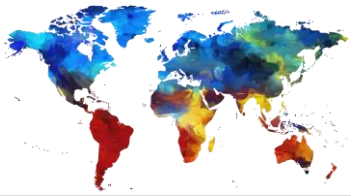
Comparative Guide
Labour and Employment - Germany



1. Legal Framework

1.1 Are there statutory sources of labour and employment law?

Unlike many other countries, Germany does not have a single employment act, but rather a patchwork of statutes that individually regulate various aspects of the employment relationship. General contractual matters are governed by the German Civil Code. Special laws that pertain to employment include the following:

- the Dismissal Protection Act;
- the Minimum Pay Act;
- the Working Time Act;
- the Sick Leave Pay Act;
- the Equal Treatment Act;
- the Pay Transparency Act;
- the Act on Part-Time and Fixed-Term Contracts;
- the Act on Temporary Hiring-out of Employees;
- the Maternal Leave Act;
- the Parental Leave Act;
- the Company Pension Scheme Act;
- the Collective Bargaining Agreement Act; and
- the Works Constitution Act.

In addition to these and other statutes, court rulings are of utmost importance, as some aspects of labour and employment law – such as the laws on industrial action – have a constitutional basis only and thus have mostly been developed by the courts.

For more information about this answer please contact: Bernd Weller from Heuking Kuehn Lueer Wojtek PartGmbB

Labour and Employment Comparative Guide
Germany
HEUKING KÜHN LÜER WOJTEK

Bernd Weller
t: +49 69 975 61-455
e: b.weller@heuking.de

Dr. Johan-Michel Menke, LL.M.
t: +49 40 35 52 80-0
e: j.menke@heuking.de

Other Labour and Employment Law guides

Canada
Cyprus
Denmark
France
Italy
Mexico
Switzerland
Thailand
UK

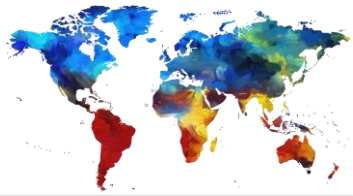
1.2 Is there a contractual system that operates in parallel, or in addition to, the statutory sources?

Contractual stipulations between employer and employee may be altered (to the benefit of the employee) by collective labour law agreements – that is, collective bargaining agreements and/or works council agreements. As a consequence, it must always be checked whether a collective bargaining agreement and/or works council agreement is applicable.

For more information about this answer please contact: Bernd Weller from Heuking Kuehn Lueer Wojtek PartGmbB

1.3 Are employment contracts commonly used at all levels? If so, what types of contracts are used and how are they created? Must they be in writing must they include specific information? Are implied clauses allowed?

Under German law, an agreement between employer and employee that the latter will do specific work for specific remuneration constitutes an employment contract; a particular form is not required. As for any contract, both parties need only agree on the core conditions (ie, working time, remuneration and identity of contractual parties).



Pursuant to EU Directive 91/533/EEC, the employer must provide the employee in writing, within one month of commencement of employment, with key information regarding the employment relationship (ie, identity of employer, commencement date, whether the contract is fixed term or indefinite, place of work, job duties, remuneration, working hours, annual holiday leave, notice periods and reference to applicable collective bargaining and works council agreements).

At the same time, statutory law requires the written form for particular clauses – most importantly, post-contractual non-compete clauses and fixed-term clauses. As most employment contracts provide for termination upon the employee reaching retirement age (which constitutes a fixed-term clause), there is de facto a general written form requirement (further to a recent decision of the Federal Labour Court).

Irrespective of the above, however, it is usual at all employment levels to provide the employee with at least a short written employment contract.

For more information about this answer please contact: Bernd Weller from Heuking Kuehn Lueer Wojtek PartGmbB

2. Employment rights and representations

2.1 What, if any, are the rights to parental leave, at either a national or local level?

Any employee whose child (and in some cases grandchild) lives in the same household is entitled to a parental leave. The leave can be requested in one block after the child's birth; alternatively, up to 24 months' leave may be taken between the child's third and eighth birthdays. Both parents may take parental leave at the same time.

An employee is further entitled to work on a part-time basis for his or her usual or a new employer while taking parental leave. However, only part-time work of between 15 and 30 hours per week may be claimed and enforced in court if the employer regularly has more than 15 employees, the employee has been employed for at least six months and the employer cannot point to urgent operational reasons that would prevent the employee from working part time.

The employer may give notice to an employee who is on parental leave only after obtaining permission to do so from a state authority.

Separate from parental leave, statutory German law also provides for maternity leave.

In addition, subject to a medical certificate or particular employment conditions, other restrictions or even statutory prohibitions may apply to pregnant employees. The employer may give notice to a pregnant employee only after obtaining permission from a state authority.

For more information about this answer please contact: Bernd Weller from Heuking Kuehn Lueer Wojtek PartGmbB

2.2 How long does it last and what benefits are given during this time?

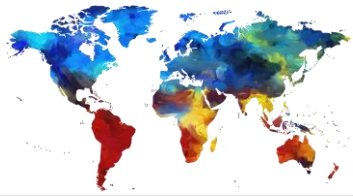
The parental leave may take up to a maximum of three years. During parental leave, the employee is entitled to remuneration only if and insofar as he or she is working. The employee may further be entitled to receive a state subsidy, depending on his or her earnings during that period.

Maternity leave starts six weeks before the (estimated) date of birth (unless waived by the pregnant employee) and ends eight weeks after the (actual) date of birth. This maternity leave cannot be waived. During maternity leave and where statutory employment prohibitions apply, the employer must continue to pay the employee. However, the employer will be reimbursed for most of this amount by statutory health insurance.

For more information about this answer please contact: Bernd Weller from Heuking Kuehn Lueer Wojtek PartGmbB

2.3 Are trade unions recognised and what rights do they have?

Establishment of trade unions, membership of trade unions and the exercise of collective freedom are protected by the German Constitution. As a consequence, trade unions may call employees on strike. Unlike in Southern European countries, a strike is permissible only if it is aimed at the conclusion of a collective bargaining agreement (ie, 'political'



strikes are not permissible), and subject to the precondition that there is no binding collective bargaining agreement already in place with regard to any of the strike goals.

Trade unions further have the right to advertise themselves within the workplace. However, this right is limited to unpaid time (ie, during work breaks), in 'public' places (eg, representatives may not walk alone on the premises), and to a proportionate extent (eg, once per calendar quarter). A union cannot force the employer to conclude a collective bargaining agreement with it; it can only enforce negotiations through the pressure caused by a strike.

The Works Constitution Act, which regulates employees' right to elect employee representative bodies within the workplace, further grants particular rights to trade unions, as long as at least one member is employed in that particular workplace. In such case, the trade union may control whether the elected works council (whose members are elected by employees at the relevant workplace and need not have any relation with the trade union) observes its statutory rights and duties.

Finally, German law requires companies of a certain size and legal form to establish a supervisory board and include employee representatives on the board. It is the supervisory board's role to control the management board of the company and to negotiate the remuneration of management board members. Where companies are obliged to establish a supervisory body, trade unions may be entitled to have one or several members serve as employee representatives on the supervisory board.

German law prohibits retaliation against employees due to membership of or activity on behalf of trade unions.

For more information about this answer please contact: Bernd Weller from Heuking Kuehn Lueer Wojtek PartGmbB

2.4 How are data protection rules applied in the workforce and how does this affect employees' privacy rights?

Employees' privacy rights are stipulated in the Federal Data Protection Act – the German statute which implements the EU General Data Protection Regulation – and the laws of the various German federal states. German law is based on the principle that data processing is permissible only if it is justified – whether by needs of a contractual nature (eg, processing employees' bank data in order to pay their remuneration), by explicit individual consent (which can be withdrawn at any time) or by a collective agreement (eg, a works council agreement). The transfer of data to other legal entities must also be justified. As a consequence, the transfer of employee data from one group company to another (even a holding company) is prohibited, unless there is a 'real' justification for the transfer. Breaches of the data protection and privacy laws may incur severe fines (up to 4% of the group's global revenue) or may constitute criminal offences.

For more information about this answer please contact: Bernd Weller from Heuking Kuehn Lueer Wojtek PartGmbB

2.5 Are contingent worker arrangements specifically regulated?

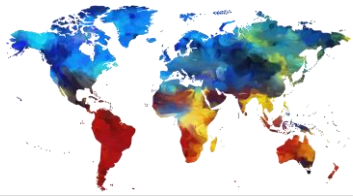
Yes, contingent worker arrangements are regulated in the Act on Temporary Hiring-out of Employees. This law has been amended frequently in recent years. The core regulations basically require contingent staffing agencies to obtain advance state permission for their business. Restrictive rules also apply to individual instances of contingent staffing. Most importantly, a contingent worker may not be hired out for more than 18 consecutive months to the same customer, and must be offered equal pay compared to standard employees of the customer performing comparable work.

Furthermore, the customer of a contingent staffing agency bears (subsidiary) responsibility for the accurate payment of remuneration, social security contributions and taxes by the agency.

Any breach of the law will have strict consequences, ranging from fines to the withdrawal of permission to hire out employees, the establishment of an employment relationship between the contingent worker and the customer, or even imprisonment.

Irrespective of the above, contingent worker arrangements are an important part of the labour market and contingent staffing agencies have been very successful in boosting their business over the last decade.

For more information about this answer please contact: Bernd Weller from Heuking Kuehn Lueer Wojtek PartGmbB



3. Employment benefits

3.1 Is there a national minimum wage that must be adhered to?

Yes, the Minimum Pay Act stipulates a nationwide hourly minimum wage for all employees of €9.19 gross (since 1 January 2019). From 1 January 2020, this will increase to €9.35 gross.

In addition, specific minimum pay regulations apply in certain industries or to certain positions on the basis of collective bargaining agreements.

For more information about this answer please contact: Bernd Weller from Heuking Kuehn Lueer Wojtek PartGmbB

3.2 Is there an entitlement to payment for overtime?

In many cases, overtime pay and its method of calculation are stipulated in employment contracts, collective bargaining agreements and/or works council agreements. However, the German courts will grant an entitlement to overtime pay to employees even where such an explicit clause does not exist. According to the courts, only employees whose annual remuneration exceeds the social security contribution ceiling (€80,400 gross) are not entitled to be paid for overtime, unless this has been explicitly provided for.

Furthermore, the Federal German Labour Court has recently held that employees are in principle entitled to be paid for their travel time, unless the parties have specifically agreed on different terms. In the case decided, the employee was claiming payment for time spent on a flight from Germany to China.

For more information about this answer please contact: Bernd Weller from Heuking Kuehn Lueer Wojtek PartGmbB

3.3 Is there an entitlement to annual leave? If so, what is the minimum that employees are entitled to receive?

Pursuant to the European directives, the Federal Holiday Act provides for minimum annual holiday leave entitlement. The number of holidays depends on the number of working days per week and amounts to four days per working day (ie, 20 days of annual leave for employees with a five-day working week).

However, the vast majority of employment contracts and collective bargaining agreements provide for a more generous annual leave entitlement – usually between 25 and 30 days per year for employees with a five-day working week. If the contractual offer falls significantly short of that, the company will find it difficult to attract qualified staff.

During holiday leave, employees are entitled to continuation of pay (calculated as the average daily pay over the 13 weeks before commencement of the holiday) – including all fixed and variable benefits, but excluding overtime pay.

Employees are further entitled to continuation of pay if a public holiday falls on one of the employee's regular working days. Depending on the region in Germany, this can add another nine to 13 days of paid leave per year.

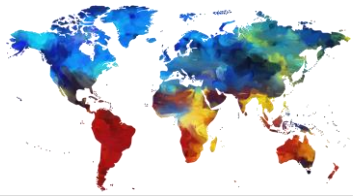
For more information about this answer please contact: Bernd Weller from Heuking Kuehn Lueer Wojtek PartGmbB

3.4 Is there a requirement to provide sick leave? If so, what is the minimum that employees are entitled to receive?

According to the Sick Leave Pay Act, employees who have been employed for at least three weeks are entitled to continuation of pay in the event of sickness, as long as this does not exceed six weeks per year. However, entitlement to continuation of pay might apply for significantly longer periods if the sick leave is taken for different medical reasons.

While this is relatively generous, employers may terminate the employment relationship on the grounds of sick leave if the number of sick leave days taken becomes too high (see further question 5.1)

For more information about this answer please contact: Bernd Weller from Heuking Kuehn Lueer Wojtek PartGmbB



3.5 Is there a statutory retirement age? If so, what is it?

The general statutory retirement age is 67. However, as the retirement age was increased some years ago, it might be some months less for older employees under a transitional rule.

Furthermore, women and severely disabled employees may retire some years earlier without financial disadvantages.

Employment beyond the retirement age is not prohibited by law; nor do employment relationships automatically end on retirement age. Instead, termination of the employment upon reaching retirement age must be agreed in writing. Otherwise, the employer must have a valid reason to give notice to the employee (see question 5.1); reaching retirement age in itself does not constitute a valid reason.

For more information about this answer please contact: Bernd Weller from Heuking Kuehn Lueer Wojtek PartGmbB

4. Discrimination and harassment

4.1 What actions are classified as unlawfully discriminatory?

The most important legal provisions protecting employees from discrimination and harassment are set out in the Anti-discrimination Act, which was enacted in August 2006. This act is based on several EU directives, including Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, although its provisions go beyond those of EU law.

The aim of the Anti-discrimination Act is to provide comprehensive protection against discrimination on the grounds of racial or ethnic origin, sex, religion or belief, disability, age or sexual orientation (Section 1). Employees are protected from both direct and indirect discrimination (Section 3).

Direct discrimination occurs when one person is, has been or would be treated less favourably than another person in a comparable situation because of an inadmissible characteristic of differentiation. In the case of direct discrimination, the discriminatory act is based specifically on a ground for discrimination (eg, a woman is not hired just because of her sex).

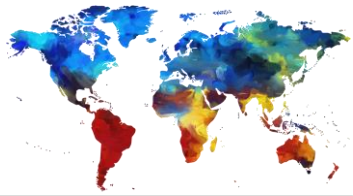
Indirect discrimination occurs when rules, criteria or procedures which appear to be neutral may in fact place certain persons at a particular disadvantage because of an inadmissible characteristic of differentiation, unless those rules, criteria or procedures are justified by a legitimate objective and are an appropriate and necessary means of achieving such legitimate objective. One example is the unjustified exclusion of part-time workers from certain benefits; indirect discrimination can then result from the fact that considerably more women are employed part time than men.

For more information about this answer please contact: Bernd Weller from Heuking Kuehn Lueer Wojtek PartGmbB

4.2 Are there specified groups or classifications entitled to protection?

The individual grounds for discrimination set out in the Anti-discrimination Act protect the following groups or classifications:

- Race or ethnic origin: This applies to groups of people who may be perceived as foreign – for example, on the grounds of skin colour, language or nationality.
- Religion or belief: 'Religion' includes every religious or denominational affiliation, as well as membership of a church or religious community (eg, Judaism, Buddhism).
- Sex: The female and male sex, pregnancy and disadvantages in connection with transitioning are all protected. According to a 10 October 2017 judgment of the Federal Constitutional Court (Case 1 BvR 2019/16), there is a third gender that cannot be assigned as either male or female: since 1 January 2019, intersexual individuals can be entered as 'inter' or 'divers' in German civil status registers.
- Age: Persons are protected from age discrimination irrespective of their age; in particular, no minimum age is required for protection under the Anti-discrimination Act.
- Sexual identity: This applies, in particular, to heterosexual, homosexual and bisexual people.



- Disability: A 'disability' is a limitation which is particularly due to physical, mental, spiritual or psychological impairments, and which constitutes an obstacle to the participation of the person concerned in society and therefore also in the workplace.

For more information about this answer please contact: Bernd Weller from Heuking Kuehn Lueer Wojtek PartGmbB

4.3 What protections are employed against discrimination in the workforce?

An employer has various organisational obligations in this regard. For example, it is obliged to design job advertisements (Section 11 of the Anti-discrimination Act) in such a way that they do not inadvertently violate the prohibition against discrimination (eg, gender-neutral advertisements). It must also take appropriate preventive measures to minimise the risk of discrimination in the workplace (Section 12 of the Anti-discrimination Act), particularly through vocational training and further education, and work towards its elimination. In addition, if an employee violates his or her obligations under the Anti-discrimination Act, the employer must take appropriate, necessary and proportionate measures to prevent such discrimination, such as a warning, implementation, transfer or dismissal.

For more information about this answer please contact: Bernd Weller from Heuking Kuehn Lueer Wojtek PartGmbB

4.4 How is a discrimination claim processed?

Employees who believe that they have been or are being discriminated against have the right to complain to the employer's competent officer – for example, the works council (Section 13 of the Anti-discrimination Act). The officer must examine the case and inform the employee of the result of its investigations.

For more information about this answer please contact: Bernd Weller from Heuking Kuehn Lueer Wojtek PartGmbB

4.5 What remedies are available?

The employee may claim compensation or damages. In the event of breach of the prohibition against discrimination, Section 15 of the Anti-discrimination Act stipulates that the employer is obliged to compensate for the resulting damage if it is responsible for the breach of duty. In the case of damage that does not constitute property damage, the employee can demand appropriate monetary compensation. This claim is independent of fault.

The employee must assert his or her claim in writing within two months. In addition, a claim for compensation must be filed with the labour court within three months of the claim being made in writing.

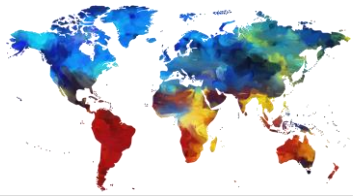
For more information about this answer please contact: Bernd Weller from Heuking Kuehn Lueer Wojtek PartGmbB

4.6 What protections and remedies are available against harassment, bullying and retaliation/ victimisation?

The employee can claim damages and compensation for pain and suffering. The bases for the employee's claim are set out in the Civil Code (Sections 823, 826 and 831). The injured legal interest usually relates to health, the body, property or the general right of personality.

Compensation therefore primarily takes the form of revocation of the defamatory allegation, omission of the infringing act or reimbursement of treatment costs for physical or mental health damage. A claim for damages for pain and suffering may also be considered, to compensate for non-material damage caused by violation of the general right of personality or health. The amount of compensation owed will depend on the extent of the fault and the nature and intensity of the impairment.

For more information about this answer please contact: Bernd Weller from Heuking Kuehn Lueer Wojtek PartGmbB



5. Dismissals and terminations

5.1 Must a valid reason be given to lawfully terminate an employment contract?

Under German statutory law, an employee who has been employed for more than six months by an employer with more than 10 employees enjoys protection against dismissal under the Law against Unfair Dismissal.

Under this law, ordinary termination is socially justified and thus valid only if either one of the following social justifications specified in the law can be established and, if necessary, evidenced in court by the employer:

- personal grounds (eg, illness);
- poor performance or misconduct (both of which require a formal advance warning); or
- business reasons.

In operations where a works council has been established, the works council must be notified of the intended termination one week in advance (Section 102 of the Employees' Co-determination Act). The employer must inform the works council about relevant details regarding the termination and the affected employee (in particular, age, seniority, alimony duties, termination date, notice period and reasons for termination). One week after such notification, a notice letter can be given to the employee, who shall be dismissed accordingly. If the notification process is not duly observed, the termination is legally void from the outset.

For more information about this answer please contact: Bernd Weller from Heuking Kuehn Lueer Wojtek PartGmbB

5.2 Is a minimum notice period required?

Parties can agree on a certain notice period in the employment contract, which must then be observed in case of dismissal.

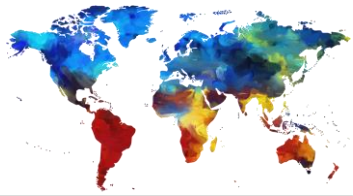
In absence of such a stipulation, the statutory notice periods apply. Mandatory extensions of the statutory notice period apply after certain terms of service. The regular and extended statutory notice periods are as follows:

- Regular notice period;
    - two weeks during a probationary period of a maximum of six months;
    - after the probationary period, or in the absence of any stipulation on a probationary period, four weeks to either the 15th or last day of a calendar month.
- Extended statutory notice periods (with effective date always to the last day of a calendar month):
    - one month after two years of service;
    - two months after five years of service;
    - three months after eight years of service;
    - four months after 10 years of service;
    - five months after 12 years of service;
    - six months after 15 years of service; and
    - seven months after 20 years of service.

A collective bargaining agreement or a works council agreement may provide for other (usually longer, but sometimes shorter) notice periods and/or other effective dates, which will then supersede the statutory and contractual notice periods.

During the notice period, normal salary and all contractual and statutory benefits must be paid to the employee.

For more information about this answer please contact: Bernd Weller from Heuking Kuehn Lueer Wojtek PartGmbB



5.3 What rights do employees have when arguing unfair dismissal?

In practice, almost every terminated employee files a claim with the locally competent labour court to contest the validity of the termination. The employee must do so within three weeks of receiving notice; otherwise he or she will lose statutory protection under the Law against Unfair Dismissal.

For more information about this answer please contact: Bernd Weller from Heuking Kuehn Lueer Wojtek PartGmbB

5.4 What rights, if any, are there to statutory severance pay?

In principle, there is no legal entitlement to severance pay. In order to avoid the risk of invalid termination, employers are usually prepared to terminate a case of dismissal at an early stage.

Another reason for settlement is that, unlike in civil court litigation, in labour law litigation the losing party bears no obligation to reimburse the costs of the winning party. Thus, the employer must bear the costs of defending its case in court even if it finally succeeds. Depending on the age and seniority of the employee, it may be cheaper to pay severance to the employee than to bear the litigation costs.

Settlement negotiations can start before or after notice is given. Litigation does not prevent the parties from continuing to seek an out-of-court or court settlement. Settlement negotiations will usually be based on the following considerations:

- If the employer has a good chance of proving that the termination was valid, a severance offer of 50% of one monthly salary for each year of employment will normally be sufficient to secure a young or short-term employee's consent to the termination.
- For older and/or long-term employees, the usual severance offer is 75% to 100% of one monthly salary for each year of employment.
- Monthly salary is often calculated as 1/12 of the total annual salary, including average variable remuneration and sometimes other benefits, such as company car and insurance. Higher severance payments must usually be offered to employees with special protection against dismissal (eg, pregnant women, works council members).

For more information about this answer please contact: Bernd Weller from Heuking Kuehn Lueer Wojtek PartGmbB

6. Employment tribunals

6.1 How are employment-related complaints dealt with?

Most complaints brought before the labour courts are actions against dismissal. In the event of dismissal, the employee has the option of filing an action for a declaratory judgment with the competent labour court. This is aimed at establishing reinstatement of the employment relationship for an indefinite period. The employee must bring the action within three weeks of receiving notice of termination. This period is prescribed by law and must be observed.

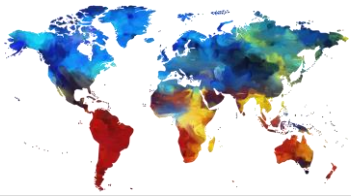
There is no requirement for legal representation in the labour court (first instance). The employee can formulate the complaint and file it with the court himself or herself.

The jurisdiction of the labour court depends on the defendant's place of residence or the location of its company headquarters.

For more information about this answer please contact: Bernd Weller from Heuking Kuehn Lueer Wojtek PartGmbB

6.2 What are the procedures and timeframes for employment-related tribunals actions?

Labour court proceedings are set in motion upon filing of the complaint. A conciliation hearing takes place approximately two weeks after filing of the complaint. At this conciliation hearing, an attempt is made to reach agreement between the parties and terminate the proceedings without a verdict. If the parties can agree, a



corresponding settlement will be reached. If the parties cannot agree, the judge will usually set a date for the chamber, in which the parties will negotiate with motions in dispute; the proceedings will end with a judgment.

An appeal may be lodged with the competent regional labour court against a judgment of the labour court. The regional labour court's decision may be further appealed within one month to the Federal Labour Court, with the appeal then substantiated within a further month. In this case, however, the regional labour court must allow the appeal because of the fundamental importance of the case.

For more information about this answer please contact: Bernd Weller from Heuking Kuehn Lueer Wojtek PartGmbB

7. Trends and predictions

7.1 How would you describe the current employment landscape and prevailing trends in your jurisdiction? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

No answer submitted for this question.

8. Tips and traps

8.1 What are your top tips for navigating the employment regime and what potential sticking points would you highlight?

No answer submitted for this question.