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Germany

EMPLOYMENT AND LABOUR LAW

Contributor

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This country-specific Q&A provides an overview of employment and labour laws and regulations applicable in Germany.

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GERMANY
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1. Does an employer need a reason to lawfully terminate an employment relationship? If so, state what reasons are lawful in your jurisdiction?

In general, the employer needs a reason to terminate an employment relationship, if the Protection Against Unfair Dismissal Act applies, which is the case if (i) the employer has more than ten full-time employees and (ii) the respective employee has been employed at that employer for more than six months. In that case, the employer can only terminate the employment relationship for either operational reasons (e.g., reduction of number of jobs due to restructuring of business) – which is by far the most important category of dismissals – or person-related reasons (e.g., long-term illness or frequent short illnesses) or misconduct (e.g., misconduct at the workplace, theft or fraud to the employer's detriment).

If the Protection Against Unfair Dismissal Act does not apply, the employer can terminate at will as long as the dismissal is not arbitrary.

An immediate dismissal without notice by the employer (= extraordinary dismissal or dismissal for cause) can only take place when it is unacceptable for the employer to continue the employment relationship until the notice period has elapsed. This can be the case if the employee has committed a serious breach of contract (e.g., theft or other criminal offences, breach of confidence) or has committed a repeated breach of contract following a respective prior warning.

2. What, if any, additional considerations apply if large numbers of dismissals (redundancies) are planned? How many employees need to be affected for the additional considerations to apply?

If a works council is in place, the employer must inform and consult with the works council. If the mass dismissal is deemed an "operational change", the employer is obliged to try to negotiate a so-called reconciliation of interest and a social plan with the works council. As a rule of thumb, a social plan is mandatory, when 10 % or more of the employees are planned to be terminated. While the reconciliation of interest deals with the question of describing the operational change in detail, the social plan states the amount of compensation for economic disadvantages that the employees are entitled to. When planning the operational change, the employer must consider the time (negotiating with the works council) and the costs (compensation).

Collective dismissals often require formal notification to the Federal Employment Agency, depending on the establishment's size and the number of employees affected. If more than 20 and fewer than 60 employees are employed it applies if more than 5 employees are to be dismissed; between 60 and 500 employees, if 10%, or more than 25 are to be dismissed; more than 500 employees: if at least 30 employees are to be dismissed. The obligation does not apply if the local establishment doesn't have more than 20 employees.

In 2023, the Sixth Senate of the Federal Labor Court had announced its intention to revise its stance regarding mass dismissal procedures under Section 17 of the Dismissal Protection Act (KSchG). Mistakes in the mass dismissal notification would no longer render dismissals invalid, although errors in the consultation process would. This proposed change prompted the Sixth Senate to consult the Second Senate which would be affect by this change via a so-called divergence request. The Second Senate now, on February 1, 2024 has suspended the matter to seek preliminary rulings from the European Court of Justice (ECJ) on several questions. The Second Senate's questions hint at the Federal Labor Court's inclination to be less punitive on mass dismissal notification errors.

Following the ECJ's decision, the divergence request process will proceed. If the Sixth and Second Senate

disagree, the Grand Senate of the Federal Labor Court will rule on the penalty system for mass dismissal notification errors. This includes the Court's President, a professional judge from each of the other nine senates, and three honorary judges from both employee and employer sides. The fuels anticipation for a potential legal shift, though a final resolution will take time.

3. What, if any, additional considerations apply if a worker's employment is terminated in the context of a business sale?

In case the business sale entails a transfer of undertaking (TUPE), which is generally the case for asset deals, the employment relationships automatically transfer from the seller to the acquirer. This is based on the EU directive 2001/23/EC. In general, dismissals made because of the transfer of business are invalid. The new employer can, however, dismiss employees afterwards for operational reasons if that is necessary for the implementation of an entrepreneurial decision which is sufficiently separate from the transfer measure as such. Employees have a right to object to the transfer of their employment relationship. The employees objecting to a transfer can often be dismissed for operational reasons if the employer they return to after having objected to the transfer cannot offer other employment opportunities.

4. What, if any, is the minimum notice period to terminate employment? Are there any categories of employee who typically have a contractual notice entitlement in excess of the minimum period?

The basic statutory notice period is four weeks to the 15th or the end of a calendar month. This notice period increases depending on the seniority of the employee up to a maximum of seven months to the end of calendar month (after 20 years of service). If the parties agree to a probationary period of no longer than six months, the dismissal notice period can be shortened to two weeks.

Collective bargaining agreements sometimes provide for shorter or longer notice periods. In general, executive employees tend to have longer contractual notice periods.

5. Is it possible to pay monies out to a worker to end the employment relationship instead of giving notice?

Generally, that is not possible. The employee's respective notice period needs to be considered in any case of an ordinary dismissal. While the notice period may be shortened or waived completely by mutual agreement it should be noted that in case of a severance payment being involved unemployment benefits will be suspended until the date on which the employment would have ended if the period of notice had been observed. In German law, this option is called a termination agreement ("Aufhebungsvertrag").

6. Can an employer require a worker to be on garden leave, that is, continue to employ and pay a worker during his notice period but require him to stay at home and not participate in any work?

The employer can require the employee to be on garden leave against the employee's will only if the employer's interests regarding the garden leave prevail. Provisions stating the employer's right to make the employee go on garden leave are often found in employment contracts. Such provisions are valid, if they concern dismissals for cause (with phasing-out period) or dismissals due to conduct. In cases of dismissal for operational reasons or for reasons of illness the employer can only require the worker to be on garden leave under certain conditions. However, sending employees on garden leave after a dismissal is common practice and employees seldom object.

7. Does an employer have to follow a prescribed procedure to achieve an effective termination of the employment relationship? If yes, describe the requirements of that procedure or procedures.

First, the notice needs to be in writing, signed in writing by the employer, i.e. (a) person(s) being legally entitled to represent the employer in this respect. The representative must present a signed copy of his or her power of attorney (unless he or she is authorized pursuant to the commercial register or is the head of personnel).

Furthermore, the works council (if one is in place at the establishment) must be heard before every dismissal. It is important that the dismissal is declared clearly and unambiguously in writing. The grounds for the dismissal generally do not need to be stated in the notice. Dismissals must be delivered in order to become effective, and it is advisable to have sufficient proof of the delivery and its date.

Furthermore, special regulations must be considered, particularly with regard to collective redundancies (cf. answer to question 2).

8. If the employer does not follow any prescribed procedure as described in response to question 7, what are the consequences for the employer?

If the employer does not follow the works council consultation procedure properly (e.g., does not provide all the relevant information) the dismissal is invalid. The same consequence applies if the dismissal is not declared clearly or if it is not signed in writing.

The employee may then claim for continued employment which in practice in the vast majority of cases leads to an agreement or a settlement involving compensation (severance payment).

9. How, if at all, are collective agreements relevant to the termination of employment?

Collective bargaining agreements can be relevant to the termination of employment relationships in many cases. Collective bargaining agreements may, e.g., prolong or shorten the notice period (cf. answer to question 4) or preclude the ordinary dismissal of elder employees with a certain length of service.

Collective bargaining agreements are applicable if the following requirements are met: both employer and employee are members of the union or employers' association respectively, or a collective agreement has been declared to be generally binding, or the application of the collective agreement has been agreed upon in the employment contract.

Apart from collective bargaining agreements, works agreements with the works council can be relevant for the termination of employment. They may even set up a ban on dismissals for operational reasons for a certain time period. In cases of an operational change, the social plan with the works council regularly contains the stipulation of severance payments for employees affected.

10. Does the employer have to obtain the permission of or inform a third party (e.g local labour authorities or court) before being able to validly terminate the employment relationship? If yes, what are the sanctions for breach of this requirement?

In general, the employer does not need to obtain permission by a third party. However, if a person falls under maternity protection or is taking parental leave they can only be dismissed if the competent state authority agrees. Also, with respect to persons with disabilities dismissals require the prior consent of the competent authority.

Furthermore, the Federal Employment Agency needs to be notified before a mass dismissal (cf. answer to question 2).

11. What protection from discrimination or harassment are workers entitled to in respect of the termination of employment?

First, the principle of equal treatment prohibits the employer from treating comparable employees differently. Furthermore, employees in Germany are protected against discrimination under the General Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz – AGG) which is based on EU Directives. The General Act on Equal Treatment expressly prohibits discrimination based on race or ethnic origin, gender, religion or belief, disability, age, or sexual orientation.

12. What are the possible consequences for the employer if a worker has suffered discrimination or harassment in the context of termination of employment?

Legal remedies under the General Act on Equal Treatment include the right to withhold performance (only in cases of harassment or sexual harassment), as well damages and compensation for pain and suffering.

Section 2 (4) AGG states that only the provisions of the general and special protection to dismissals apply, whereby the legislator wanted to avoid a separate dismissal protection regime under the AGG. The courts solve this by finding that discriminatory termination decisions are also not "socially justified" and therefore also breach the Protection Against Unfair Dismissal Act.

13. Are any categories of worker (for example, fixed-term workers or workers on

family leave) entitled to specific protection, other than protection from discrimination or harassment, on the termination of employment?

Fixed-term employments cannot ordinarily be terminated unless a termination clause is included in the contract.

Women during a pregnancy and in the first four months after delivery enjoy special protection. The same applies to employees (men or women) during parental leave. Furthermore, employees with a severe disability are protected and the employer requires prior consent of the competent authority. Other people who enjoy special protection against dismissal are works council members and other officials under the Works Constitution Act. They cannot be dismissed ordinarily but only for cause and only if the consent of the works council has been granted or been replaced by a court decision. In addition, some other employees given special tasks under relevant laws such as the Data Protection Officer (if an employee) enjoy special dismissal protection.

Also, some collective bargaining agreements preclude the dismissal of elder employees with a certain length of service (cf. answer to question 9).

14. Are workers who have made disclosures in the public interest (whistleblowers) entitled to any special protection from termination of employment?

In April 2019, the Trade Secret Protection Act ("GeschGehG") came into force, which serves to implement the EU Trade Secrets Directive (EU) 2016/943. This has led to an improvement in the position of whistleblowers. Pursuant to Section 5 No. 2 GeschGehG, whistleblowing is expressly permitted, i.e. the obtaining, use or disclosure of trade secrets "for the purpose of detecting an illegal act or professional or other misconduct, if such obtaining, use or disclosure is likely to protect the general public interest". This significantly facilitates whistleblowers' ability to defend themselves against labour law sanctions, even if otherwise the German legal system still does not have comprehensive provisions about the protection of whistleblowers. To address these changes, it is advisable to implement an internal whistleblowing process.

The German Whistleblower Protection Act (Hinweisgeberschutzgesetz – HinSchG) -implementing the EU Whistleblower Directive – is effective since 2 July 2023. It specifically covers punishable offenses and fines, safeguarding life, health, and employee rights. The Act facilitates reporting administrative offenses through internal whistleblower systems, ensuring protection and anonymity.

Since 17 December 2023, small and medium-sized companies (50 to 249 employees) have to establish internal reporting offices, allowing shared reporting systems. Anonymous reporting is mandatory. A central external reporting office at the Federal Office of Justice oversees both public and private sectors.

Reprisals or sanctions against whistleblowers are strictly prohibited, with the burden of proof reversed in favor of the reporter, accompanied by the right to claim damages. Violations of the Act's main provisions are punishable as administrative offenses, incurring fines.

15. In the event of financial difficulties, can an employer lawfully terminate an employee's contract of employment and offer re-engagement on new less favourable terms?

N/A

16. What, if any, risks are associated with the use of artificial intelligence in an employer's recruitment or termination decisions? Have any court or tribunal claims been brought regarding an employer's use of AI or automated decision-making in the termination process?

Recruitment by artificial intelligence is likely to conflict with anti-discrimination principles. As data analysis by algorithms serves to form groups and by assigning persons who typically exhibit certain characteristics and as the algorithms are usually based on group probabilities, "discriminatory effects" are not unlikely. In addition, there is a risk that when artificial intelligence is used in the application process, inadmissible questions linked to discriminatory characteristics and also questions within infringing the general protection of personality are asked or the respective data will be collected through internet searches.

Consequently, artificial intelligence also raises data protection questions. For example, it is questionable how data subject rights can be exercised in relation to artificial intelligence. There is also the question of how to

delete individual data that are no longer an isolable part of artificial intelligence, or how to exercise the right of access under Article 15(1) of the GDPR regarding data processing that has already taken place. Effective consent to data processing by artificial intelligence is also likely to be difficult, as the data processing is likely to remain largely non-transparent.

While there are no specific court decisions in Germany directly addressing employers' use of AI or automated decision-making in the termination process, in February 2024 the Hamburg Labour Court has ruled on the matter of co-determination rights. It found that the works council cannot prohibit employees from using ChatGPT or similar artificial intelligence systems, and there was no co-determination right involved. This decision was based on the fact that the employer and works council had already concluded a works agreement on the use of browsers, meaning the right of co-determination had already been exercised. The court might have reached a different conclusion if this agreement on browser use did not exist and if employees were using a company account instead of a private one.

Overall, employers are faced with a multitude of regulations when introducing AI systems. They are required to develop internal guidelines, such as an AI strategy, governance, or policy, detailing the correct use of AI within the company and the measures needed for compliance and risk management. It is also advisable to update framework agreements on IT systems and data protection to reflect the unique aspects of AI.

17. What financial compensation is required under law or custom to terminate the employment relationship? How is such compensation calculated?

In general, no compensation must be paid for a valid dismissal. However, if the employment relationship is terminated by a mutual agreement or before court by a settlement agreement severance pay is common practise. A usual formula is: 0.5 * monthly gross salary * seniority years. However, the factor can vary, depending on the area of business, the economic performance of the company, and the prospects of success of the dismissal.

Also, in case of operational changes (e.g. collective redundancies) a social plan (to be agreed with the works council) regularly contains a formula according to which the compensation for each employee who leaves the company is calculated.

18. Can an employer reach agreement with a worker on the termination of employment in which the employee validly waives his rights in return for a payment? If yes, in what form, should the agreement be documented? Describe any limitations that apply, including in respect of non-disclosure or confidentiality clauses.

In Germany, an employer can indeed reach an agreement with an employee on the termination of employment in which the employee validly waives their rights in return for a payment. This is commonly executed through a mutual termination agreement (*Aufhebungsvertrag*) or a settlement agreement (*Abwicklungsvertrag*) if the termination follows an already given notice. Such agreements are subject to strict formal requirements under German law, including a mandatory written form with wet-ink signatures from both the employee and a legal representative of the employer.

The content of a termination agreement typically includes details such as the termination date, garden leave period, severance payment, and provisions regarding confidentiality, non-disparagement, and possibly non-compete and intellectual property regulations. While there is no statutory entitlement to a severance payment when mutually ending an employment relationship, it is common to negotiate such payment, which can vary depending on the employee's salary, reasons for termination, and job tenure.

Even in the absence of a corresponding contractual provision, the employee must in principle maintain confidentiality about legitimate business and trade secrets of the employer even after termination of his employment relationship, but only to the extent that the employee is not unreasonably restricted in the exercise of his profession by the observance of his confidentiality obligations. Contractual provisions may be useful for clarification, but they must not unreasonably disadvantage the employee in order not to be inadmissible.

19. Is it possible to restrict a worker from working for competitors after the termination of employment? If yes, describe any relevant requirements or limitations.

It is possible to restrict an employee from working for competitors after the termination of employment for a maximum period of two years, if this is necessary to

safeguard a justified commercial interest of the employer and if it does not unfairly jeopardize the employee's future career. Such agreement has to be concluded in writing. The employer must compensate the employee with at least half of his/her former salary (including all bonuses and benefits). If the employee earns money during the period, the compensation is reduced if earnings and compensation together exceed 110% of the employee's previous remuneration (125% if the employee had to move to another place due to the non-competition obligation). In practice, post-contractual competition restrictions are not very common since the costs are very often higher than the employer's interest in the employee not working for a competitor.

20. Can an employer require a worker to keep information relating to the employer confidential after the termination of employment?

The basic principle in German employment law is that it is part of the employees' obligations not to disclose any confidential information even after termination of the employment. Covered by this obligation are trade and business secrets as well as confidential information which the employer has marked as confidential for the company's interest. However, under the Trade Secret Protection Act ("GeschGehG") undisclosed know-how and business information (trade secrets) must have been subject to appropriate confidentiality measures (e.g. "need-to-know" principle, protected facilities, proper encryption and password management).

21. Are employers obliged to provide references to new employers if these are requested? If so, what information must the reference include?

Employees have a statutory right to be provided with a written benevolent reference by their former employer. The reference must include the length of service and a description of the employee's job and can include an assessment of the employee's performance. A framework has been developed by employers and courts which provides standard rating clauses for certain aspects of the employee's performance from "very good" to "poor". The employee can sue if the employer fails to provide a report or if the employee has the impression that he was assessed inaccurately.

22. What, in your opinion, are the most common difficulties faced by employers in your jurisdiction when terminating employment and how do you consider employers can mitigate these?

Difficulties result from various angles: the formal requirements that need to be observed, from the fact that the burden of proof for the grounds of termination generally lies upon the employer and from the general high level of protection for employees. For example, the dismissal for operational reasons only stands up in court if the employer can prove that he has made an entrepreneurial decision resulting in a reduction of the volume of work or personnel needs. The dismissal of the person as such must not be the sole subject of the entrepreneurial decision. Furthermore, the dismissal is invalid if there is a vacant position in the company to which the dismissed employee could have been reassigned even if the working conditions are less favourable. Moreover, the employer must carry out a "social selection" which is subject of many disputes in court. And finally, there are quite numerous categories of employees enjoying special dismissal protection.

All these difficulties can only be mitigated by diligent planning and execution of the termination measure(s). A good legal advisor is essential who can translate the business needs of the client into a measure that is in compliance with legal requirements and the specific tests applied by the labour courts.

23. Are any legal changes planned that are likely to impact the way employers in your jurisdiction approach termination of employment? If so, please describe what impact you foresee from such changes and how employers can prepare for them?

Whistleblowers are now particularly protected from dismissal by the Whistleblower Protection Act. (cf. question 14).

With regard to mass dismissal notification it it remains to be seen how the ECJ will decide on the Federal Labor Court's questions and how this will then affect the hitherto rather strict mass dismissal notification requirements in Germany (cf. question 2).

Furthermore, the implantation of Directive (EU) 2019/1152 on transparent and predictable working conditions into German law has led to changes in the Part-Time Work and Fixed-Term Employment Act (Teilzeit- und Befristungsgesetz). Now, an agreed probationary period in a fixed-term employment relationship must be in proportion to the expected

duration of the fixed-term and the nature of the work. Hitherto, pursuant to section 622 (2) of the Civil Code (BGB), a probationary period of up to six months could previously be agreed upon, during which the employment relationship could be terminated with two weeks' notice. This maximum period is now no longer to be applied to short fixed-term employments. Unfortunately, the permissible ratios are not regulated and therefore remain unclear. It also remains unclear whether a further consequence will be that in the case of short fixed-term contracts (i.e. of less than one year), the Dismissal Protection Act will have to be applied before the expiry of six months.

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