

EMPLOYMENT

LAW

in Germany



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Employment Law

in Germany

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German Labor and Employment Law

The German Labor and Employment Law system is not codified in a special labor code, but can be found in various laws, including the German constitution (*Grundgesetz*), regulations, and collective bargaining agreements between employers, employers' associations, and unions. German Labor and Employment Law generally is intended to protect the employee.

As a consequence human resources directors and executives need practical solutions to comply with the ever-changing legal framework Germany has created for its work force. This *Hidden Secret* is for them and their international businesses and German operations who want an easy-to-use legal resource.

It is also available online, as *Employment Law in Germany* on the go:

<https://buse.de/insights/employment-law-germany>

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01

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Forms of Employment Agreements

The standard employment contract in Germany is for an indefinite period of time. An employment contract is concluded by an offer from the employer and an acceptance by the employee. An employee often (although considerable social change can be seen here) stays with her or his employer until she or he reaches retirement age, unless the employment is terminated before, or unless otherwise agreed by the parties.

Under the **Part Time and Fixed Term Employment Act** (*Teilzeit- und Befristungsgesetz*), however, other forms of employment are possible.

1. Fixed-Term Employment

There are two types of fixed-term employment contacts:

Fixed-term according to the calendar – i.e., fixed date – (*Befristung ohne Sachgrund*), and fixed-term established by the purpose of the employment (*Befristung mit Sachgrund*).

Fixed-term employment according to the calendar is established without a specific purpose, and is permissible for up to two years, § 14 para. 2 *Teilzeit- und Befristungsgesetz*.

Fixed-term employment established for a purpose is permissible for longer than two years. The *Teilzeit- und Befristungsgesetz* stipulates in § 14 para. 1 objective grounds that employers can use to initiate a fixed-term employment established by purpose:

- There is only a temporary need for the job
- The fixed term is agreed to following training or study, and is designed to facilitate the employee's transition to a subsequent job;
- The employee is substituting for another employee;
- The job or the work is designed for a fixed term;
- The fixed term is a probationary period;
- The fixed term is agreed to because of personal reasons on the part of the employee;
- The employee's salary comes from government budgets, which are assigned to that type of employment;
- The fixed term is agreed in a court settlement.

Any fixed-term employment contract must be in writing.

2. Part-Time Work

Part-time work is possible under § 6 to § 13 *Teilzeit- und Befristungsgesetz*. Employees who start with full-time jobs can request part-time work from their employers in offices of the company with more than 15 employees and if the employee has more than six months of seniority. The employer can object to such part-time work claims for business reasons. However, labor courts tend to grant part-time work to employees – particularly women with young children – if they file legal action after the employer has refused to consider their request.

01 | B
Hiring

Discrimination

The German Constitution prohibits discrimination and preferential treatment against any individual on the basis of gender, ethnic origin, race, language, country and descent, beliefs, or religious or political attitudes. Discrimination against disabled individuals is also unlawful in Germany. These guidelines apply to applicants for employment, as well as to current employees.

In addition the **General Equal Treatment Act** (*Allgemeines Gleichbehandlungsgesetz*) prohibits direct or indirect discrimination based on race, ethnic origin, sex, religion or belief, disability, age, or sexual identity. It is unlawful to discriminate against or to instruct to discriminate against in any employment. This includes, in particular, that it is unlawful to discriminate in connection with access to employment, to self-employment, or professional career and occupation as well as the employment and working conditions, vocational guidance and training. Such discrimination can lead to damage claims against the employer and senior staff. The *Allgemeine Gleichbehandlungsgesetz* calls for employers to compensate employees for any monetary damages resulting from discrimination and

financial damages for non-economic-losses. The employee may also refuse to work or file a complaint against the employer.

Discrimination against part time-workers is likewise unlawful under **§ 4 Part Time and Fixed Term Employment Act** (*Teilzeit- und Befristungsgesetz*).

Germany has adopted a law on the equal participation of men and women in leadership positions in the private and public sectors. According to **§ 76 para. 4 Stock Corporation Act** (*Aktiengesetz*) a gender quota of 30 percent applies to supervisory boards of companies that are listed or co-determined. The quota regulation therefore addresses stock companies, limited partnerships by shares (*Kommanditgesellschaft auf Aktien*) with more than 2000 employees and European Stock Corporations (*Societas Europaea*). These companies must comply with the quota, when assigning vacant supervisory seats. In case of non-compliance with the quota the election is invalid and the companies are required to leave the seats vacant (»empty chair«).

In addition, companies that are either listed or co-determined are obliged to set targets to increase the proportion of women on supervisory boards, management boards and at the top level management. As a minimum target is not intended, the affected companies can set their minimum targets on their own.

According to the **Remuneration Transparency Act** (*Entgelttransparenzgesetz – EntgTranspG*), male and female employees must receive equal pay for work of the same, similar or of equal value. In order to hold companies accountable to this equal pay requirement, employees can claim information from their employers, e.g. on the company's salary policy or promotion scheme (§§10-16 *EntgTranspG*).

Employment Applications

In Germany, employers may not seek information from applicants that is otherwise protected by law. For example, a prospective employer may not ask questions concerning religion, political attitude, or union membership, although exceptions are made for employers whose businesses are based on certain religious beliefs or political attitude. Nor may an employer seek information concerning pregnancy.

In addition, it is recommendable for employers in job interviews not to ask any questions related to race, ethnic origin, sex, religion or belief, disability, age, or sexual identity. Such questions could constitute discrimination claims under the **General Equal Treatment Act** (*Allgemeine Gleichbehandlungsgesetz*). The same applies to job offers/vacancies in the press or media.

If relevant to the specific job or position, the employer may seek information regarding criminal convictions. However, the employer can only consider an applicant's convictions that led to a criminal record under the **Federal Criminal Record Act** (*Bundeszentralregistergesetz*).

Under § 670 Civil Code (*Bürgerliches Gesetzbuch*), the employer is responsible for the employee's expenses in connection with an interview (e.g. travel, accommodations).

In an office where a Works Council is established, and where more than 20 individuals are employed, the Works Council must be informed before a new employee is hired, § 99 para. 1 Works Constitution Act (*Betriebsverfassungsgesetz*). If the employer wants to use a questionnaire for interviews, the design of such a document is subject to co-determination rights of the Works Council.

Use of Employment Contracts

It is essential that employers put a fixed-term employment contract in writing. Otherwise, by law, the employment will be for an indefinite period of time.

Under the **Documentation Act** (*Nachweisgesetz – NachwG*), after the first month of employment, the employer is required to provide to the employee a written document that includes at least the following information:

- Name and address of employer and employee;
- Date of commencement of the employment relationship;
- If a fixed-term contract, the term of the employment relationship;
- Place of work and, if the employee is required to travel, an indication that employment will take place at various locations;
- Description of tasks and duties;
- Remuneration, including extra pay, incentives, and special payments, and other components of the remuneration and pay day;
- Working hours;
- Annual vacation;

- Notice periods for termination of employment;
- Reference to collective bargaining agreements and other agreements between the employer and employees' representatives if applicable to the employment relationship.

Contracts of interns have to be provided directly (§ 2 para. 1a *NachwG*). It is quite common in Germany to use non-compete clauses in employment contracts for key employees. These must be in writing, and are fully enforceable if the requirements in §§ 74 to 75d German Commercial Code (*Handelsgesetzbuch*) are met.

 See page 60 below.

Advertising/Recruitment

Employers should ensure to comply with the laws and guidelines described in [▶](#) page 14 above, when advertising or recruiting for employees in Germany. In particular, it is important to comply with the **General Equal Treatment Act** (*Allgemeine Gleichbehandlungsgesetz*).

[▶](#) See page 11 above.

In case of recruiting a temporary worker, further obligations for employers must be taken into account. Temporary work is a form of employment where workers are employed by temporary work agencies which in return hire them out to a third party (the client company) where they work temporarily under the client company's direction and supervision. The temporary worker is hereby considered an employee of the temporary work agency.

The **Personnel Leasing Act** (*Arbeitnehmerüberlassungsgesetz*) limits the maximum period for a temporary worker to 18 months. The temporary worker has to be explicitly mentioned in the contract to avoid any circumvention of the law.

In addition the Equal Pay Principle obliges the temporary work agency to pay the same wage that a comparable employee of the hiring company earns. Exemptions are generally only allowed during the first 9 months. After that, the same wage compared to an employee of the hirer must be paid. Any violation of the *Arbeitnehmerüberlassungsgesetz* can result in heavy fines, up to € 500.000.



Employment References/ Background Investigations

In Germany, employers are generally free to check employment references and other information presented by job applicants. This can be done by inquiries to third parties and, in particular, former employers. However, the Constitutional individual personal right of the applicant (*Allgemeines Persönlichkeitsrecht*), EU General Data Protection Regulation (GDPR) and Federal/State data protection legislation (**Federal Data Protection Act – Bundesdatenschutzgesetz**) have to be considered in terms of privacy and protection of personal data.

01 | G
Hiring

Transfer of Undertakings (TUPE)

In § 613a Civil Code (*Bürgerliches Gesetzbuch*) Germany has enacted European Union TUPE regulations (**Regulation 2001/23/EG**). If a transfer of undertakings takes place, the receiving company steps into the employer position for all employees affected by the transfer of undertaking. The affected employees have the right to object the transfer of their employment relationship to the receiving company. The objection has to be filed by the employee within one month notice after being informed about details of the transfer. German labor courts tend to review the information given by the employer with high scrutiny. Failing to meet the test applied by the courts can result to objections to the transfer far beyond the one month notice period.



02

Compensation and Benefits

A

Minimum Wage

B

Minimum Age

C

Wage Payments

D

Child Labor

E

Health Insurance
and other
Social Insurance

F

Overtime Issues

G

Workday/
Workweek/
Work Hours

Minimum Wage

The **Act on Minimum Wages** (*Mindestlohngesetz – MiLoG*) stipulates in Germany a minimum wage of per working hour (2019: € 9,19). The minimum wage generally applies to all industries and private and public sector and is indispensable (§ 3 *MiLoG*). The law allows exemptions for e.g., internships, compulsory practical trainings, employees without vocational training younger than 18 years old (§ 22 para. 2 *MiLoG*, § 2 **Young Individuals' Protection in Employment Act – Jugendarbeitsschutzgesetz**) or employees hired from long-term unemployment (§ 22 para. 4 *MiLoG*) and includes transitional rules for some industries. But employers have to consider very carefully if their intern/trainee might in fact be an employee and therefore addressed by the Act on Minimum Wages.

In addition to the *MiLoG* wage is often specified in collective bargaining agreements between employers and unions. These agreements are binding for employers if they are members of an employer association or if they have negotiated bargaining agreements with the unions on their own, without the employer association (*Haustarifvertrag*).

Wages agreed to between employers and employees that do not exceed two-thirds of the amount in the relevant bargaining agreement are deemed unfair and void; if this is the case, payments must be made according to the relevant collective bargaining agreement.

Collective bargaining agreements can be declared generally binding by government order, **§ 5 Act on Collective Bargaining Agreements** (*Tarifvertragsgesetz*). In this case, the agreement is binding for all employers and employees in the particular industry.

The minimum wage also applies for employees of foreign companies operating in Germany, regardless if the foreign company has an office or site in Germany or not. If a collective agreement states a higher minimum wage than the statutory one, this higher wage is binding and the employer may not cut the higher wage.

Any agreement cutting, excluding or ignoring the minimum wage is legally void and not enforceable. Furthermore employers are obliged to keep records of the start, end and duration of the individual's daily working time

(*Mindestlohdokumentationspflichtenverordnung – MiloDokV*). This documentation obligation addresses only those economic sectors or branches of industries mentioned in §§16, 17 *MiLoG* which refers to § 2a of the **Act to Combat Clandestine Employment** (*Schwarzarbeitsbekämpfungsgesetz – SchwarzArbG*).

Violations of the statutory minimum wage may be punished with a fine up to € 500,000 (§ 21 para. 3 *MiLoG*). In addition to the employer also the instructing entrepreneur is liable.

02

Compensation and Benefits

| B

Minimum Age

Under the **Young Individuals' Protection in Employment Act** (*Jugendarbeitsschutzgesetz*), the minimum age for employment is 13 years. The employment of minors is permissible only with the parent's consent and if the job is suitable for children. *Jugendarbeitsschutzgesetz* defines a »minor« as any person under the age of 18 years.

02

Compensation and Benefits

| C

Wage Payments

Germany has no general legislation concerning standard pay days in employment relationships. However, it is common that salary is paid monthly at the end of the calendar month for work performed during that month. The **Act on Minimum Wages** (*Mindestlohngesetz – MiLoG*) stipulates that minimum wage has to be paid at the latest on the last bank day of the month following the month where the employee has performed her/his work, § 2 para. 1 no. 2 *MiLoG*.

Under the **Documentation Act** (*Nachweisgesetz*) ([➤](#) see page 16 above) an employer must provide written information regarding when salary payments will be made.

02 Compensation and Benefits | D

Child Labor

The **Young Individuals' Protection in Employment Act** (*Jugendarbeitsschutzgesetz*) regulates the employment of minors. Employers who want to employ persons under the age of 18 are required to comply with this law. Employment of persons under the age of 13 is not permitted.

02

Compensation and Benefits

| E

Health Insurance and other Social Insurance

In Germany, statutory social insurance is mandatory for most employees. It covers pension insurance, unemployment insurance, home and institutional care insurance, employee accident insurance, and health care insurance. The employer and employee each pay about 50% of the social insurance premiums. Currently, the payment amounts to approximately 40% of an employee's gross monthly salary, with the employee and employer each paying about 20%.

The statutory health insurance under the **Social Code No. V** (*Sozialgesetzbuch Fünftes Buch*) performs and promotes health care and avoidance of illness. It includes medical treatment, dental treatment, provision of pharmaceuticals, etc.

Overtime Issues

Germany has no regulations dealing explicitly with extra salary for overtime work. The regular working day is eight hours. In general, the employer will pay for overtime work. In addition, many collective bargaining agreements provide for extra salary for overtime work and/or night work. German labor courts take the view that senior employees and executives may be expected to work overtime without any additional payment.

If a Works Council is established, any overtime work is subject to co-determination under the **Works Constitution Act** (*Betriebsverfassungsgesetz*).

02

Compensation and Benefits

| G

Workday/Workweek/Work Hours

Under the **Hours of Employment Act** (*Arbeitszeitgesetz*), a workday should not exceed eight hours. Employees may work up to 10 hours per day if, within six calendar months or 24 weeks, the average working hours per day do not exceed eight hours.

Employees who have worked more than six but fewer than nine hours in a workday must be given a break of at least 30 minutes; those who work longer than nine hours must be granted one 45-minute break. Employees must also have a break of at least 11 hours between workdays.

Work on Sundays and bank holidays is generally not permitted.

The *Arbeitszeitgesetz* includes various exemptions to provide flexibility to the medical care, health, restaurant and other industries.



03

Time Off / Leaves of Absence

A

Paid Vacation

B

Paid Sick Leave

C

Paid Time Off

D

Family and
Other
Medical Leaves

E

Disability
Leaves

F

Pregnancy
Leave/
Paternal Leave

G

Caregiver
Leave

H

Workers'
Compensation

Paid Vacation

Under the **Federal Vacation Act** (*Bundesurlaubsgesetz*), the minimum amount of paid vacation per calendar year is 24 days. This number is based on a workweek of six days, and can be less if the workweek is shorter than six days. Thus, for example, it is possible to grant 20 days of vacation based on a five-day workweek.

Many collective bargaining agreements provide 30 days of vacation per year for a workweek of five days. It is also not uncommon to agree on that number in employment contracts.

To use her or his vacation claim, an employee must apply for vacation on a certain date and request approval from her or his employer. The law orders the employer to approve the request if there are no urgent operational reasons not to do so.

Unused vacation claims have to be paid at termination if they cannot otherwise be used for leave of absence during notice periods.

03

Time Off / Leaves of Absence

| B

Paid Sick Leave

Germany requires employers to provide employees with six weeks of paid sick leave for each illness that result in incapacity to work. The sick pay leave is regulated under the **Sick Pay Act** (*Entgeltfortzahlungsgesetz*).

Employees are required to inform their employer in due course if they are incapable of working and also how long such incapability may presumably last. Employees with three days of sick leave must produce a written medical certificate no later than the next (fourth) day of incapability attesting to the illness.

Following six weeks of sick pay by the employer, employees will receive sick allowance by their health insurance in the amount of 70 % of their last salary. The maximum period for this coverage is 78 weeks. However, the system in Germany is changing rapidly, and further developments in legislation are expected.

03

Time Off / Leaves of Absence

| C

Paid Time Off

Germany observes up to 12 paid public holidays, depending on the state. The minimum number of paid public holidays is nine.

Employers often grant paid time off to employees during their notice period. It is important to note that time off can only be granted if the employee agrees or if this option is included in the employment contract. German labor courts have ruled that, unless otherwise stipulated in the employment contract, employees are entitled to continued employment through the end of their contract and then cash out the accrued leave.

03

Time Off / Leaves of Absence

| D

Family and Other Medical Leaves

Germany has extensive legislation to protect pregnant employees, employees with newborn children, and employees with children up to the age of three. [➤](#) See page 38 below.

03

Time Off / Leaves of Absence

| E

Disability Leaves

Under German labor and employment law, disabled individuals are protected. **Social Code No. IX** (*Sozialgesetzbuch Neuntes Buch – SGB IX*) stipulates promotion, protection, and reintegration of disabled persons.

Under § 208 *SGB IX*, disabled persons have an additional vacation claim of five days per vacation year.

Pregnancy Leave/Parental Leave

The **Maternity Protection Act** (*Mutterschutzgesetz*) excludes women from performing certain tasks during their pregnancy and for eight to 12 weeks following the birth of the child. A pregnant employee does not have to work during the last six weeks before the (expected) birth of her child.

Under § 15 of the **Federal Parents Education and Parents Allowance Act** (*Bundeselterngeld- und Elternzeitgesetz – BEEG*) parents of a newborn child can claim up to three years of unpaid time off to take care of their child. This total time off can be claimed by the mother and father simultaneously or individually. Employees who take time off under the Act are permitted to work up to 30 hours per week (i.e., part-time) during this period with either their current or another employer. Employees who take time off have special protection against termination during their time off (§ 18 BEEG).

In addition they can claim payments from public funds to pay up to 12 months of this time in the amount of 67% of the last net wage (*Basiselterngeld*), at least € 300 per month (§ 2 BEEG). If both parents take

time off, the time paid by public funds can be extended up to 14 months (§ 4 para. 4 *BEEG*). The »Elterngeld PLUS« stipulates further options to combine employment and education. Employees who want to do part-time work can split their claim among 24 months with half of payments from public funds, at least € 150,00 per month (§ 4 para. 3 *BEEG*). The claim can be extended up to 28 months if both parents are working for four months between 25 – 30 hours per week at the same time. Both payments can be combined flexible. Main differences between *Basiselterngeld* and »Elterngeld PLUS« are the promotion period and the higher number of parents working in part-time under »Elterngeld PLUS«.

Caregiver Leave

The **Home Care Leave Act** (*Pflegezeitgesetz – PflegeZG*) entitles employees to organize nursing of close relatives or nurse them themselves and regulates the consequences for the employment relationship. Employees who have to organize nursing care for close relatives because of an urgent need must be granted up to 10 unpaid days time off (§ 2 *PflegeZG*). Employees who do not receive compensation by the employer can demand a compensation for the loss of wages by the home and care insurance (§ 44a para. 3 *Social Code No. XI – Sozialgesetzbuch Elftes Buch*). In companies employing more than 15 employees, they can claim up to six unpaid months off or part-time work per close relative to provide care (§ 3 para. 1 *PflegeZG*). The salary difference is covered by interest-free credits accrued in monthly rates. Employees taking leave under the Act have special protection against termination of their employment during the time off (§ 5 *PflegeZG*).

The **Family Caregiver Act** (*Familienpflegezeitgesetz – FPfZG*) aims to facilitate the balance of work and family caregiving. In companies employing more than 25 employees the Act stipulates a claim of up to 24 months reduced working time up to 15 hours per week for employees who

are active as caregivers to family members at home (§ 2 para. 1 *FPfZG*). The salary difference is covered by interest-free credits accrued in monthly rates. Employees taking leave under the Act have special protection against termination of their employment during the time off (§ 5 *PflegeZG*, § 2 para. 3 *FPfZG*). Both caregiving models can be combined flexibly.

03

Time Off / Leaves of Absence



Workers' Compensation

Germany has under the **Social Code No. VII** (*Sozialgesetzbuch Siebtes Buch*) a system of workers' compensation insurance that provides coverage in case of accidents at the workplace, including accidents that occur on the way to or from work, and disease resulting from the job. The employer alone is responsible for the payments to this part of the social security system; the employee is not expected or required to contribute to the system.



04

Termination Issues

A

Wrongful
Termination
Claims

B

Discrimination
Claims

C

Severance Pay

D

Harassment

Wrongful Termination Claims

In Germany, it is possible to terminate employment contracts with (*fristgemäße Kündigung*) or without notice, with immediate effect (*fristlose Kündigung aus wichtigem Grund*). Termination without notice has to be issued within two weeks of obtaining knowledge of the facts for the termination. It is also possible to issue constructive dismissal and change the essential conditions of employment unilaterally (*Änderungskündigung*). The *Änderungskündigung* aims to change the working conditions and not to terminate the employment.

The respective minimum notice periods can be found in the Civil Code, collective bargaining agreements, and the employment contract itself. Statutory notice periods increase with the seniority of the employee. The standard notice period is four weeks to the 15th or end of the calendar month, and increases to seven months to the end of the calendar month after 20 years of employment. Upon agreement by the employer and employee, a worker still in his or her probationary period has a notice period of two weeks.

The **Protection Against Dismissal Act** (*Kündigungsschutzgesetz*) protects employees against wrongful termination. The Act previously applied to employees who work in branches with more than five employees and who have been employed for more than six months; respectively the branch must have more than 10 employees. Under the *Kündigungsschutzgesetz*, termination is permissible for the following causes:

- Personal reasons;
- Conduct; or
- Business reasons.

Termination based on personal cause is often a result of illness of the employee. If an employee is incapable of work due to illness, the employer may give notice if:

- A negative prognosis for the employee's future health applies;
- the employer's business is affected seriously by the incapable employee, e.g., is experiencing a financial burden because of paying for sick leave (👉 see page 35 above); and
- the employer's interest to end the employment contract outweighs the employee's interest in keeping her or his job. German labor courts tend to review carefully every detail in these types of cases.

German labor courts have ruled that a valid termination based on inappropriate conduct requires in general a prior warning by the employer and continued inappropriate conduct after the warning.

Termination based on business reasons requires, for example, an employer's decision to restructure the business in a way that certain jobs or positions in the organization are no longer needed. In a process called social election (*Sozialauswahl*), the employer then has to identify who among the employees should be given notice if more than one job or position is redundant. In the process of *Sozialauswahl*, the employer has to

consider the following factors for the employee:

- Seniority;
- Age;
- Number of dependents or family maintenance obligations; and
- Disability (if any).

The employee with the highest factor(s) in the *Sozialauswahl* keeps her or his job.

It is important for employers in Germany to know that an employee who brings legal proceedings in front of a labor court claiming wrongful termination may be entitled not only to reinstatement to her or his former position, but also to payment of outstanding salaries. The employee can claim remuneration for the months during which she or he did not receive her or his salary payment because the employer thought the employment relationship had been terminated.

However, the *Kündigungsschutzgesetz* permits employers to avoid litigation in case of termination for business reasons by offering severance

pay equal to one-half month's gross salary for each year of service to the company.

In offices where Works Councils are established under the **Works Constitution Act** (*Betriebsverfassungsgesetz*), the council must be informed before any employee termination is issued. The Works Council has one week to inform the employer about any concerns regarding the intended dismissal. This period is three days in case of intended termination without notice.

04

Termination Issues

| B

Discrimination Claims

In Germany employers can face claims for direct or indirect discrimination on the basis of race, on the grounds of ethnic origin, sex, religion or belief, disability, age, or sexual identity under the **General Equal Treatment Act** (*Allgemeines Gleichbehandlungsgesetz*). [➤](#) See page 11 above. The individual discriminated against can sue for damages or non-financial losses, may refuse to work, and may file a complaint with the relevant department of the company or with the **Federal Anti-Discrimination Agency** (*Antidiskriminierungsstelle des Bundes*). Claims for damages or non-financial losses must be made in writing within a period of two months the most recent discriminatory conduct; otherwise the claim lapses.

04

Termination Issues

| C

Severance Pay

In Germany, employers are generally not required to offer severance pay to employees who are terminated. However, in an effort to avoid litigation, enacted legislation permits employers to offer severance pay to employees who are laid off for business reasons.

➤ See page 44 above.

04

Termination Issues

| D

Harassment

The § 3 para. 4 of the **General Equal Treatment Act** (*Allgemeines Gleichbehandlungsgesetz*) provides protection against sexual harassment at the work place. The affected individual can institute legal proceedings against the employer for damages or non-financial losses.

➤ See also page 11 above.

05

Layoffs/Work Force Reduction/Redundancies

A

Advance Notice,
Negotiations
with
Works Council,
Reconciliation of
Interests and
Social
Compensation
Plan

B

Severance
Pay

C

Benefits

D

Use of
Separation
Agreements

Advance Notice, Negotiations with Works Council, Reconciliation of Interests and Social Compensation Plan

The **Works Constitution Act** (*Betriebsverfassungsgesetz – BetrVG*) stipulates that the Works Council has to be informed in due course and in detail concerning the intended layoffs/work force reductions, even before the process is started. This is required by law if a change of business/alteration (*Betriebsänderung*) is started by the employer in companies with more than 20 employees. Depending on the size of the company, the employer must also inform the following employee committees:

- Finance Committee (*Wirtschaftsausschuss*). This committee, which is outside the Works Council, needs to be informed separately about the economic matters of the company.
- Central Works Council (*Gesamtbetriebsrat*) and Combine Works Council (*Konzernbetriebsrat*), if established.
- European Works Council (*Europäischer Betriebsrat*), if there is one, needs to be involved in the process, based on the **European Works Council Law** (*Gesetz über Europäische Betriebsräte*), if the intended layoff/work force reduction affects companies in Germany as well as in other memberstates of the European Union.


Included among the information shared with the Works Council should be written documents detailing the financial situation of the company and any other information as required by the Works Council.

Experience has shown that the first disputes with the Works Council or the unions often occur in this early phase of information sharing. Works Council and unions often claim insufficient information, or even the complete lack of information at this point. From the employer's point of view, it is, of course, essential to present to the Works Council only as much information as legally required.

During the negotiation phase prior to the change of business/alteration (*Betriebsänderung*), the company negotiates a reconciliation of interest (*Interessenausgleich*) and social compensation plan (*Sozialplan*) with the Works Council.

The reconciliation of interest is an agreement between the employer and the Works Council that describes the company's intended restructuring (in particular, the changes in the organization and the number of employees to be dismissed); the schedule for termination; and other related measures.

According to the *Betriebsverfassungsgesetz*, any approval of the Works Council concerning reconciliation of interests and termination of the respective employees is not required. However, the law stipulates that the employer has to at least try to reach agreement with the Works Council concerning a reconciliation of interests. This means that the employer must undertake good-faith negotiations, even if they fail in the end.

In the reconciliation of interests, for example the criteria pursuant to which employees are going to be dismissed are based on data given by the social election ( see page 47 above) under the **Protection Against Dismissal Act** (*Kündigungsschutzgesetz*). It is extremely important that the social election is performed without any material mistakes, since every mistake puts the legal validity of the termination at risk for possible litigation in front of the labor courts.

The social compensation plan is an agreement between the employer and the Works Council that stipulates the social (financial) compensation for the layoff/work force reduction. In particular, the social compensation plan

covers any losses of present possession and any financial losses for the employees in connection with the termination.

Unlike the reconciliation of interests, the social plan agreement is enforceable by the Works Council. This means that if the negotiations on the social compensation plan fail, the Conciliation Committee (*Einigungsstelle*) determines the scope and extent of the financial compensation for the employees who are to be laid off. The procedure of the Conciliation Committee is similar to an arbitration process, and its decision is binding for both the employer and the Works Council.

The Works Council must also be informed and consulted with regarding any so-called mass layoffs, under **§ 17 para. 2 sentence 1 Protection Against Dismissal Act** (*Kündigungsschutzgesetz*). And, finally, the **labor office** (*Agentur für Arbeit*) has to be informed concerning any intended layoffs, including details on the number of affected employees. The information has to arrive at the labor office prior to any termination.

05

Layoffs/Work Force Reduction/Redundancies

| B

Severance Pay

Employers are generally not required to provide severance pay for employees who are laid off. However, a social compensation plan agreed to with the Works Council (and which the Works Council can legally claim) can require respective payments in case of workforce reductions. Such an agreement is binding for employers.

05

Layoffs/Work Force Reduction/Redundancies

| C

Benefits

Employers are not required to provide benefits except the agreed salary for employees who are laid off. As with severance pay, however, a social compensation plan agreed to with the Works Council can require respective payments in case of workforce reductions. Such an agreement is binding for employers.

05

Layoffs/Work Force Reduction/Redundancies

| D

Use of Separation Agreements

Separation Agreements are often used in Germany to avoid litigation. They are in general fully enforceable.

However, not all claims can be settled by a separation agreement. In particular, it is not permissible to waive claims from collective bargaining agreements and minimum wage in a separation agreement. Therefore, when drafting such an agreement, it is important to review in detail what claims should be settled. German labor courts generally require employers to inform employees about possible consequences, e.g., in tax and social security law, when negotiating a separation agreement.

06

Unfair Competition/ Covenants Not to Compete

A

Trade Secrets

B

Covenants
Not to Compete

C

Non-Solicitation
of Employees
and Customers

06

Unfair Competition/Covenants Not to Compete

| A

Trade Secrets

An employee bound by an employment contract may not disclose any confidential information concerning her or his employer's business. Confidential information refers to material aspects of an employer's business and trade secrets.

06

Unfair Competition/Covenants Not to Compete

| B

Covenants Not to Compete

Under § 110 **Industrial Code** (*Gewerbeordnung*) and § 74 to § 75f **Commercial Code** (*Handelsgesetzbuch*), the employer and employee can agree on covenants not to compete after termination of the employment contract. Such agreements will be enforceable if:

- The period of non-covenant does not exceed two years;
- the non-covenant agreement is necessary to protect the employer's business;

- the agreement does not jeopardize the employee's future professional career;
- the employer pays to the employee a financial compensation of at least 50% of all remuneration and benefits at the date of termination of the employment contract for the period of non-covenant; and
- the agreement is agreed to in writing.

Prior to termination of the employment contract, any competitive actions by the employee in the employer's business is unlawful, and can be used by the employer to terminate the employee for cause, in many situations even with immediate effect.

06

Unfair Competition/Covenants Not to Compete



Non-Solicitation of Employees & Customers

Agreements of non-solicitation are in general enforceable in Germany. However, they are often considered to be covenants not to compete with respective prerequisites to be enforceable, as listed above (➤ see page 60 above). Legal restrictions can apply to agreements between two (or more) employers, stipulating non-solicitation or no-hire clauses for employees.



07

Personnel Administration

A

Required
Postings

B

Required
Training

C

Personnel
Records

D

Meals and
Rest Periods

E

Payment
Upon
Discharge
or Resignation

F

Giving
Employment
References

G

Recordkeeping

Required Postings

As discussed above (➤ see page 16 above), under the **Documentation Act** (*Nachweisgesetz*), after the first month of employment, the employer is required to provide an employee with a written document that includes at least the following information:

- Name and address of employer and employee;
- Date of commencement of the employment relationship;
- If a fixed-term contract, the term of the employment relationship;
- Place of service, and, if the employee is required to travel, an indication that employment will take place at various locations;
- Description of tasks and duties;
- Remuneration, including extra pay, incentives, and special payments, and other components of the remuneration and pay day;
- Working hours;
- Annual Vacation;
- Notice periods; and
- Reference to collective bargaining agreements and other agreements between the employer and employees' representatives if applicable to the employment relationship.

In addition employers are required to post the following notices:

- A copy of the **Hours of Employment Act** (*Arbeitszeitgesetz*).
- A copy of the **Closing Time Act** (*Ladenschlußgesetz*) if the employer's business is sales or retail.
- A copy of the **General Equal Treatment Act** (*Allgemeines Gleichbehandlungsgesetz*) and **§ 61 b Labor Court Act** (*Arbeitsgerichtsgesetz*).
- A copy of the **Young Individuals' Protection in Employment Act** (*Jugendarbeitsschutzgesetz*) if any minors are employed.
- A copy of the **Maternity Protection Act** (*Mutterschutzgesetz*) if there are more than three female employees;
- Any applicable collective bargaining agreements; and
- if a Works Council is established, any shop agreements between the Works Council and the employer.

07

Personnel Administration

| B

Required Training

Germany generally does not require employment-related training for management staff. However, as in other countries, training can reduce legal claims arising from the employment relationship and can make

existing claims much more cost-effective to defend. German anti-discrimination law ([➤](#) see page 11 above) requires employers to take effective steps to ban discrimination from the work place. Such steps can be training of employees and management in anti-discrimination laws.

We recommend that management staff in Germany be trained in the areas of hiring and wrongful dismissal, where the **Protection Against Dismissal Act** (*Kündigungsschutzgesetz*) is applicable.

Training in the basics of labor and employment law is mandatory for employees who are members of Works Councils.

07

Personnel Administration



Personnel Records


Under **§ 83 Works Constitution Act** (*Betriebsverfassungsgesetz*), all employees have the right to inspect her or his personnel file. She or he may also include a member of the Works Council in this inspection. An employee may also request that any written statements concerning her or his employment relationship be kept in the file.

07

Personnel Administration

| D

Meals and Rest Periods

Under the **Hours of Employment Act** (*Arbeitszeitgesetz*), employers must provide their employees with rest periods. Specifically, employees who have worked more than six but fewer than nine hours in a workday must be given a break of at least 30 minutes; those who work longer than nine hours must be granted a 45-minute break.  See page 31 above.

07

Personnel Administration

| E

Payment Upon Discharge or Resignation

An employee whose employment terminates must be paid all wages due and owing, including all accrued and unused vacation time. If the employer terminates the employee with notice, she or he is often asked to take unused vacation time during the notice period.

In case of termination, the employer has to settle and balance the employment as agreed to in the employment contract or, in case of termination without notice, without unreasonable delay.

Giving Employment References

Under § 109 Industrial Code (*Gewerbeordnung*), employees are entitled to a written reference. The law distinguishes between a simple (*einfach*) and a qualified (*qualifiziert*) reference. The former includes statements concerning only the duration of employment and a description of job duties. The latter includes that same information, as well as additional statements concerning the employee's conduct and performance.

Labor courts in Germany have ruled that employers have to meet certain high standards when giving a reference. In particular, the reference has to be favorable for the employee and must not hinder her or his future professional career.

07

Personnel Administration

| G

Recordkeeping

German Labor and Employment Law has various recordkeeping requirements, many of which are dependent on the employer's business. Specifically:

- Under **§ 16 para. 2 Hours of Employment Act** (*Arbeitszeitgesetz*), the employer must record any overtime work.
- Under **§ 7 para. 2 sentence 4 Personnel Leasing Act** (*Arbeitnehmerüberlassungsgesetz*), employers who leases out employees must keep their personnel files ready for inspection by government agencies for three years.
- Under **§ 19 Posted Workers Act** (*Arbeitnehmerentsendegesetz*), under certain circumstances, the employer must keep employee files regarding working time ready and available for inspection for at least two years.

Employers should seek legal advice concerning other recordkeeping requirements for their businesses.



08

Privacy

A

Drug
Testing

B

Personnel
Records
and
Information

C

Off-Duty
Conduct

D

Medical
Information

E

Searches

F

Lie
Detector
Test

G

Social
Security
Numbers

H

Finger-
prints

I

Surveillance
and
Monitoring

Legal Framework

Much like other countries of the European Union, Germany has high standards for protecting privacy and data of its citizens, especially with respect to the employment relationship.

The German Constitution guarantees the right of informational self-determination (*Recht auf informationelle Selbstbestimmung*), which refers to restrictions on the collection, storage, and use of information and data related to individuals (*personenbezogene Daten*).

The collection, storage, and use of personal data are restricted by the **EU General Data Protection Regulation**, the **Federal Data Protection Act** (*Bundesdatenschutzgesetz – BDSG*) and the **State Data Protection Acts** (*Landesdatenschutzgesetze*).

The *Bundesdatenschutzgesetz* grants employers the right to collect, process and use employee data for employment-related purposes, in particular recruiting and hiring, carrying out or terminating the employment. § 26 para. 1 sentence 2 BDSG is the legal basis for corporate investigations, where an employer wants to investigate misconduct or

even illegal behavior at the work place. The legal basis to collect, process and use employee data for employment-related purposes is § 26 para. 1 sentence 1 BDSG.

Where a Works Council is established, the use of personal data by the employer can be subject to co-determination under the **Works Constitution Act** (*Betriebsverfassungsgesetz*).

08 | A

Privacy

Drug Testing

German employers may conduct drug tests on applicants for employment and on current employees if they give their consent. There is no general obligation for employees to agree to a drug test, unless a reasonable suspicion is raised that could affect their ability to work. In this case, refusing to give consent can lead to disciplinary action against the employee.

Where a Works Council is established, drug testing can be subject to co-determination rights of the Works Council under the **Works Constitution Act** (*Betriebsverfassungsgesetz*).

Personnel Records and Information

German employers are required to protect the personnel files of their employees from disclosure. Under the **Works Constitution Act** (*Betriebsverfassungsgesetz*), however, employees have the right to inspect their own files. [↪](#) See page 66 above.

Off-Duty Conduct

Employers can only take disciplinary action against employees for off-duty conduct if the conduct has an impact on the employment relationship. The **Federal Labor Court** (*Bundesarbeitsgericht*) has ruled, for example, that a professional driver who loses her or his driving license because of alcohol abuse can be dismissed for cause. However, off-duty political or social activity does not, in general, give sufficient basis for any kind of disciplinary action by the employer.

08 | D
Privacy

Medical Information

Medical information is personal data and therefore is protected under the **EU General Data Protection Regulation**, the **Federal Data Protection Act** (*Bundesdatenschutzgesetz*) and the **State Data Protection Acts** (*Landesdatenschutzgesetz*). Employers are required to comply with the requirements of these acts.

08 | E
Privacy

Searches

Generally, German Labor and Employment Law views searching employee property or even searching the employee personally as grievous encroachment of the employee's right to privacy. Searches are only permissible if there is reasonable suspicion of gross misconduct or criminal activity to justify them.

Lie Detector Test

German employers cannot require employees to take a polygraph test as a condition of continued employment.

Social Security Numbers

Social security information – as with other personal data – is subject to protection under the **EU General Data Protection Regulation**, the **Federal Data Protection Act** (*Bundesdatenschutzgesetz*) and the **State Data Protection Acts** (*Landesdatenschutzgesetze*). Employers have to comply with the requirements of these acts.

08 | H
Privacy

Fingerprints

German employers cannot require employees to furnish their fingerprints as a condition of continued employment.

08 | |
Privacy

Surveillance and Monitoring

In Germany, surveillance and monitoring at the workplace can be regarded as a grievous encroachment on the employee's right to privacy. Such action is permissible only if there is reasonable suspicion of inappropriate behavior or criminal activity. German law prohibits 24/7 surveillance and monitoring at the workplace.

It is, however, permissible for employers to supervise the job-related conduct and performance of their employees.

Where a Works Council is established, surveillance and monitoring can be subject to co-determination under the **Works Constitution Act** (*Betriebsverfassungsgesetz*).



09

Employee Injuries/Workers' Compensation

Employee injuries in Germany are covered by statutory employee accident insurance under the **Social Code No. VII** (*Sozialgesetzbuch*).

 See page 41 above.



10

Unemployment

In case of unemployment, employees can receive payments from unemployment insurance under the **Social Code No. III** (*Sozialgesetzbuch – Drittes Buch*).



11

Health & Safety

Laws of particular importance for health & safety at work in Germany are, for example, the **Employee Protection at Work Act** (*Arbeitsschutzgesetz*), the **Act on Works Physicians, Safety Engineers and Other Specialists for Employee Safety** (*Gesetz über Betriebsärzte, Sicherheitsingenieure und andere Fachkräfte für Arbeitssicherheit*), and the **Federal Act on Immissions Protection** (*Bundesimmissionsschutzgesetz*).

An employer's compliance with these laws and other health & safety regulations is monitored and enforced by government agencies. Failure to comply can result in fines.



12


Unions & Industrial Relations

In Germany, Industrial Relations cover on one hand the employee's co-determination under e.g., the **Works Constitution Act** (*Betriebsverfassungsgesetz*) or the **Co-determination Act** (*Mitbestimmungsgesetz*), and on the other hand relations between employers, employers' associations and unions.

Article 9 of the Constitution (*Grundgesetz*) protects the right to be and to become a member of an employers' association or a union, and also not to participate in these organizations. The right to perform industrial action, such as strikes, is also protected.

The *Betriebsverfassungsgesetz* is of great practical importance for employers in Germany. It stipulates that in any works or office with at least five employees over the age of 18, a Works Council must be established. The Works Council represents the employees of its branch or office, and exercises various information, consultation, and co-determination rights against the employer. For example, the employer may not implement workplace monitoring or bonus schemes without prior consent of the

Works Council. If the employer and the Works Council cannot reach agreement regarding their disputes, they will need to institute proceedings in front of the Conciliation Committee (*Einigungsstelle*). Rulings and decisions made by the *Einigungsstelle* replace the consent of the parties and are binding.

It is furthermore important to know that the Works Council must be informed before issuing notice of termination of an employee's employment contract.  See page 48 above.

It is strongly recommended that employers seek the advice of legal counsel when dealing with Works Councils or unions; failure to comply with the *Betriebsverfassungsgesetz* can be regarded as a criminal offense.

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References

Who's Who Legal Germany 2018 - Labour & Employment

WWL says: »Jan Tibor Lelley draws high praise from international sources as one of the leading labour and employment practitioners in the country.«





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Jan Tibor Lelley, 1. Ed. March 2019

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