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Germany

Employment and Labour Law

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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: Employment and Labour Law

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

Germany is not a jurisdiction where an employment relationship can be terminated by the employer at-will, but a statutory reason is required if the employee benefits from the protection afforded by the Protection Against Dismissal Act ('Kündigungsschutzgesetz'). That requires two conditions to be met, namely that (a) the employee has completed a minimum continuous service period with the employer of at least six months and (b) that the employer's establishment ('Betrieb') that the employee is assigned to usually engages more than ten employees. If these conditions are met then a dismissal by the employer requires the employer to rely on one of three statutory reasons for dismissal, either a compelling operational reason, or a reason linked to person in question, or a reason linked to the employee's conduct.

For further information on the calculation of employee numbers for the protection under the Protection Against Dismissal Act to apply see question 4 below.

'Establishment': the Protection Against Dismissal Act frequently refers to the 'establishment' and not the legal entity (often a company) as the connecting factor. The act itself does not define the term 'establishment' and, confusingly, case law has determined that the meaning depends on whether a German national law interpretation is required or whether a European Union uniform definition need to be applied. The employing entity (company) can have one or several 'establishments'. In German national law (as developed by case law and which is applicable here) an establishment is an organisational unit of human and material resources with which the employer continuously pursues a specific work-related purpose. A degree of organisational and managerial independence within the establishment is typically required to meet this definition. Getting the distinction between the employing entity on the one hand and any establishments (if any) within that entity on the other correctly assessed can be the difference between falling within the scope of the Protection Against Dismissal Act or not, as the case may be. This is often a thorny and potentially contentious legal issue. Of course, if the employer is not multi-sited but there is one location only, then the employing entity and the establishment fully overlap.

A reason relating to the person ("personenbedingter Grund") mainly covers cases of incapacity (long term illness or short-term repeated absences over a long term) but it can also cover issues such as lack or loss of a necessary work permit, regulatory approval required for the role, lack of necessary qualifications/skills and inability to acquire them or a criminal conviction or loss of the driving licence (in cases where driving is a key requirements to undertake the role). Each case turns on its own facts though, dismissal must not be an automatic response but a considered and proportionate step.

German law does not recognise a separate category of poor performance as a termination reason. Where poor performance is due to a reason relating to the employee's person, such as illness or lack of a skill or qualification, a dismissal may be justified on grounds linked to the person.

A reason relating to conduct ("verhaltensbedingter Grund") – this category covers misconduct by the employee. A dismissal is usually the consequence of an escalation of prior disciplinary measures (warnings). Where poor performance is due to an employee not doing their job properly a dismissal may be justified on conduct grounds. However, importantly, this will only be the case where there is actually some misconduct involved, for example, the employee not complying with reasonable instructions such as to make a certain number of customer visits/calls in a day or week, produce reports by a certain deadline or similar. If the employee complies with all reasonable instructions but the outcomes are poor, this will not typically carry a conduct dismissal.

A compelling operational reason ("betriebsbedingter Grund") covers redundancy as well as restructuring scenarios and whilst the loss of overall headcount is often a consequence of such a termination, this is not a requirement.

If the Protection Against Dismissal Act does not apply, the employer is not limited by the reasons set out in the Protection Against Dismissal Act, provided the reason does not constitute unlawful discrimination (i.e. is discriminatory based on any of the protected characteristics set out in the German Equal Treatment

Act ('Allgemeines Gleichbehandlungsgesetz') and further provided that the selection process of employees to be dismissed for operational reasons meets the requirement developed by case law of including a 'minimum level of social consideration', which means in practice that the employer will have to justify the selection decision with operational, personal or other factual reasons that formed the basis for the selection decision (for selection criteria to be applied in situations where the Protection Against Dismissal Act does apply, please below at Question 2 below). Note though that any special dismissal protection ('Sonderkündigungsschutz') still applies, even if an employee is not covered by general dismissal protection. Please see Question 14 for details.

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?

Section 17 the Protection Against Dismissal Act defines a collective redundancy as a dismissal within 30 calendar days of either:

- more than five employees in an establishment with 20-59 employees;
- more than 25 employees or 10% of those regularly employed in establishments with at least 60 and fewer than 500 employees; or
- at least 30 employees in an establishment with more than 500 employees.

'Establishment': the Protection Against Dismissal Act frequently refers to the 'establishment' and not the legal entity (often a company) as the connecting factor. The act itself does not define the term 'establishment' and, confusingly, case law has determined that the meaning depends on whether a German national law interpretation is required or whether a European Union uniform definition need to be applied. The employing entity (company) can have one or several 'establishments'. As a result of the European Union's Directive on collective redundancies it is the CJEU case law definition of 'establishment' that is relevant here (rather than the definition of 'establishment as developed by German national law). Consequently a much wider definition of 'establishment' applies in relation to Section 17 of the Protection Against Dismissal Act, effectively meaning the unit to which the employee to be made redundant is assigned to carry out their duties, with such unit being a distinct entity with a certain degree of permanence and stability which is assigned to perform certain tasks and which has the workforce, technical means and organisational structure to do so. Notably, there is no level autonomy or managerial independence required here.

Employee threshold numbers are to be determined based on the date of the notice of termination (rather than the effective date of termination) and includes those employees who entered into a mutually agreed termination agreement initiated by the employer (for example those who have accepted voluntary redundancy in this way).

A collective redundancy exercise triggers the need to consult with the works council ('Betriebsrat') – if one is established. If the redundancy is part and parcel of an operational change ('Betriebsänderung'), as is typically the case, then a Balancing of Interest Agreement ('Interessenausgleich') (which concerns the if, when and how of such dismissals) and a Social Plan ('Sozialplan') (which is primarily an agreement on severance pay) will need to be negotiated with the works council.

The primary challenge in any redundancy exercise is the requirement to form an appropriate selection pool and to then apply a set of static redundancy selection criteria to this selection pool. In other words: the employer must carry out a 'social selection' between comparable employees on the same level and may only dismiss the employees least in need of protection (based on the statutory redundancy selection criteria). Selection criteria include age, length of service, support obligations for dependents, and severe disability.

Employers can mitigate undesirable outcomes in terms of the composition of the workforce by way of agreeing a derogation with their works council from the otherwise compulsory application of those statutory selection criteria but the employer will usually have a pay a high price for this in terms of agreed severance packages as part of a social plan.

In addition, notification obligations need to be complied with vis-à-vis the employment agency ('Agentur für Arbeit'). The notification must be provided to the employment agency at least one month prior to any notice of dismissal issued. However, as the notification need to be accompanied by a statement of the works council in relation to the proposal, the reality is that the required consultation with the works council must typically be well under way before the employer is in a position to provide the required works council statement on the proposed collective redundancy.

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

If the employing business is sold by way of a share sale and purchase agreement, then the purchaser simply buys shares in the employing entity, but the identity of the employer remains unchanged. In this scenario normal termination protection rules apply (see above). Of course, it is perfectly feasible that the seller may have secured contractual assurances as part the transaction from the buyer to not trigger any operational dismissals for a defined period of time post completion of the transaction. In addition, any collective agreements that may provide for a temporary ban on operational dismissals remain typically unaffected by a share sale.

In a German asset sale, if the assets constitute a business or part of a business, employees associated with that business automatically transfer to the buyer, as per § 613a of the German Civil Code ('Bürgerliches Gesetzbuch'), which is the norm that give effect to the Acquired Rights Directive (Council Directive 2001/23/EC of 12 March 2001). The termination of the employment relationship of an employee by the transferor or by the transferee on account of the transfer of a business or a part of a business is void. However, dismissals for compelling operational reasons ('betriebsbedingt') are not prohibited by § 613a of the German Civil Code. The same applies to other permitted reasons for termination.

4. Do employees need to have a minimum period of service in order to benefit from termination rights? If so, what is the length of the service requirement?

Employees who work in an establishment ('Betrieb') with usually more than ten employees (NB not ten or more) and who have more than six months service at the time they receive a notice of termination, enjoy general dismissal protection under the Protection Against Dismissal Act ('Kündigungsschutzgesetz').

Until 31 December 2003 the threshold was 'usually more than five employees' and employees who were employed before 1 January 2004 and enjoyed unfair dismissal protection under the old regime continue to do so unless even under the old regime, they would have by now lost the protection.

Note: the calculation of the threshold number can be complex as this is not worked out on simply the number of staff engaged but takes into consideration the hours worked: part-time employees with a maximum of 20h/week count towards the threshold with a factor of 0.5. Those working between 20h and 30h per week count towards the threshold with a factor of 0.75 and employees working above 30h count towards the threshold with a factor of 1. Those absent on maternity leave or parental leave are to be included unless someone has been hired as a temporary cover. Trainees, interns, and statutory directors ('Geschäftsführer') will not normally count towards the number of employees when determining if the threshold number is reached/exceeded. As an added complexity, when calculating staff numbers this is not linked to the actual number engaged at the time of the proposed dismissal nor the average number of staff over a certain period of time but linked to the 'usual' number of staff required for business operations within the establishment. This introduces a degree of ambiguity that can easily turn contentious.

If general unfair dismissal protection applies this means that an employee can only be dismissed for one of three accepted lawful reasons: a reason relating to the employee's person ('personenbedingt'), a reason relating to the employee's conduct ('verhaltensbedingt') and for a compelling operational reason ('betriebsbedingt').

5. 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?

Statutory minimum notice periods are regulated by § 622 of the Civil Code ('Bürgerliches Gesetzbuch'). These depend on length of service and the minimum notice period applicable to a dismissal by the employer and a resignation by the employee is initially four weeks, such period to expire on the 15th or the end of a calendar month. By way of an example: if the employer gives notice of dismissal on, say, the 12th of a calendar month, then the effective date of termination will be the 15th of the following calendar month.

This statutory minimum notice period applicable to a dismissal by the employer then increases with years of continuous service, with such notice only expiring at the end of the month as follows:

- after two years of service: one month, to expire at the end of a calendar month;
- after five years of service: two months, to expire at the end of a calendar month;
- after eight years of service: three months, to expire at

the end of a calendar month;
- after ten years of service: four months, to expire at the end of a calendar month;
- after twelve years of service: five months, to expire at the end of a calendar month;
- after fifteen years of service: six months, to expire at the end of a calendar month;
- after twenty years of service: seven months, to expire at the end of a calendar month.

The minimum notice period applicable to a resignation of the employee does not increase automatically with years of service but the parties can agree (usually in the employment contract from the outset), that any prolongation of the notice period that applies to the employer shall also apply to the employee. The parties can also agree to apply longer than the minimum statutory notice periods, always provided that the notice period applicable to an employee resignation must never be longer than the notice period applicable to an employer dismissal.

During an agreed probationary period (which must not exceed six months) the employment may be ended by either party with a notice period of two weeks. Note that the probationary period applicable to fixed term contracts may have to be shorter than six months as it need to be proportionate to the duration of the fixed term.

Collective bargaining agreements may provide for shorter or longer notice periods.

Derogations from these rules are permitted only to a limited extent and in most cases can be agreed only by way of an agreement between employer or the employers association that represents the employer and a trade union ('Tarifvertrag'). The only exceptions for individual contractual agreements apply in respect of temporary contracts not exceeding three months or in respect of employers employing fewer than 20 employees provided the notice period is not shorter than four weeks.

Senior executives and employees with any managerial responsibility are frequently subject to contractually agreed longer notice periods of between three and six months immediately following the probationary period. Statutory directors ('Geschäftsführer') of companies who are also engaged and remunerated by the entity on the basis of a service agreement are not classed as 'employees' and hence do not typically enjoy general dismissal protection. To balance this lack of protection, the notice period for such directors is typically contractually enhanced and a notice period of 12 months is not unusual.

6. Is it possible to make a payment to a worker to end the employment relationship instead of giving notice?

Payment in lieu of notice provisions in employment contracts, which provide the employer with a unilateral contractual right to make a payment to a worker instead of giving notice are unlawful. Employees do have a right to notice in an ordinary dismissal scenario (and also a right to work).

It is possible though for the employer and employee to agree an early effective end date of the employment and to then agree a payment in lieu of notice by way of a mutually agreed termination agreement ('Aufhebungsvertrag'). This is typically only feasible though in cases where the employee has already arranged for alternative employment or the dismissal. If that is not the case, then such a termination agreement triggers the risk the Employee being regarded as having voluntarily given up their employment, the consequence of which would be a ban ('Sperrzeit') on receiving unemployment benefit ('Arbeitslosengeld') for 12 weeks or longer from the effective date of termination.

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

Employees have a right to work and an employer imposing garden leave ('Freistellung') unilaterally is only justified if, on balance, the employer's interest in suspending the employee for a short period of time on full pay trumps the right of the employee's right to work. This may, for example, be the case in a situation of a breakdown of trust and confidence between the parties or simply in a situation where there is no work available (lack of orders etc.).

A distinction is made between an irrevocable ('unwiderruflich') and a revocable ('widerrruflich') garden leave. If irrevocably released from work duties, the employee can no longer be unilaterally requested by the Employer to undertake any tasks during the suspension period. This form of suspension is regularly combined with an offset of accrued and untaken holiday and time off in lieu entitlements, but this will need to be declared expressly to avoid ambiguity. Boiler plate wording in an employment contract though that aims at providing the employer with a blanket general right to put an employee on garden leave during the notice period as a matter of

course is typically not enforceable though.

8. 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.

If there is a works council ('Betriebsrat') established that covers the establishment at which the affected employee is engaged, then the works council must be consulted before every individual dismissal. The employer must inform the works council that it intends to dismiss a particular employee and provide the employee's start date, date of birth, maintenance obligations (whether they are single, married or divorced and have dependent children), the applicable notice period, whether the dismissal is to be on notice or is a summary dismissal, any applicable special dismissal protection status, the reasons for the dismissal and, where applicable, how a selection pool was made up and the details of the selection process of any affected employee for dismissal.

The works council then has one week (in cases of a proposed summary dismissal this is just three days), to comment and/or object. If the works council does not comment/object within that period, the employer can proceed to dismiss.

Even if the works council objects to the dismissal, the employer can decide to serve notice of termination, but the notice need to be accompanied by the works council's objection statement. If the employee then files a claim protection against dismissal claim with the employment court ('Arbeitsgericht'), which is very likely in these circumstances, the employer must allow the employee to remain in their role until the court proceedings are concluded unless the employer is successful in applying to the court to be released from this obligation. The court will do so only if (a) the employee's claim has no reasonable prospect of success, or (b) the continued employment of the employee would lead to an unreasonable economic burden on the employer or (c) the works council's objection was obviously unfounded.

If no works council is established, the above requirements fall away, but the employer should still document their decision-making process in detail and in a way akin to the information that would be provided to a works council so to be able to defend allegations of an unlawful dismissal with contemporaneous documentation. Even if there is no work s council present, the employee in question may still be protected by the Protection Against Dismissal Act and may, as the case may be, enjoy special dismissal protection rights.

The formal requirements for the actual notice letter are somewhat archaic and failure to meet these in full is likely to render the dismissal notice ineffective. The dismissal notice must be 'in writing' ('schriftlich') which is a reference to the statutory definition set out in § 126 of the Civil Code. What is required here is an original letter, wet-ink signed by hand (no scanned signature, no electronic signing via Acrobat Sign or DocuSign etc.) and by an individual or (if more than one is required to represent the employer) the individuals who are authorised to act for the employing entity and signed in a way that identifies the signatory by their signature (initialling is not usually sufficient). Authorised to sign a notice letter are usually any of the following:

- a person or persons authorised to represent the employing company in the company law sense (e.g. a registered statutory director); or
- by the personnel manager of the company who is known as such within the employing entity; or
- by another person who encloses an original power of attorney signed by either of the above.

If the notice letter is not signed by any of the above, then the employee can reject the notice letter and provided they do so without delay (i.e. usually within a few days of receipt) the notice will be void on technical formality grounds.

As the notice period is triggered by receipt of the original notice letter by the employee, the employer must be able to show evidence of delivery to the employee, so ideally notice letters should be handed over in person with a witness present. Note: it is the original notice letter that must be delivered to the employee, it is not sufficient to provide a copy (scan) of the same by email or the like.

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

Failure to either inform the works council altogether where that is required or an incomplete set of information provided to the works council will render a dismissal ineffective, but the employee will need to have this established by an employment court and file a claim to this end within three weeks of the notice of termination (NB not the effective date of termination). Please note that the remedy that the employee will claim is for the employment court to determine that the dismissal was ineffective and that consequently the employment never ended.

Similarly, if the notice letter is ineffective then the

employee or their legal representative may 'reject' the letter ('Zurückweisung') and file a claim within three weeks of the notice of termination to for the employment court to determine that the dismissal was ineffective and that consequently the employment never ended.

In both scenarios reengagement is not typically the outcome though, most cases end with either a settlement at the initial conciliation hearing ('Güteverhandlung') or at full hearing ('Kammertermin').

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

Collective agreements come in the form of collective bargaining agreements ('Tarifverträge') – these are agreements between employer or the employers association that represents the employer and a trade union – and as works council agreements ('Betriebsvereinbarungen') between an employer and their works council. Both can contain provisions relevant to the termination of employment, from a prolongation and reduction of statutory notice periods and/or regulations for severance payment calculations in trade union agreements to a temporary ban on terminations for compelling operations reasons in work council agreements or a ban of terminations during certain periods of the year in collective bargaining agreement with unions.

Particularly in the context of collective redundancies negotiating a balancing of interests plan and social plan (see Question 2 for details) comes with a distinct upside for the employer, as the employer can, as part of the balancing of interest plan, negotiate a selection of employees for redundancy that deviates from the outcome that would otherwise be applicable if the statutory selection criteria had to be applied. The statutory selection criteria are length of service, age, active maintenance obligations for dependants (primarily child and spouse maintenance) and disability. Generally speaking, the older the employee, the more protected they are, although this may be different if the employee is very close to retirement age. Similarly, the longer the service, the more protected the employee is and the more maintenance obligations the employee carries, the more protection they enjoy. Applying these criteria may not lead to the best outcome from a business operational perspective and the employer can negotiate with the works council a reasonable deviation which, on the flipside, a works council will typically only agree to if, under the terms of the social plan, the severance for those identified for redundancy is significantly enhanced.

Please note that some collective bargaining agreements are universally applicable ('allgemeinverbindlich'), regardless of the employer being a party to it directly or through an employer's association. In such cases the employer and employees will need to comply with any relevant termination provisions flowing from a such a collective bargaining agreement if the agreement does not already apply otherwise.

11. 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?

Notification requirements or the need to obtain consent only apply in a limited set of circumstances.

According to § 168 of Book IX of the Social Code (SGB IX), the Integration Office's ('Integrationsamt') consent is a condition for the effectiveness of the termination of an employment relationship with a 'severely disabled person' ('Schwerbehinderte Person').

A dismissal during pregnancy and for the period of four months after the childbirth is only possible in exceptional circumstances and requires the consent of the competent state authority ('zuständige Landesbehörde'). The same applies during a period of parental leave (which is a period of up to three years per child) or a period of family care leave (there is a legal entitlement to family care leave for the care of a close relative in need of care in a domestic environment. Family care leave can be taken for a maximum of 24 months. During the family care period, a part-time job of at least 15 hours a week must be worked. The entitlement to family care leave does not apply to employers with 25 or fewer employees as a rule).

In the event of a collective redundancy please see Question 4 for notification requirement to the employment agency ('Agentur für Arbeit').

Furthermore, members of the works council can only be dismissed if prior approval of the works council is obtained.

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

The General Equal Treatment Act ('Allgemeines Gleichbehandlungsgesetz'), enacted in 2006, incorporates

four anti-discrimination directives of the EU into German law and prohibits discrimination (i.e. less favourable treatment, harassment, and victimisation) based on race, ethnic origin, gender, religion, belief, disability, age, or sexual orientation.

The General Equal Treatment Act is expressly not applicable to dismissals (§ 2 (4)). This is widely considered to constitute a violation of the underlying European directives that the legislation seeks to implement into national law. However, this is generally understood to have been remedied by case law and, specifically, a decision by the Federal Employment Court ('Bundesarbeitsgericht') in 2008 which stipulates that the principles of the General Equal Treatment Act are to be observed when applying the national Protection against Dismissal Act and other special dismissal protection laws.

The social selection criteria that need to be applied in a German redundancy exercise, which positively discriminate on account of age and disability, seem to sit oddly with the principles of the General Equal Treatment Act: if employees out of a group of comparable employees are to be made redundant for operational reasons, then a so called social selection ('Sozialauswahl') must be carried out in order to identify those employees who are in least need of social protection; they are to be dismissed first. The social selection is carried out on the basis of the following four criteria that are listed in the Protection Against Dismissal Act ('Kündigungsschutzgesetz'): length of service, age, active maintenance obligations for dependants that and severe disability. However, discrimination may sometimes be lawful if there are justified grounds for the difference of treatment. Applying length of service and age as selection criteria effectively means to treat older employees more favourably (and younger employees less favourably) but this is in most cases seen as justifiable on account of the reality that older employees find it typically more difficult to secure alternative employment and that this group therefore requires an increased level of protection.

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

Employees who have experienced discrimination as it is defined in the General Equal Treatment Act have the right to claim compensation for a dismissal that unlawfully discriminated them. Claims must be made in writing within two months of the alleged discrimination taking place but are typically combined with a general claim for dismissal protection at the employment court and made within the usual three-week limitation period from the date a notice letter is served on the employee.

14. 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 or part-time workers do not enjoy any specific additional dismissal protection on account of their fixed term or part-time working arrangements. Please note that a fixed term employees cannot be dismissed ordinarily (on notice) prior to the end of the fixed term unless their contract expressly reserves this right. A summary dismissal will be possible though.

Certain employees enjoy special dismissal protection on account of either a specific role they carry or on account of personal circumstances/characteristics.

Maternity related protection: pregnant employees or employees who have given birth within the last 4 months enjoy special dismissal protection and can only be dismissed with the prior consent of the relevant state authority. Which state authority is competent varies from Federal State to Federal State.

Family care time related protection: there is a special protection against dismissal in place for employees who care for their family members at home under the Care Time Act ('Pflegezeitgesetz') or the Family Care time Act ('Familienpflegezeitgesetz'). This legislation aims at improving the compatibility of job and family-care at home. The dismissal protection begins with the notification of the care time and ends with its termination. Where special protection applies, a dismissal will be void, unless prior permission was obtained from the competent state authority.

Parental leave related protection: employees who are on parental leave or will start parental leave within the next eight weeks (or who work part-time during parental leave) enjoy special dismissal protection and can only be dismissed with the prior consent of the relevant state authority.

Disability related protection: certain employees who are registered as severely disabled ('schwerbehindert') enjoy special dismissal protection. They can only be dismissed with the prior consent of the competent state authority.

National voluntary military service: Germany no longer operates a compulsory military service (although this is expected to be reviewed) but offers the option of a voluntary military service (which is remunerated by the armed forces) of up to 23 months with the armed forces. Employees who have successfully applied to undertake such voluntary military service cannot be dismissed ordinarily, the protection starts from the date of receiving their conscription order until the end of their voluntary military service. The employment moves into a 'dormant' state and comes back to life at the end of the military service.

Trainees ('Auszubildende'): following any probationary period, an ordinary dismissal is excluded, and they can only be dismissed if there is a reason justifying summary dismissal.

Works council related protection: employees who are members of a works council can only be dismissed for a reason that would justify summary dismissal, and the works council gave its consent. This protection continues even after the term of office for a period of one year unless the office position was ended by a court decision.

Members of the works council election committee and election candidates cannot be dismissed from the start of their office or their nomination for candidacy until the expiry of six months from the date of the election, unless there is a reason justifying summary dismissal and the works council gave its consent.

Employees carrying certain compliance/monitoring functions: data protection officers ('Datenschutzbeauftragte') as well as some other functions within a company with the purposes of supplementing external monitoring by the authorities with a form of self-monitoring enjoy special dismissal protection in that they cannot be dismissed ordinarily. The same protection applies to representatives of employees with severe disabilities ('Schwerbehindertenvertretung').

Collective bargaining agreements: these may provide sometimes that a certain category of employees (for example those beyond a certain age or service time) cannot be dismissed ordinarily.

Employees who are candidates for or elected to the German Federal Parliament, the European Parliament or any State Parliament may not be dismissed for a reason linked to them carrying such mandate. In some Federal States the protection also includes running for and being elected to local political representative bodies (local council) or local political offices.

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

The Whistleblower Protection Act ('Hinweisgeberschutzgesetz'), which has been in force since 2 July 2023, grants special protection against dismissal from the start of an employment relationship, regardless of the number of staff engaged.

The Whistleblower Protection Act also aims to protect from detriments on account of the whistleblowing short of dismissal. As a result, measures like a disciplinary warning, reprimand, transfer, or even non-promotion can be such detriments within the meaning of Section 36 of the Whistleblower Protection Act and are prohibited.

A dismissal (without notice) on account of whistleblowing are invalid due to a violation of Section 36 of the Whistleblower Protection Act.

The whistle-blower is entitled to compensation, even if detriment is merely threatened, e.g. if there is a threat of dismissal or non-promotion if misconduct is reported.

A key feature in the protection of whistle-blowers from detriments is the burden of proof: if a whistleblower claims they were subjected to retaliation, the employer must demonstrate that the action taken was not related to the whistleblowing report (rather than the whistleblower proving the retaliation).

16. 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?

Combining a dismissal with an offer to re-engage on new, less favourable terms ('Änderungskündigung') is principally an option available to employers in certain, narrowly defined circumstances and expressly acknowledged as in instrument by the Protection Against Dismissal Act. However, financial difficulties as such are an insufficient justifying reason. The first limb of this instrument (the dismissal for operational reasons) must be based on a justifying operational reason and follow the same rules as any other dismissal for operational reasons, including the necessary social selection. The second limb (for example the offer to continue the employment at a reduced salary) must be proportionate, the employer will need to evidence that an insolvency event is otherwise looming and that other options have

been exhausted to avoid such a step.

17. 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?

The European AI-Act came into force on 1 August 2024 (and be fully effective as of 02 August 2026) and aims to establish standardised requirements for the development and use of AI in the European Union. Similar to the introduction of the General Data Protection Regulation, the AI Regulation will have a significant impact on companies, especially in the HR sector, as the law establishes a risk-based AI classification system. The AI-regulation mandates that AI systems used in recruitment and other HR functions be safe, fair, transparent, and non-discriminatory, especially those deemed "high-risk".

The prohibition of automated individual decisions pursuant to Section 22 GDPR precludes the selection of candidates for recruitment, issuing of warnings and even more so dismissals by AI in any case. Both measures significantly affect the employee and must therefore be taken by a human being.

The (mere) preparation of recruitment or dismissals for operational reasons by AI, such as the narrowing down of a candidate pool or the compilation of points tables by AI, is widely seen as permissible. However, the CJEU (European Court of Justice, ruling dated 7 December 2023 – C-634/21) has put this in question in a 2003 judgment (not related to automated recruitment or dismissals though but to a credit score assessment for loan approvals) in their SCHUFA judgement, applying a broad interpretation of 'decision' in Article 22 GDPR when assessing whether SCHUFA (a credit agency) had undertaken any automated decision making. It concluded that although SCHUFA did not itself make the decision to reject loan applications, in providing the credit score, it played a "*determining role*"' in the ultimate outcome, which was enough to constitute the making of a decision. The effect of the CJEU's broad interpretation of 'automated decision-making' within the context of Article 22 GDPR means that a wider range of automated processes may be caught. Like the Schufa credit agency, many AI applications create analyses that precede the "actual" decision-making process, which is why it will now also be necessary to check in each of these cases whether and to what extent automated decision-making can still be assumed.

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

If the dismissal is lawful then an employee is not entitled to any severance or termination payment. Notably, there is no entitlement to a statutory redundancy payment. However, an employee may be entitled to a severance payment under a social plan agreed with the works council, but a social plan is negotiated only in case of collective redundancy or another substantial change in the establishment.

The Protection Against Dismissal Act provides in § 1a that where an employer serves notice of termination for a business-related reason the employer may offer a severance payment amounting to half a month's remuneration for each year of completed service to be paid on condition that the employee does not file a claim with the employment court within the three-week limitation period. If the employee meets that condition, they become automatically entitled to this severance payment. However, as the employer is entirely free to choose whether to make such an offer this is not a statutory redundancy payment. Employers are often in two minds about the benefit of this route, particularly as court settlements are frequently worked out on a similar formulaic approach.

19. 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.

Written form is required for such termination agreements (for details of the meaning 'in writing' please see Question 8 above) and such agreements can be either entered into in avoidance of an employer dismissal or subsequent to an employer dismissal. Either way, they are capable of settling all claims that an employee has or might have and are typically structured such that they include a mutual waiver declaration such that the agreement is in full and final settlement of all claims that either party may have against the other. There are no statutory requirements for the employee to be legally represented, but this will often be the case. Agreements of this kind will typically provide for a severance payment and the parties may agree on matters such a garden

leave period, confidentiality, an agreed reference wording, the fate of any long terms incentive entitlements, post termination restrictions etc.

In respect of post-termination restrictions, the consideration set out below at Question 20 are also applicable to such restrictions agreed in termination agreements. In respect of confidentiality note that limitations are set by the German whistle-blower protection legislation and, in short, provisions of any confidentiality agreement that seek to limit the ability to 'blow the whistle' are ineffective and void, see § 39 of the German Whistleblower Act ('Hinweisgeberschutzgesetz').

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

Under German law restrictive covenants can be agreed in writing for a period of up to two years after termination but they are only valid and enforceable if (a) the clause also contains a promise by the employer to pay compensation for the duration of the restrictive covenant and (b) if the restriction period goes no further than is required to protect a legitimate business interest of the employer and does not unfairly impact of the employee's career prospects. The compensation must amount to at least 50% of the last contractual remuneration and benefits.

Whilst an employer may waive a restrictive covenant at any time prior to termination of the employment this waiver only terminates the compensation obligation one year after the waiver has been declared. In many cases where employees have shorter notice periods the waiver provision will therefore be of limited use to avoid payment, if an employer at the time of giving notice decides that they are no longer interested in the protection afforded by the restrictive covenant.

As a result of the costs connected with post-termination restrictive covenants the use of such restrictions in German contracts is not common.

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

During and after the employment relationship, employees are obliged to keep company and business secrets that have become known to them in the course of their work to themselves. This does not require an additional agreement but follows from the employee's duty of loyalty and fidelity towards the employer. The definition of trade and business secrets covers all facts, circumstances and processes relating to a company that are not generally accessible, but only to certain selected persons, and which the company has a legitimate interest in not disclosing. In short, this is information that is of economic value to the company in which the employee works and is not in the public domain.

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

Employers will not normally provide a reference to the employee's new employer upon such a request being raised by the new employer. The reference system works differently in that employees are entitled to a written reference on termination of their employment and typically employers will issue a reference as a matter of course rather than being asked for one.

As of 01 January 2025, a job reference may also be submitted electronically to the employee, provided the employee has given consent.

The reference must, as a minimum, provide details as to the job title and job description and the duration of the employment (simple reference). However, the employee can request a more extensive reference that also contains an assessment of conduct and performance (qualified reference). The norm is a qualified reference.

An employee is also entitled to an interim reference on request if circumstances are such that the employee has a justified interest in such an interim reference. This might be the case, for example, where an employee is under notice or under threat of notice or where there are significant changes to the employee's work environment such as a change in supervisor or a relocation or transfer to another job.

A job reference must be accurate and therefore must only contain facts and not assumptions or suspicions. However, an employer also has the duty to act benevolently and in an understanding manner. A reference may not unnecessarily impede the employee's future prospects.

Employees can apply to the employment court to have their reference corrected if they are of the view that it does not comply with these principles. The resulting case law has led to accepted standard wording which often make German job references look formulaic. It has also

led to references generally sounding positive and the decisive factor being the degree of positiveness rather than outright negative statements.

23. 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?

Dismissals often become contentious because of the procedural rules applicable when an employee wishes to take a claim to the employment court: employees who are at the receiving end of a dismissal notice have only three weeks from the receipt of the notice to file a claim with the employment court. If that window is missed, they are typically out of time to bring a claim. Three weeks are not usually anyway near enough though for their legal representative to assess the merits of the case or the parties to come to an amicable agreement, if necessary. As a result, employment court claims are often filed as an automatic response to a dismissal rather than based on a full assessment of the merits by the claimant's legal representative. Professional planning can help to reduce the risks of a contentious outcome.

The requirement for employers to apply a set of static redundancy selection criteria set out by law with little wriggle room is a particular challenge, especially for SMEs. In other words: the employer is not usually free to decide who of their staff is best placed to move the business forward (and should stay), based on their skillset and performance, but the employer must carry out a 'social selection' between comparable employees on the same level and may only dismiss the employees least in need of protection (based on the statutory redundancy selection criteria). Employers can mitigate undesirable outcomes in terms of the composition of the workforce by way of agreeing a derogation with their works council from the otherwise compulsory application of those statutory selection criteria but will usually have a pay a price for this in terms of severance packages as part of a social plan.

There have been attempts in recent years to reduce the German bureaucracy, but this is a slow-moving initiative. For example, the onerous formal requirements for a notice letter are archaic and hardly in tune with commercial requirements in a digitalised world. Professional support is often required to navigate such and other bureaucratic pitfalls.

24. 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?

Germany has had a federal election in late February 2025 and at the time of writing (March 2025) a new Government is not yet in place. This will need to be a coalition Government (as is often the case in Germany) as no single party has won an outright majority in the elections. Neither of the parties set to form the new coalition Government (Conservative parties CDU/CSU and the German Labour Party SPD) have set out any concrete pre-election manifesto pledges or details for an employment law reform and there are currently no proposals on the table to change or reform the German law in regard to the termination of employment in any material way.

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