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SCOPE OF LAWS

1. Do the main laws that regulate the employment relationship apply to:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

Laws applicable to foreign nationals

Germany has adopted the Rome Convention on the law applicable to contractual obligations (1980/934/EEC). As a result, parties to an employment contract can choose a foreign law to govern their relationship, although they are subject to certain mandatory provisions of German law (for example, laws regarding employment protection, working hours (*see Question 7*) or prohibited types of employment).

If the parties to an employment contract do not expressly choose a governing law, the law of the jurisdiction in which the employee usually carries out work governs the contract. If the employee carries out work in more than one country, the governing law is the law of the jurisdiction in which the employer's registered branch is located and the employee is employed.

Laws applicable to nationals working abroad

A German national is subject to German law if assigned to work abroad temporarily for not more than three years. However, during the assignment, the employee is subject to the mandatory parts of the foreign law, such as working hours, employment security and public holidays.

EMPLOYMENT RESTRICTIONS AND INCENTIVES

2. Are there any age or nationality restrictions on managers or company directors? If so, please give details.

Age restrictions

There are no age restrictions on managers or company directors.

In principle, employment contracts or collective bargaining agreements (CBAs) can set age limits. However, to be enforceable, these must not be considered age discriminatory under the General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*) (*see Question 14*). The General Act on Equal Treatment lists acceptable justifications for age limits (sections 8 and 10) (*see Question 14, Discrimination*).

Nationality restrictions

There are no nationality restrictions on managers or company directors.

3. Are any grants or incentives available for employing people? If so, please give details.

An employer can receive certain incentives for employing:

- **Disabled persons.** An employer can generally claim back from the state up to half of a disabled person's monthly salary over a 12-month period. This increases in exceptional cases to 70% over a 24-month period.
- **Long-term unemployed persons.** If an employer employs a previously long-term unemployed person, it can receive a subsidy of up to 75% of the employee's salary from the state.

WORK PERMITS

4. What permits do foreign nationals require to work in your country? Please explain:

- **How these permits are obtained.**
- **How much they cost.**
- **How long the process takes.**

Required permits

Foreign nationals must generally obtain a work and residence permit to work in Germany, unless they are European Economic Area (EEA) nationals or have an unlimited permit to reside in Germany (for example, where they have obtained a permanent residence and work permit because they are highly qualified (*see below*)). Nationals from the new EU member states that acceded in 2004 (such as Slovakia and the Czech Republic, except for Cyprus and Malta) are subject to a temporary EC regulation that restricts their freedom to work in the old EU member states. This restriction ends on 30 April 2011. Foreign nationals from these EU member states must have a work permit. Work permits are generally denied if there are any German nationals available who could do the job. Citizens from Bulgaria and Romania, which acceded in 2007, are also subject to restrictions and will require a work permit until 30 April 2011. There are potential additional exceptions from the requirement for a work permit for (*Work Permit Decree (Arbeitsgenehmigungsverordnung)*):

- Managerial employees.
- General employee representatives.

- Academic employees (such as university lecturers).

The following provisions apply to foreign nationals who wish to work in Germany (*Immigration Act (Aufenthaltsgesetz)*):

- Employers can recruit foreign nationals if they cannot find German nationals to fill their vacancies. In this case, the employer must take all necessary steps to obtain the work and residence permits required (*section 18, Immigration Act*).
- Highly qualified persons (such as computer scientists, geneticists, other specialised scientists and professors) can obtain permanent residence permits immediately if certain conditions are met, for example, if there is a specific offer of employment. This permanent residence permit is unlimited and includes the permission to work (*section 19, Immigration Act*).
- Foreign nationals who intend to set up their own business or company can obtain a residence permit for three years if justified by a strong economic interest. There is usually a strong economic interest, if, when setting up the business, the foreign national creates both (*section 21, Immigration Act*):
  - an investment of at least EUR250,000 (as at 1 August 2010, US$1 was about EUR0.8);
  - at least five new jobs.

Obtaining permits

Local immigration departments (*Ausländerbehörden*) of the municipality (*Stadtratsamt*) of the employee's intended place of work issue work and residency permits.

Work and residence permits last for a maximum of five years, but employees or employers can apply for extensions.

Cost

Work permits are free of charge. A permanent residence permit costs up to EUR85. A standard temporary residence permit costs up to EUR60.

Length of process

The whole process of obtaining a work and residence permit can last several weeks, depending on the size of the relevant authority.

TERMS OF EMPLOYMENT

5. What terms govern the employment relationship? In particular:

- **Is a written employment contract or statement of employment terms required?**
- **Are any terms implied by law into the employment contract (in addition to the terms referred to in *Question 1*)?**
- **Are collective agreements with trade unions or employee representatives common (generally or in specific industries)?**

Written employment contract

There are no formal requirements for an employment contract to be valid. However, if no written employment contract exists, the employment terms must be documented in writing (*Statute of the Documentation of Employment Terms (Nachweisgesetz)*). In addition, to be effective, a fixed-term clause in an employment contract must be in writing. CBAs can also require employment contracts to be in writing.

Implied terms

Many employment terms and conditions are implied into an employment contract, for example the:

- Duty of care.
- Principle of equal treatment.
- Duty of trust, confidence and loyalty between the employer and employee.

In addition, conditions that are not expressly mentioned in the contract can be implied by common practice. For example:

- Standard remuneration must be paid if no contractual provision for remuneration has been agreed (*section 612, paragraph 2, Civil Code (Bürgerliches Gesetzbuch)*).
- General factory or office hours apply if the employment contract does not set out working hours.

Collective agreements

CBAs are widespread, particularly in the following industries:

- Metal.
- Chemical.
- Mining.
- Insurance.
- Retail.
- Construction.
- Public service.

However, individual employment contracts rather than CBAs tend to govern modern industries such as IT and consulting.

MINIMUM WAGE

6. Is there a minimum wage? If so, please give details, in particular whether it applies to all employees, regardless of their age and experience.

CBAs can set minimum wages, in which case the minimum wage applies only to union members and the employer can decide whether to extend it to other employees. In certain circumstances, the government can extend a CBA term to cover non-union members (*Arbeitnehmerentsendegesetz (AEntG)*). In addition, in areas such as the building and construction industries, CBA terms can also apply to employment relationships between employees employed in Germany and their foreign employers. The government has declared CBA terms to be binding on non-union members in the following sectors:

- Construction.
- Roofing.
- Painting and decorating.

- Building cleaning.
- Electrician trade.

Under the 2009 supplement to the AEntG, CBAs terms can also be declared binding on non-union members in the following sectors:

- Healthcare (including geriatric and domestic healthcare).
- Postal work.
- Security services.
- Coal mining.
- Laundry services.
- Waste management (including street cleaning and winter road maintenance).
- Education and training.

WORKING TIME

7. Are there restrictions on working hours? If so, please give details.

The maximum working time is (*Statute on Working Hours (Arbeitszeitgesetz)*):

- Eight hours a day.
- Six days a week.

As a result, the maximum working week is 48 hours.

The number of working hours can be averaged, so it is possible to work for up to ten hours a day if the average number of hours worked does not exceed eight hours a day (in a six-day week) calculated over a six-month period.

8. Is there a minimum holiday entitlement? If so, please give details. How many public holidays are there in a year and are they included in the minimum holiday entitlement?

Employees' holiday entitlements vary depending on the number of their working days. If they work a six-day week, they are entitled to a minimum holiday of 24 working days each year (*section 3, paragraph 1, Federal Holiday Act (Bundesurlaubsgesetz)*). This entitlement then reduces proportionally for every day they work less than six days a week. For example, employees who work a five-day week are entitled to 20 days' holiday a year.

Certain categories of employees are entitled to additional holiday, for example:

- Persons under the age of 18.
- Disabled persons.

The number of public holidays differs between the federal states, and ranges from 9 to 13. Public holidays are not included in the minimum holiday entitlement.

ILLNESS AND INJURY PAY

9. What rights do employees have to time off in the case of illness or injury? Is that time off paid? Can an employer recover from the state sick pay granted to its employees?

Employees receive full sick pay from the employer for six weeks for illness or working injury if (*Continuation of Remuneration Act (Entgeltfortzahlungsgesetz)*):

- They have worked for at least four weeks.
- The illness or injury is not caused by their own negligence.

If an employee has an underlying condition, this six-week period begins again with each onset of the illness, provided either:

- Six months have passed since the last sick leave.
- One year has passed since the beginning of the first sick leave.

The employer does not recover sick pay from the state. Once the six-week period expires, employers receive a sickness allowance under their statutory health insurance scheme (*see Question 20, Social security contributions*). Additional health schemes are unusual.

PARENTS AND CARERS

10. What are the statutory rights of employees who are parents or carers (including those of disabled children and adult dependants)? How is employees' pay affected during periods of leave?

Maternity rights

Female employees have maternity leave of 14 weeks, divided up as follows:

- Six weeks before childbirth.
- Eight weeks after childbirth. This is extended to 12 weeks for multiple or premature births.

During this time, they receive maternity pay (*Mutterschaftsgeld*). This is equivalent to their average monthly salary during the three-month period before maternity leave. No income tax is charged on this maternity pay.

Female employees cannot be dismissed either:

- During pregnancy.
- Until the end of the fourth month after the childbirth.

An employer can only breach this rule in exceptional cases, and with the competent authority's approval.

Paternity rights

There is no specific paternity leave, but male employees can claim parental leave (*see below, Parental rights*).

Adoption rights

Parents who adopt a child can claim parental leave (*see below, Parental rights*). This lasts for three years from the adoption.

Parental rights

Parents can claim parental leave of three years after childbirth. The right to parental leave expires when a child turns eight years old. Both parents split this maternity leave, and it is repeated for each child.

During parental leave, employees have the right to work 30 hours a week or less, as long as this reduction is agreed with the employer. When parental leave ends, employees have the right to work the same number of working hours as before the parental leave.

Employees are protected against dismissal during parental leave but cannot claim remuneration.

Carers' rights

Employees can claim full remuneration for days of absence from work due to caring for close relatives. This entitlement depends on the circumstances of the case, but does not usually extend beyond several days. This is not a mandatory right, and is usually excluded in the employment contract.

One parent can claim release from work to care for an ill child if both (*section 45, Compulsory Health Insurance Act (Sozialgesetzbuch V, Gesetzliche Krankenversicherung)*):

- The child is either:
  - under 12 years old; or
  - disabled.
- No one else in the employee's household can care for the child.

This release can last for ten days a year. This may be extended to 20 days for single parents. Whether or not the release is paid depends on the employee's health insurance.

CONTINUOUS PERIODS OF EMPLOYMENT

11. Does a period of continuous employment create any benefits for employees? If individual employees are transferred to a new entity, are they deemed to retain their period of continuous employment?

Benefits

Employees' length of continuous employment determines their eligibility for certain statutory benefits, such as:

- Protection against dismissal (this arises after six months' continuous employment).
- Full holiday entitlement.
- Sick pay (this arises after four full weeks' employment).
- Severance pay.
- Longer notice periods.
- More social protection.
- The right to change from full-time to part-time status, or vice versa.

Transfer

If employees are transferred to a new entity under an asset sale, they are deemed to retain their period of continuous employment for the purpose of statutory benefits.

Continuity of employment is often presumed if individuals are transferred between affiliated companies. However, the parties can specifically agree otherwise, provided that their agreement meets minimum statutory requirements.

TEMPORARY AND AGENCY WORKERS

12. To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees?

Agency workers

An agency proposing to hire out agency workers can only do so if it has the necessary licence. An agency worker has essentially the same rights as other employees. This particularly applies in relation to the issue of remuneration. The only exception to this principle is where a CBA gives other provisions (*section 9, Law on Labour Leasing (Arbeitnehmerüberlassungsgesetz)*).

Temporary workers

Part-time and temporary workers have the same rights as other employees. There is an exclusive discrimination prohibition that applies to such workers, due to the particular nature of their work contract (*section 4, Law on Part-time Work and Temporary Work Contracts (Gesetz über Teilzeitarbeit und befristete Arbeitsverträge)*).

DATA PROTECTION

13. What statutory data protection rights do employees have?

Employees' personal data is protected under:

- The Federal Data Protection Act (*Bundesdatenschutzgesetz*), especially section 32, which implements Council Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.
- Individual employment contracts and tort law.
- Constitutional law (which sets out certain basic rights).
- Co-determination by the works council under the Works Council Constitution Act (*Betriebsverfassungsgesetz*).

Employers must inform employees if their personal data is being stored or conveyed to a third party. Under certain conditions, employees can require data about them to be amended, deleted or stored. They can claim compensation if they suffer damage due to a breach of their data protection rights.

DISCRIMINATION AND HARASSMENT

14. What protection do employees have from discrimination or harassment, and on what grounds?

Most German employment law legislation contains provisions that protect employees against discrimination and harassment. The most important provisions are set out in the Anti-Discrimination Act, which was enacted in August 2006. This act is based on several EU directives, including Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, but its provisions go beyond EU legislation.

Discrimination

Employees are protected from direct and indirect discrimination on the grounds of (*General Act on Equal Treatment*):

- Race.
- Ethnic origin.
- Gender.
- Religion or belief.
- Disability.
- Age.
- Sexual orientation.

The following discrimination can be justified under the General Act on Equal Treatment:

- Positive discrimination to abolish existing disadvantages (*section 5, General Act on Equal Treatment*).
- Professional requirements that are in effect discriminatory, provided that these requirements, such as gender or age, are essential to the performance of the profession (*section 8, General Act on Equal Treatment*).
- Discrimination on the grounds of religion or belief by religious communities, if religion or belief is a specific professional requirement (*section 9, General Act on Equal Treatment*).
- Age discrimination, if based on an objective and appropriate aim, for example, the protection of younger or older employees through a reduction in their working hours (*section 10, General Act on Equal Treatment*).

Individual or collective agreements that contain non-justifiable discriminatory terms are invalid.

Employees who believe they are discriminated against have the right to complain to the employer's competent officer, for example, the works council (*section 13, General Act on Equal Treatment*). The officer must examine the case and inform the employee of the result of its investigations.

Employees who are discriminated against can claim compensation for the damage caused by the discrimination, for example, the difference in pay based on gender. Employees must make a claim within two months of becoming aware of the discrimination. A job applicant who is rejected on discriminatory grounds cannot require the employer to recruit him for that position.

If employees violate anti-discrimination provisions, the employer must take the required measures to prevent discrimination, such as giving the employee a warning letter or transferring or dismissing the employee.

An employer must:

- Employ one disabled person if it has 20 to 39 employees.
- Employ two disabled persons if it has 40 to 59 employees.
- Ensure that 5% of its workforce is made up of disabled persons if it has over 60 employees.

If this requirement is not met, the employer must pay a monthly fine of EUR105 to EUR260 for each position that should be filled by a disabled person (the fine depends on the number of employees in the business).

German law contains no particular provisions on victimisation, but a private law provision forbids employers from disadvantaging employees on the grounds that they exercise their legal rights.

Harassment

Harassment is considered to be offensive behaviour that is threatening or disturbing, beyond that which is socially permissible.

Discrimination includes harassment and sexual harassment (*section 3, General Act on Equal Treatment*). As a result, harassed employees have the same rights as those that apply in the case of discrimination (*see above, Discrimination*). In addition, if the employer does not take suitable measures to stop harassment in the workplace, harassed employees can refuse to work.

15. Do whistleblowers have any protection? If so, please give details.

There is no statutory protection for whistleblowers and the courts are reluctant to protect them, although their attitude has relaxed over the last five years. Employees must not suffer adverse consequences in their employment relationship if they meet their public duties by whistleblowing (*Decision of the Federal Constitutional Court of 2 July 2001, 1 BvR 2049/00*).

According to two decisions of the Federal Labour Court of Germany an employee can be dismissed on grounds of conduct for making a criminal complaint against his employer if the complaint is a disproportionate reaction, especially if the employee was expected to clarify the situation internally (*Decisions of the Federal Labour Court of 3 July 2003, 2 AZR 235/02 and of 7 December 2006, 2 AZR 400/05*).

Whistleblowers can report information on criminal conduct anonymously on a website that was set up in Lower Saxony.

The EU has taken steps towards recognising a pan-European whistleblowing system.

DISMISSALS AND REDUNDANCIES

16. What rights do employees have when their employment contract is terminated? Please provide information on:

- **Notice periods.**
- **Severance payments.**
- **Any procedural requirements for dismissal.**

Notice periods

Statutory notice periods apply, unless CBAs and employment contracts specify more favourable notice periods. Statutory notice periods depend on the duration of the employment relationship. For example, the notice period is:

- Four weeks for an employment relationship of less than two years. The dismissal becomes effective on the earliest of the 15th day or the end of the calendar month.
- Seven months for an employment relationship of 20 years or more. The dismissal takes place at the end of the calendar month.

Employees are entitled to receive their usual remuneration during the notice period.

Severance payments

The only legal entitlement to severance pay arises on a business reorganisation. Employees who are fairly dismissed as a result of economic, technical or operational reasons (ETO reasons) can claim half a month's gross salary for each year of employment if the following conditions are met:

- The employer offers severance pay in the dismissal notice terms.
- The time limit to file a claim against the dismissal has expired (*see below, Procedural requirements*).

Employees who are unfairly dismissed can claim reinstatement. However, most unfair dismissal proceedings are settled by severance payments rather than by reinstatement. These payments are often calculated on the basis of half a month's salary for every year of employment. Employees can claim severance pay if the Labour Court declares that the employment relationship is dissolved under section 9 of the Protection against Unfair Dismissal Act (*Kündigungsschutzgesetz*) and either:

- The employee cannot reasonably be expected to continue the employment relationship.
- The employer demonstrates that it is unlikely that future employment of the employee will serve the company's best interests.

If so, the maximum severance pay for unfair dismissal is either:

- A full year's salary, in most cases.
- 15 months' salary in exceptional cases, where both:
  - the employee has reached the age of 50;
  - the employment relationship has lasted for at least 15 years.

Procedural requirements

Before any dismissal, the employer must notify and consult with the relevant works council (*see Question 23, Management representation*) and provide all information needed to consider the dismissal's legality. Any notice of dismissal given without proper consultation with the works council is invalid. However, this is only a duty to notify and consult. The works council's approval is required for the dismissal without notice of a works council member.

If employees object to their dismissal, they must file a complaint with the Labour Court (*Arbeitsgericht*) within three weeks of receiving notice of the dismissal. An initial hearing is then scheduled. Once the parties have exchanged pleadings and at least one further hearing has taken place, the court gives judgment. This procedure can take between six and nine months, depending on the circumstances of the case.

17. What protection do employees have against dismissal? Are there any specific categories of protected employees?

An employee is protected from unfair dismissal if both:

- The employee has worked for more than six consecutive months.
- The company employs:
  - over ten employees; or
  - over five employees, if both:
    - the employee concerned began working for that employer before 1 January 2004; and
    - the employer employed more than five employees before 1 January 2004 and still employs all of the employees employed at that time.

Dismissals can only be justified for:

- Individual circumstances (for example, a long-term illness).
- Conduct.
- ETO reasons that rule out the possibility of an employee continuing to work in the business.

If a dismissal is based on ETO reasons, the employer must consider the following social selection criteria when deciding which employees to dismiss (*Sozialauswahl*):

- Length of service.
- Age.
- Any maintenance duties.
- Any severe disability.

If the criteria are not met, the dismissal may be void.

If unfair dismissal is proved, employees can claim reinstatement, although they can receive severance pay if certain requirements are satisfied (*see Question 16, Severance payments*). In addition, one or both parties to an employment relationship can apply to the Labour Court to dissolve the relationship. See also *Question 18*.

18. What rules apply on redundancies?

When considering redundancies, in certain circumstances, such as when there is a business reorganisation and at least 20 employees are eligible to vote, the employer must inform and negotiate with the relevant works council to prepare:

- **A reconciliation of interests' agreement (*Interessenausgleich*).** Redundancies can only take place when the employer has met the duty to negotiate this agreement. The negotiations can last from a few days to several months, depending on how the works council responds. If an agreement is drawn up, it lists by name the employees affected by the reorganisation, either because of a change in employment terms or because of redundancies. It is then assumed that the listed employees' redundancy is justified by ETO reasons.
- **A social compensation plan (*Sozialplan*).** This typically specifies the redundancy payments to employees.

All dismissals must observe the generally applicable notice periods (*see Question 16, Notice periods*). In addition, a notice of dismissal must be given in writing to be valid.

Employees who are dismissed for ETO reasons have a legal right to severance pay (*see Question 16, Severance payments*). If there is no justifiable reason for making employees redundant, the Labour Court can award the dismissed employees additional compensation.

TAXATION OF EMPLOYMENT

19. What is the basis of taxation of employment income for:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

Foreign nationals

Individuals who are domiciled or resident in Germany are subject to German income tax on all income, wherever it arises. They are usually considered domiciled or resident if they have lived in Germany for a minimum of 183 days in one calendar year.

However, if their income is also taxed in another jurisdiction, a double taxation treaty often provides relief.

Nationals working abroad

Individuals who are not domiciled or resident in Germany only pay German income tax on German-source income. This income is taxed at either 15% or 30%, depending on the income source.

Different rules may apply under a double taxation treaty.

20. What is the rate of taxation on employment income? Are any other taxes or social security contributions levied on employers and/or employees? If so, please give details, including the rates.

Income tax

Individuals who are resident or domiciled in Germany are taxed on their income (after general and personal deductions have been made) at progressive rates, ranging from 14% to 42%, with a tax rate in 2009 of 45% for income over EUR250,000. All types of employment income are taxed (for example, wages, bonuses and other benefits in kind, such as a company car). They must also pay the following on the amount of income tax paid:

- A solidarity surcharge of 5.5% (this relates to the unification of the former East and West Germany).
- A church tax of 8% or 9% (up to a cap of 2.75% or 3.5% of the taxable income) if they are members of a church.

The first EUR8,004 of income is not taxed. All employees can also deduct a lump sum allowance of EUR920. The amount of tax payable is affected by:

- An employee's marital status.
- Whether employees have children.

Individuals who are not resident or domiciled in Germany pay income tax at the same progressive rates but are subject to a minimum rate of 15%.

Income tax on employment income is typically levied by tax withholdings calculated and deducted from salary payments by the employer. This does not apply to foreign employees.

Social security contributions

All employees are compulsory members of the state social security system (*Sozialversicherung*), which organises the following types of insurance:

- Pension insurance (*Rentenversicherung*): 19.9% of gross salary.
- Health insurance (*Krankenversicherung*): 14.9% of gross salary, on average.
- Unemployment insurance (*Arbeitslosenversicherung*): 2.8% of gross salary until 31 December 2010 and 3% from 1 January 2011.
- Nursing care insurance (*Pflegeversicherung*): 1.95% of gross salary.

The employer and employee share these contributions equally. They add up to 40% of an employee's gross income. For calculating the contributions, there are caps of:

- EUR66,00 for unemployment insurance and pension schemes (in 2010).
- EUR45,00 for health and nursing insurance (in 2010).

LIABILITY

21. Are there any circumstances in which:

- **An employer can be liable for the acts of its employees?**
- **A parent company can be liable for the acts of a subsidiary company's employees?**

Employer liability

An employer is responsible to third parties with which it has a contractual relationship, for any damage caused by its employees in the performance of their duties and must pay compensation (for example, to cover damage that employees caused to a customer's vehicle).

The employer may be able to avoid liability towards a third party if it both:

- Does not have a contractual relationship with it.
- Can prove that it exercised the necessary diligence when recruiting the relevant employee for the position.

Parent company liability

A parent company is not generally liable for the acts of its subsidiary's employees. However, it may be liable if it used the subsidiary to meet its own contractual obligations towards a third party. In this case, the subsidiary and/or the subsidiary's employees act as auxiliary persons.

22. What are an employer's obligations regarding the health and safety of its employees?

The Labour Safety Act (*Arbeitsschutzgesetz*) regulates health and safety standards. This implements Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work.

The employer must take all measures necessary to protect its employees' health and safety. This involves not only maintaining certain standards in the workplace, but also continuously improving these standards. The employer is responsible for the costs of the measures, and cannot impose contributions on employees (*section 3, Labour Safety Act*). The specific duties that an employer must meet depend on the nature of the individual workplace.

REPRESENTATION AND CONSULTATION

23. Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

Management representation

If a company (or a company branch) has more than five employees, a works council can be elected (*Works Council Constitution Act (Betriebsverfassungsgesetz)*). The works council can deal with a wide range of matters that affect employees' social and personal rights. For example, the employer must consult or negotiate with the works council:

- Before dismissals (*see Question 16, Procedural requirements*).
- Before a transfer (*see Question 25*).
- If business operations change and at least 20 employees are eligible to vote for the works council. The employer and works council must negotiate to draw up a reconciliation of interests' agreement and a social compensation plan, to identify and apportion any economic disadvantages that affect the employees (*see Question 18*).

The Committee of Spokesmen (*Sprecherausschuß*) organises independent representations for managerial employees.

Consultation

Employees and shareholders have rights to be represented by supervisory boards in relation to important corporate planning and decision making under the following:

- The Co-determination Act (*Mitbestimmungsgesetz*).
- The Works Council Constitution Act.
- Co-determination in the Coal, Iron and Steel Industries Act (*Montanmitbestimmungsgesetz*).

Major transactions

In companies with more than 100 employees, an economic committee (*Wirtschaftsausschuß*) is set up to report to the works council on economic matters. The employer must inform the economic committee of all financial matters that extend beyond the scope of the management's usual decisions, such as (*section 106, Works Council Constitution Act*):

- Acquisitions.
- Disposals.
- Joint ventures.

If the works council is not consulted about a transfer, it can bring a claim against the employer and the transfer may be prohibited.

If a business or part of a business is to be transferred, the former or new employer must inform employees of the (*section 613a, paragraph 5, Civil Code, which implements Council Directive 2001/23/EC on safeguarding employees' rights on transfers of undertakings, businesses or parts of businesses*):

- Proposed date of the transfer.
- Reasons for the transfer.
- Legal, economic and social implications of the transfer.
- Measures that are planned in relation to the employees.

Employee consultation or consent is not required on a share sale, since this does not involve a transfer of the business or part of the business.

24. What are the remedies that are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

Remedies

Generally, if an employer fails to comply with its consultation duties, the measure it wanted to implement is invalid. Otherwise, compensation to the employees is the only remedy.

If the employer fundamentally breaches its duties under the Works Council Constitution Act, the works council and labour union, as representatives of the company, rather than individual employees, can apply for an injunction to stop the employer implementing the proposed measures. If the employer continues to infringe, it is liable to pay compensation of up to EUR10,000.

Employee action

Employees cannot take action to prevent proposals going ahead independently of their representatives.

TRANSACTIONS

25. Is there any statutory protection of employees on a business transfer? In particular:

- **Are they automatically transferred with the business?**
- **Are they protected against dismissal (before or after the disposal)?**
- **Is it possible to harmonise their terms of employment with other (existing) employees of the buyer?**

Automatic transfer

If a business or part of a business is transferred to another entity, the employment relationships concerned are also automatically transferred to the new entity (*section 613a, paragraph 1, Civil Code*) (*see Question 11, Transfer*). Employees can object to the transfer of their employment relationship. They must put forward any objections within one month of being informed of the transfer (*section 613a, paragraph 6, Civil Code*).

Protection against dismissal

Employees cannot be dismissed solely as a result of a transfer (*section 613a, paragraph 4, Civil Code*). However, any other dismissal, for example for ETO reasons (with the option of re-engaging employees on altered terms) is valid.

Harmonisation

The rights and duties set out in an employment contract, CBA or works council agreement (WCA) continue to apply after a transfer takes place. The fact that the new employer's existing employees are subject to different provisions is not a legitimate reason to alter the transferring employees' employment terms. To achieve harmonisation, after the transfer the new employer can either:

- Mutually agree new contractual terms with each individual employee.
- Dismiss the employees, with the option of re-engaging them on altered terms and conditions. However, dismissals that have the aim of changing employment terms are only valid if ETO reasons (such as lack of funding) make the changes necessary. The employer must also be careful that the dismissals are not held to be unfair, by establishing defences under the Protection against Unfair Dismissal Act (*see Question 17*).

PENSIONS

26. Do employers and/or employees make pension contributions to the state in your jurisdiction? If so, please give details of:

- **The contributions payable.**
- **The tax treatment of those contributions.**
- **The monthly amount of the state pension.**

Contributions

Both the employer and employees make contributions to the statutory pension insurance system. The employer transfers the total amount of both contributions to the insurer.

Tax

The employer's contribution to the statutory pension insurance system is tax free for the employee, but retired employees must pay tax on state pensions.

Monthly amount

Most employees are eligible for retirement benefits at the age of 67 (*section 35, Social Security Code VI*). From 2012, this threshold will progressively increase to 67. Lower age thresholds are possible, for example, for handicapped employees or persons who can take early retirement. The pensions payable depend on:

- The number and amount of contributions made.
- The period of time over which the contributions are paid.
- The employee's income.
- Social factors.

The average monthly pension is about 60% of a retired employee's former salary. The amount depends on the factors outlined above.

27. Is it common (or compulsory) for employers to provide access, or contribute, to supplementary pension schemes for their employees? Do such schemes provide pensions the value of which:

- **Can usually be determined at the start of the arrangement (for example, the value is linked to the employee's salary)?**
- **Cannot usually be determined at the start of the arrangement (for example, the value is dependent on employer and employee contributions and investment return on those contributions)?**

If employees request it, an employer must offer a private pension scheme in the form of deferred compensation. The employer is

not obliged to offer other private pension schemes and these are not as common as they once were, although companies still usually offer one of various forms of supplementary pension scheme. The form of pension scheme chosen is commonly one in which the value is determined at the start of the arrangement. The employer generally pays the contributions, but employees partly or fully finance some schemes.

28. Is there a regulatory body that oversees the operation of supplementary pension schemes? If so, please briefly summarise the regulatory framework.

There are various types of supplementary pension schemes. Only some of them are overseen by a regulatory authority. For example, if the supplementary pensions scheme is financed by a pension fund, it is controlled by the Federal Financial Supervisory Authority.

29. Are any tax reliefs available on contributions to supplementary pension schemes (by the employer and employees)? If so, please give details.

Company pension schemes do not benefit from particular tax reliefs, but under certain circumstances the contributions are tax free for the employees.

30. Is there any legal protection of employees' pension rights on a business transfer? In particular:

- **Do supplementary pension rights qualify as acquired rights that transfer automatically under national legislation?**
- **If not, is there any other protection for pension rights on transfer?**

If a business (or part of a business) passes to another owner the latter succeeds to the rights and duties under the employment relationships existing at the time of transfer (*section 613a, paragraph 1, Civil Code*). This means that an employee who had acquired pension rights before the business transfer does not lose them and the duties automatically transfer to the new owner of the business.

31. Can the following participate in a pension scheme established by a parent company in your jurisdiction:

- **Employees who are working abroad?**
- **Employees of a foreign subsidiary company?**

Employees working abroad

Employees working abroad can participate in a pension scheme established by a parent company in Germany.

Tax deductibility as set out in *Question 29* may be available if both:

- An employment contract exists between the employees and the parent company.
- The employees are only sent to work abroad temporarily.

Employees of a foreign subsidiary company

The conditions applicable to employees working abroad also apply to employees of a subsidiary based abroad.

BONUSES

32. Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded? If so, please give details.

Employers commonly give employees supplementary payments in addition to a basic salary. These can include:

- Bonuses for exceptional work.
- Discretionary payments in recognition of length of service (employers often grant these with the additional intention of encouraging continued commitment to the business).

Systems for awarding bonuses can be established by:

- Individual employment contracts.
- CBAs.
- WCAs.
- Common practice.

The employer must observe the principle of equal treatment when establishing a bonus system that is intended to apply to the whole business (*see Question 14*).

IP

33. If employees create IP rights in the course of their employment, do the employees or the employer own the rights?

An employer owns the rights arising from the economic exploitation of inventions that employees create in the course of their employment. However, employees are entitled to:

- Claim appropriate remuneration for the use of these inventions (*Employee Invention Act (Arbeitnehmererfindungsgesetz)*).
- Be recognised as the authors of inventions created during the course of their employment.

In addition, employers can retain other IP rights, such as copyright and rights over designs, if the employment contract's express or implied terms allow this.

RESTRAINT OF TRADE

34. Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer pay its former employees remuneration while they are subject to post-employment restrictive covenants?

It is possible to restrict an employee's activities after termination of employment. Certain provisions regulate non-compete clauses for employees, workers and officials in the civil service. These include the following provisions (*sections 74 to 75h, Commercial Code (Handelsgesetzbuch)*):

- A contractual non-compete agreement must be made in writing.
- For each year that a post-contractual non-compete clause applies, the employer must pay compensation equivalent to at least one-half of the employee's most recent contractual remuneration.
- A non-compete agreement cannot be extended beyond a period of two years after the end of the employment relationship.

Non-compete clauses can generally be included in any employment contract. However, employers should consider their inclusion very carefully, because of the high costs that they trigger. They are typically only applied to managerial employees or those with specialist knowledge.

PROPOSALS FOR REFORM

35. Are there any proposals to reform employment law or pensions law in your jurisdiction?

The provisions covering temporary workers have been amended in order to combat unemployment caused by the worldwide economic crisis. The changes extend the period when work can be considered temporary to 24 months. During the first seven months of temporary employment, the employment agency pays the employees' social insurance contributions. For the rest of the 24 months the contributions are split half between the agency and employer.

Due to the perception of widespread management failure during the financial crisis, the German government has changed the law governing managing boards' salaries to ensure they are appropriate. The goal is to make managers focus on the company's long-term development by, for example, making share options only exercisable after a period of at least four years.

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