the proper notice period, they are not required to provide any reasons.

If an employee terminates the employment without justification and without observing the proper notice period, a court may determine that the notice of termination is ineffective and that the employee is liable for any damages caused by breaching contractual duties. This can include the salary difference if a suitable substitute is only willing to work for a higher salary than what the employer would have paid to the employee, or any supplements to be paid to other employees who work overtime in order to fulfill the employee's tasks in his stead. The employee can also be liable for loss of profits suffered by the employer as a consequence of the employee's non-performance. However, practical experience shows that in most instances it is difficult – if not impossible – for the employer to claim and specify damages. As a consequence, some employment contracts contain contractual penalty clauses for this kind of breach of contract.

Payment in Lieu of Notice

German law does not recognize the concept of payment in lieu of notice. Employment relationships must be continued until the end of the notice period unless expressly agreed otherwise in writing with the employee by way of a separation agreement.

Transfer of Business Sites

General Considerations

If a business site or an identifiable part of a business site is transferred from one entity to another, the employment relationships of all employees who are attributable to the transferred business site transfer to the acquiring entity by operation of law. The acquiring entity takes over all rights and obligations of the employer under the employment relationship.

Very roughly speaking, such transfer of business site (*Betriebsübergang*) is deemed to take place if an acquiring entity continues a transferring entity's operations with assets acquired from the transferring entity in a way that mirrors the organizational structure and responsibilities of the transferring entity (e.g., producing the same product with the same machines and the same processes). Case law in this regard is manifold and complex. Therefore, it is essential to analyse carefully whether a transfer of a business site occurs in each individual scenario, taking into account all facts of the individual case.

Employers' Information Obligation

Prior to such transfer of a business site, the parties involved in the transfer have to inform the affected employees in writing about:

- the point of time or the planned point of time of the transfer;
- the reason for the transfer;
- the legal, economical, and social impacts of the transfer for the employees; and
- any planned measures with respect to the employees.

Employees' Objection Right

Each of the affected employees may object to the transfer of his or her employment relationship within a period of one month after proper notification about the transfer. The effect of such objection is that the objecting employee's employment relationship remains with the transferring entity.

However, if it is not possible for the transferring entity to continue the employment relationship, for instance because the entire business site has been transferred, the transferring entity may dismiss the objecting employee for compelling business reasons.

Objecting employees may cause serious problems for the transferring entity if only a part of the business site is transferred. In this situation, the transferring entity may not simply dismiss the objecting employees. Instead, it is generally obliged to undertake a proper social selection process as outlined above.

Also, the one-month objection period is not triggered if the notification does not meet the strict requirements set out by statutory and case law. In such a case, employees can object to the transfer of their employment relationship for an indefinite period of time. At least as long as this right is not forfeited, the transferring entity faces the possibility of returning employees beyond the regular one-month objection period.

Special Provisions Relating to Plant Closures, Cut-Backs, etc.

Small Employers and Business Sites with no Works Councils

In business sites in which no works council has been established and in companies with less than 20 regular employees, terminations in connection with a plant closure, cutback, etc., will follow the general rules for terminations for compelling business reasons.

Larger Employers and Business Sites with Works Councils – Interest Reconciliation Agreement

In companies with regularly more than 20 employees eligible to vote, the employer must provide complete information to the respective business site's works council before enacting any substantial change of business operation (*Betriebsänderung*), provided that such measure may involve material hardship for all or a substantial number of the business site's employees. Such substantial change of operation can, inter alia, be the shutdown of a business site or a workforce reduction of considerable size.

After the information has been given, the employer must consult and discuss the proposed changes with the works council in an effort to obtain the works council's consent to such measures. To that end, the employer must discuss and negotiate with the works council in an attempt to conclude a so-called interest reconciliation agreement (*Interessenausgleich*).

If an agreement on the necessity of the measures planned by the employer cannot be obtained, the law provides for various time-consuming mediation procedures. The employer must exhaust all possible means of coming to an agreement with the works council prior to the implementation of the proposed change.

Not seeking such agreement or deviating from an interest reconciliation agreement may result in the employer being obliged to compensate all employees affected by the change for any hardships suffered. This can include a loss of job (in which case a severance needs to be paid), but also, for instance, a loss in income or an increase in commuting costs, which must be compensated for a period of up to one year.

As far as dismissal protection is concerned, the Act Against Unfair Dismissal states that dismissals that result from substantial changes of operation can be subject to a formal simplification: The names of the employees to be dismissed may be specifically listed

within the interest reconciliation agreement. Such a list of names will result in a presumption that these employees shall be dismissed for compelling business reasons. The court may only review whether the employees were selected randomly. This considerably eases the strict principles of social selection. In practice, such lists must often be bought from the works council by providing more generous social measures to the affected employees.

Larger Employers and Business Sites with Works Councils – Social Plan

Typically, the works council has the power to impose a so-called social plan (*Sozialplan*) on the employer in case of a change of business operation. This social plan contains measures – such as severances and outplacement measures – which will compensate or mitigate the economic hardship suffered by the workforce in connection with the implementation of the operational change. Such social plan is generally at the centre of discussions between the management and the works council concerning a change of operation.

There are two situations in which the employer does not have to agree on a social plan. Firstly, a social plan is not required for business sites belonging to a company that has only been founded within the last four years. (This does not, however, apply to new companies created in the course of restructuring and reorganization of companies or groups of companies.) Secondly, in case of a reduction in operations of a business site or part of a business site that consists of dismissal of personnel only, i.e., without any other measure constituting a change in operation, a social plan is only required if specified minimum numbers of dismissals are exceeded.

Labor Disputes

The Right to Strike

The right to strike is a constitutional right.

Lock-Outs

According to the German Federal Employment Court, employers may use lock-outs as a counteraction against employees. However, lock-outs require a proportionality of the severity of the employer's sanction to the severity of the actions taken by the employees and trade unions against the employer.

Legal Consequences of Strikes

Employees on strike are not entitled to salary.

Dismissals are unjustified and, therefore, invalid if they are based on an employee's participation in a legal strike. In contrast and subject to certain exceptions, an employee who participates in an illegal strike can be terminated for misconduct. In such circumstances, employers can also be entitled to claim damages from strike organizations (e.g., trade unions) and striking employees.

Trade Unions and Employer Associations

Trade Unions, Employer Associations and their Role in the Work Place

The German constitution guarantees the protection of trade unions and employer associations based upon their function to protect and advance work and trade conditions. Therefore, employers are strictly prohibited from impeding the work of trade unions.

Tasks and Organization

The most important task of trade unions and employer associations is the negotiation and conclusion of collective bargaining agreements (*Tarifverträge*). These agreements stipulate wage levels and general working conditions (e.g., overtime regulations, holidays, terms of termination) for a large number of employees.

In particular, trade unions and employer associations

- influence working conditions through collective bargaining agreements and labor disputes;
- advise and care for their members;
- comment on all pertinent legislative plans; and
- designate and provide honorary judges for employment and social law courts and employer and employees' representatives for self-governing bodies, in particular for the administrative board of the Federal Employment Agency (*Bundesagentur für Arbeit*).

Trade unions are partly organized in accordance with industrial branches and partly in accordance with job categories.

Rights of the Individual Employee in Relation to Union Membership

Individuals not only have the right to join and be represented by a union, but also have the right not to join a union. In either case, they must not be discriminated against as a result of their decision. Also, union admission requirements must not discriminate against certain groups of persons.

Employee Stock Options

Stock options are a well-known compensation tool in the German market place. They are the same types as those known in all other industrialized countries, i.e., as virtual options, phantom shares, real life shares, etc.

In general, the granting of stock options by a foreign (e.g., US) parent company to employees in Germany is permitted. Depending on the specific structure of said stock options, certain regulatory issues (for example, prospectus obligations) may have to be addressed.

The establishment and material contents of a stock option plan set up by a German entity need to be in line with the requirements of German employment law. Depending upon its precise implementation, an (international) stock option plan established by the parent company abroad and under foreign law may also have to comply with German employment law if and to the extent it is applied to employees based in Germany. In particular, the principle of equal treatment and/or certain employee participation rights may become relevant in this context.

With respect to the potential tax implications of the intended granting of stock options, employers and employees working in Germany will have to be aware of the following general rules:

- Under German tax law, the difference between the fair market value of the shares acquired by the employee on the date at which the share transfer takes place (as a result of the exercise of the option) and the amount paid by the respective employee for such shares is regarded as income from employment and is thus subject to wage tax, solidarity surcharge and church tax (if applicable).
- The date of the share transfer (and not the date the options have been granted or the vesting occurs) constitutes the triggering event for tax purposes. In general, this applies equally to immediately exercisable options, tradable options, and options that can only be exercised or transferred after the expiry of a vesting period. However, if a tradable option is actually disposed of, such disposition constitutes the triggering event.
- A profit gained from a subsequent sale of shares acquired within the framework of a stock option plan is generally subject to the flat tax regime (*Abgeltungssteuer*) in Germany.

Your Contacts

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