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SCOPE OF EMPLOYMENT REGULATION

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

Under Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I), parties to an employment contract have the right to choose the applicable law. However, the employee's protection under the chosen law must be equal to the mandatory provisions of the law that would apply in the absence of a choice of law having been made.

In the absence of a contractual choice of law, employment relationships are governed by the law of the country in which the employee usually performs their work. As a result, even if the parties choose foreign law, foreign employees are governed by the mandatory provisions of German law provided:

- These provisions are more beneficial to the employee.
- The employees are not only temporarily assigned to Germany.

Laws applicable to nationals working abroad

In general, German law is applicable to an employment relationship if the employee usually performs their work in Germany, even if they are temporarily employed abroad. The law applicable to nationals working abroad is also governed by Rome I.

RESTRICTIONS ON MANAGERS AND DIRECTORS

2. Are there any restrictions on who can be a manager or company director?

Age restrictions

There are no statutory age restrictions on managers or company directors.

Nationality restrictions

There are no nationality restrictions on managers or company directors. In general, foreign managers or company directors can obtain a residence permit for the purpose of gainful employment even without the approval from the competent employment agency (*see Question 4*).

Other

The Stock Corporation Act (*Aktiengesetz*) and the Limited Liability Company Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung*) provide legal grounds that prohibit persons to act as a board member (*Vorstand*) of a stock corporation or as a registered director (*Geschäftsführer*) of a limited liability company where:

- They have been convicted of certain white-collar crimes.
- They have been prohibited from practicing a profession or trade.

RECRUITMENT

3. Are any grants or incentives available for employing people? Do any filings need to be made when employing people?

Grants or incentives

Incentives can be given in the following circumstances:

- An employer employing a person that is difficult to place can receive a subsidy of up to 50% of the employee's salary for up to 12 months.
- An employer employing a disabled person can receive a subsidy of up to 70% of the employee's salary for 24 months (sometimes even longer).
- An employer employing an employee who has been unemployed for at least one year can receive a subsidy of up to 75% of the employee's salary for up to 24 months.
- An employer employing a person aged 50 or over who has been unemployed for at least half a year can receive a subsidy of up to 50% of the employee's salary for up to 36 months.

Filings

Employers under German law are responsible for the correct payment of the employees' income tax and social security contributions. Therefore, the employment and its details must be notified to tax office and social security authorities either by the employer or its payroll service provider.

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PERMISSION TO WORK

4. What prior approvals do foreign nationals require to work in your country?

Visa

Procedure for obtaining approval. EU and European Economic Area (EEA) nationals do not need a visa. If bilateral agreements do not provide otherwise, non-EU nationals have to apply for a visa before they come to Germany. The applicant has to address the German embassy or German consulate located in the area of their permanent or habitual residence.

Cost. The service charge is EUR60 (though some exceptions to this charge are available) (as at 1 August 2012, US$1 was about EUR0.8).

Time frame. The whole process (including obtaining a residence permit to work in Germany, see below, *Permits*) usually takes at least two months.

Permits

Procedure for obtaining approval. EU and EEA nationals do not need a residence permit to take up employment in Germany.

Non-EU/EEA nationals require, as a rule, a residence permit that allows them to take up gainful employment. Applications for the required residence permit can be filed with the German embassy or consulate abroad, or within Germany with the competent authority. Before these authorities issue a residence permit allowing employment, they must obtain the approval of the Federal Employment Agency's International Central Placement Office (*Zentrale Auslands- und Fachvermittlung*). Approval will only be granted if the employment of the foreign national has no detrimental effect on the German labour market, in particular:

- If no German employees or employees enjoying equal rights are available.
- If the working conditions of the non-EU/EEA nationals are not less beneficial than those of comparable German employees.

Cost. The service charge is a minimum of EUR50.

Time frame. The whole procedure usually takes at least two months.

REGULATION OF THE EMPLOYMENT RELATIONSHIP

5. How is the employment relationship governed and regulated?

Written employment contract

As a rule, there are no formal requirements for an employment contract to be valid. However, fixed-term clauses as well as post-contractual non-compete covenants must be in writing. CBAs can also require employment contracts to be in writing.

If no written employment contract exists, the employment terms must be documented in writing within one month after the beginning of the employment (Statute of the Documentation of Employment Terms (*Nachweisgesetz*)). The document must include details of, among other things:

- The names and addresses of the parties.
- The starting date of employment.
- A specification of the employee's position.
- The place of work.
- Working hours.
- Remuneration.
- Holidays.
- Notice periods for termination.
- Reference to any applicable CBAs.

Implied terms

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

- Duty of care.
- Principle of equal treatment.
- Duties of confidentiality and loyalty.

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 on (*section 612, para 2, Civil Code (Bürgerliches Gesetzbuch)*).
- Customary working hours apply if the employment contract does not set out a working schedule.

Collective agreements

CBAs concluded with the unions are widespread, particularly in the following industries:

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

Works agreements

The works council and the employer can conclude work agreements (*Betriebsvereinbarungen*) providing for certain terms and conditions of employment (for example, the beginning and end of the working day). Under section 77, para 4, Works Constitution Act (*Betriebsverfassungsgesetz*) works agreements have immediate and binding effect on the employment relationship, independent of the employer and employees being bound by CBAs. Where a works council exists, works agreements are almost always concluded. Typical content of works agreements are for example, regulations on working hours, the use of IT (for monitoring purposes) and workplace health and safety.

6. What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

The unilateral change of the agreed position or the employee's place of work (where remuneration remains unaffected) can be justified if the employer has reserved their right to make such a change, if the change is reasonable for the employee and in particular if the new position is at least on an equal level compared to the old one.

The unilateral change of agreed benefits can be justified if the employer has reserved their right to revoke the benefit and if the benefit does not exceed between 25% to 30% of the total remuneration.

The employer can also unilaterally change the terms and conditions of employment by issuing a dismissal with the option of altered conditions of employment (*Änderungskündigung*), which is regarded as a termination of the current employment contract combined with an offer to continue the employment on new terms and conditions. However, the likelihood that the employer can justify such a dismissal is severely restricted by the Protection against Dismissal Act (*Kündigungsschutzgesetz*) (*see Question 17*).

MINIMUM WAGE

7. Is there a national (or regional) minimum wage?

Various CBAs lay down minimum wages for the benefit of the union members in a particular industry; however, in practice, the employers bound by a CBA also pay the (minimum) wage to non-union members.

Under certain circumstances, the government can declare a CBA to be generally binding (*allgemeinverbindlich*), with the result that it must be applied by all employers of the particular industry to which the CBA relates to all of their employees.

Furthermore, in areas such as the construction industry, CBAs also apply to employees who are seconded to Germany by their foreign employers. Generally, binding CBAs providing for minimum wages must be applied for the benefit of all employees, regardless of whether they are seconded from abroad or regularly employed in Germany, and whether or not they are union members, in the following industries:

- Agency workers.
- Construction.
- Roofing.
- Painting and paint finishing.
- Building cleaning.
- Electrician trade.
- Nursing services.
- Security services.
- Laundry services.
- Waste management.

RESTRICTIONS ON WORKING TIME

8. Are there restrictions on working hours?

Working hours

Under the Working Hours Act (*Arbeitszeitgesetz*) the maximum working time is:

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

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

However, with the exception of shift workers (*see below, Shift workers*), it is possible to work up to ten hours a day if the average number of hours worked over a six-month period does not exceed eight hours a day (in a six-day week).

In general, employees are not allowed to work on Sundays and public holidays. Exceptions are made for jobs that cannot be limited to weekdays (for example, the emergency services) or that have been permitted by regional directives (such as bakeries).

Rest breaks

As a rule, employees working six to nine hours a day are entitled to a rest break of 30 minutes. Employees working more than nine hours a day are entitled to a rest break of 45 minutes. Employees are not allowed to work longer than six hours without a break. Between two working days, the employees must have an uninterrupted rest period of at least 11 hours.

Shift workers

In line with the general rule (*see above, Working hours*), the maximum working time for shift workers is eight hours a day, which can be extended to ten hours. However, if shifts for night workers are extended to ten hours, it must be ensured that the average number of hours worked over a period of only one month (or four weeks) does not exceed eight hours a day.

HOLIDAY ENTITLEMENT

9. Is there a minimum holiday entitlement?

Minimum holiday entitlement

Holiday entitlement depends on the number of working days. In a six-day week employees are entitled to a minimum holiday of 24 working days per year (*section 3, para 1, Federal Holiday Act (Bundesurlaubsgesetz)*). The holiday entitlement is reduced proportionally for every day the employees work less than six days a week. For example, employees who work a five-day week are entitled to 20 days' holiday a year. However, German employers usually grant voluntarily longer holidays to their employees (usually between 26 to 30 days for a five-day-week).

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

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

Public holidays

The number of public holidays differs between the federal states, and ranges from eight (Berlin) to 12 days (Bavaria). Public holidays are not included in the minimum holiday entitlement referred to above.

ILLNESS AND INJURY OF EMPLOYEES

10. What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Can an employer recover any of the cost from the government?

Entitlement to time off

If an employee is unable to work they are entitled to time off. After three days of illness, employees must submit a medical certificate that confirms their incapacity and its expected duration.

Entitlement to paid time off

Under the Continuation of Remuneration Act (*Entgeltfortzahlungsgesetz*) employees are entitled to receive full sick pay from the employer for up to six weeks of illness, provided they have been employed with the employer for at least four weeks. 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.
- Different illnesses are only summed up to the six weeks limit if they are at least partially congruent.

Once the six-week period expires, employees receive a sickness allowance under their statutory health insurance scheme (*see Question 26*). Additional healthcare schemes financed by the employer are unusual.

Recovery of sick pay from the state

The employer does not recover sick pay from the state.

STATUTORY RIGHTS OF PARENTS AND CARERS

11. What are the statutory rights of employees who are:

- **Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?**
- **Carers (including those of disabled children and adult dependants)?**

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 (the employee's health insurance contributes a maximum tax-free amount of EUR13 per day).

Female employees cannot be dismissed:

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

Dismissals are only possible in exceptional cases with the competent authority's approval.

Paternity rights

There is no statutory paternity leave, but male employees can claim parental leave (*see below, Parental rights*). Further, many CBAs provide for the father's right to one day off with continued pay in the event of childbirth.

Surrogacy

Surrogate mothers have the same maternity rights as other mothers (*see above, Maternity rights*).

Adoption rights

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

Parental rights

Both parents are entitled to parental leave of three years after the birth of each child. They can take it simultaneously or at different times. With the employer's consent, one year of this three-year parental leave can be transferred to a time between the child's third and eighth birthday.

During parental leave, employees have the right to work 30 hours per week or less for the current or, subject to the current employer's approval, a different employer.

At the end of the parental leave, the parents are entitled to work the same number of working hours as they worked prior to the parental leave.

Employees are protected against dismissal during parental leave. Dismissals are only possible in exceptional cases with the competent authority's approval.

During the parental leave, the employees do not receive remuneration from their employer unless they work on part-time. However, for the duration of up to 14 months, they are entitled to a state aid (*Elterngeld*) of at least 65% of the average monthly salary but limited to EUR1,800 per month during the 12-month period before parental leave.

Carers' rights

Under the Nursing Care Leave Act (*Pflegezeitgesetz*) employees are entitled to unpaid time off to care for one's family if the employer employs at least 15 employees. The leave from work can last six months. Employees engaged in home nursing are protected against dismissal during their leave. Dismissals are only possible in exceptional cases with the competent authority's approval.

If not expressly agreed otherwise, employees who take care of close relatives can claim full remuneration for the days of their absence from work. The scope of this entitlement depends on the circumstances of the individual case, but is, in general, limited to ten days.

Under section 45 of the Social Security Code, Chapter V (*Sozialgesetzbuch V*), one parent can claim leave from work to care for an ill child provided that:

- The child is either under the age of 12 years or is disabled.
- No-one else in the employee's household can care for the child.
- A medical certificate confirms the inability to work because of the necessity to care for the child.

During the period of leave, the parent is entitled to sick pay under the statutory health insurance scheme. However, this entitlement is limited to ten days (or for single parents to 20 days) per year, per child.

Under the Family Nursing Care Leave Act (*Familienpflegezeitgesetz*) employees may claim to reduce their working time by half to care for family members. In such case, the employer and employee may claim a subsidised loan from a state agency so that the employee receives 75% of his last pay rather than only 50%. When returning to the job full time, the employee continues to receive 75% of his last salary until he has completely paid back the advance.

CONTINUOUS PERIODS OF EMPLOYMENT

12. Does a period of continuous employment create any benefits for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

Benefits created

Employees' length of continuous employment determines their eligibility for certain benefits, for example:

- Protection against dismissal under the Protection against Dismissal Act (after six months of employment).
- Full holiday entitlement (after six months of employment).
- Sick pay (after four weeks of employment).
- Severance pay.
- Longer notice periods.
- Benefits (for example, jubilee payments, company pension, and so on).
- The right to change from full-time to part-time work or vice versa.

Consequences of a transfer of employee

Following a transfer of a business (within the meaning of Directive 77/187/EEC on the approximation of the laws of the member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (Acquired Rights Directive)) to another legal entity, their period of continuous employment is not interrupted. For the purpose of calculating entitlement to certain benefits, the dates on which the employees' period of continuous employment started would usually be the dates on which they started work with the old employer (*section 613a, Civil Code*). This principle applies not only to asset deals but also to transformations of companies in terms of the Law Regulating Transformation of Companies (*Umwandlungsgesetz*).

Continuity of employment is often agreed on or even prescribed by statutory law if individuals are transferred to an affiliated company.

TEMPORARY AND AGENCY WORKERS

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

Temporary workers

Temporary (and part-time) workers have the same rights as other employees. Statutory law expressly prohibits any discrimination towards these workers.

In the event of expiry of the fixed-term, however, employees can only claim the invalidity of the fixed-term, for example, as it was not in writing or if no justification reason existed. Should the fixed-term clause be invalid, an employment for indefinite time exists by virtue of law. If a fixed-term contract is concluded without a reason justifying a longer term, the maximum term is 24 months. Shorter terms can be prolonged only three times provided the 24 months are not exceeded in the aggregate.

Independent contractors

Whether a person is an employee or an independent contractor cannot be stipulated contractually but is decided by social, tax and labour courts as well as social security authorities. It is mainly decisive if the independent contractor:

- Has only one or many customers.
- Has his own employees.
- Has his own business expenses (such as an office).
- Is an operational part of the employer's work organisation.

If somebody was wrongly treated as an independent contractor, that is considered not only an infringement of tax provisions (possibly criminal offence) but results in the employer having to pay the entire social security contributions for the past plus interest without the possibility of taking recourse from the independent contractor.

Agency workers

Under the Law on Labour Leasing (*Arbeitnehmerüberlassungsgesetz*) an agency proposing to lend out agency workers can only do so if it has the necessary licence. In general, agency workers are entitled to the same basic terms and conditions as comparable employees who are directly employed by the hiring company. This is, in particular, true with respect to remuneration. However, CBAs can lay down more disadvantageous terms and conditions. Since 1 January 2012, a minimum loan agreement is applicable to agency workers.

DATA PROTECTION

14. What data protection rights do employees have?

Personal data is protected by the Federal Data Protection Act (*Bundesdatenschutzgesetz*). The collection, use and processing of personal data is only allowed either:

- With the employee's consent.
- Where it is permitted by law or (under case law) by a works agreement.

The transfer of personal data outside the EC, in particular the US is only permissible in restricted cases. Corporations enjoy no privileges.

DISCRIMINATION AND HARASSMENT

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

Several statutes on employment law contain provisions that protect employees against discrimination and harassment. The most important provisions are set out in the General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*), which was enacted in August 2006. This Act is based on various EU Directives, including Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (Equal Treatment Framework Directive), but its provisions go beyond the EU legislation.

Protection from discrimination

Employees are protected from direct and indirect discrimination on the grounds of:

- 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 overcome existing disadvantages.
- Professional requirements that are discriminatory provided that these requirements, such as gender or age, are essential to the performance of the profession.
- Discrimination on the grounds of religion or belief by religious communities if religion or belief is a specific professional requirement.
- 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.

Non-justifiable discriminatory terms of individual or collective agreements are invalid.

Employees who are discriminated against can claim compensation for material and immaterial damages 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 them for that position.

If employees violate anti-discrimination provisions during their working time, the employer must take the required measures to prevent discrimination, for example, giving the employee a warning letter, or transferring or dismissing the employee.

To promote the integration of disabled persons into the professional world, German law obliges employers to hire a certain number of disabled persons depending on its headcount. If this requirement is not met, the employer must pay a monthly fine ranging between EUR105 and EUR260 for each position that should be filled by a disabled person. Further, employers must check with their local employment agency (*Arbeitsagentur*) if there is an adequate unemployed disabled person whenever they have a vacant position.

Statutory law contains no particular provisions on victimisation and bullying (also known as "mobbing"), but under case law the employer must take the necessary measures to prevent victimisation and bullying (for example, by submitting warning letters, or transferring or dismissing the employee).

Protection from harassment

Harassment is defined as offensive behaviour that is threatening or disturbing beyond that which is socially acceptable.

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. In addition, if the employer does not take suitable measures to stop harassment in the workplace, harassed employees can refuse to work (*section 14, General Act on Equal Treatment*).

WHISTLEBLOWERS

16. Do whistleblowers have any protection?

There is currently no statutory law that permits or obliges employees to contact prosecuting or supervising authorities where there are irregularities within their employing company. Moreover, there is no statutory law specifically dealing with the protection of whistleblowers. In cases where a whistleblower has been dismissed, the Federal Labour Court demonstrated several times that the loyalty of an employee to their employer is fundamental and accepted the dismissal of whistleblowers.

DISMISSAL OF EMPLOYEES

17. What rights do employees have when their employment contract is terminated?

Notice periods

Statutory notice periods apply unless CBAs or employment contracts specify more favourable notice periods. Under section 622 of the Civil Code there are minimum notice periods depending

on the service term ranging from two weeks to seven months. Employees are entitled to receive their usual remuneration during the notice period. In practice, there is no payment in lieu of notice.

Severance payments

If the court decides that the dismissal is ineffective, the employment relationship will continue. The employee will be entitled to reinstatement and to remuneration for the period between the expiry of the notice period and the court's decision. Therefore, statutory law does not provide for the employees' entitlement to severance pay (unlike various CBAs and social plans). There are only two exceptions to this rule:

- If a dismissal is socially unjustified, on application by the employer or the employee, the court can dissolve the employment relationship (provided its continuation would be unacceptable or unreasonable) and order the employer to pay a severance payment; statutory law provides the maximum limit of these severance payments ordered by the court (up to 12 or 18 monthly salaries, depending on the length of service and the age of the employee).
- If in the case of a dismissal for urgent business requirements the employee agrees not to take legal action, they are entitled to a severance payment of half a monthly salary for each year of service, provided the termination letter contains the information that the dismissal is for urgent business requirements and offering the severance payment once the deadline for legal action has expired.

However, in practice, the majority of dismissal cases are settled by a termination agreement involving a negotiated severance package (usually ranging between a half and one month's salary for each year of service).

Procedural requirements for dismissal

Any dismissal (as well as termination agreement) must be in writing to be valid (a copy or a fax, for example, do not meet this requirement). In general, termination letters need not refer to the reasons for the dismissal. Dismissals by the employing company must be signed by a legal representative registered in the commercial register or, if the power of authority is attached to the dismissal, by an authorised representative. That is often a source of mistakes in international corporations.

Dismissals only become effective if and once they are delivered to the other party.

If a works council exists, it must be informed and heard by the employer of the reasons for the intended dismissal before the dismissal is delivered to the employee. The works council's answer is irrelevant for the dismissal's validity unless a works council member must be dismissed. Then the works council or, in its position, the local labour court, have to permit the dismissal in advance. If the employer fails to properly involve the works council, the dismissal will be invalid.

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

Protection against dismissal

The termination of an employment relationship by the employer is restricted by the Protection Against Dismissal Act. This Act applies to protect employees who have been employed for more than six months where their employer employs, as a rule, more than ten employees.

Under the Protection Against Dismissal Act ordinary dismissals are only "socially justified" and effective if they are based on one of the following three reasons:

- Urgent business requirements (in particular redundancy).
- Conduct (for example, misconduct or breach of contract).
- Personal circumstances (for example, illness).

The dismissed employee must file an action with the labour court within three weeks after receipt of the termination letter if they wish to object, otherwise the dismissal will be deemed effective. Before the labour court, the employer bears the burden of proof for all facts that make the dismissal effective.

Protected employees

Certain groups of employees enjoy special protection against dismissal, for example:

- Members of the works council can only be dismissed for good cause and with the prior approval of the works council (or the labour court).
- Severely disabled persons cannot be dismissed without the prior approval of the competent authority.
- Pregnant employees cannot be dismissed during pregnancy and for a period of four months after childbirth without the prior approval of the competent authority.
- Employees on parental leave cannot be dismissed for the period running from the date of application for parental leave to the end of parental leave without the prior approval of the competent authority.
- Employees engaged in the home nursing of their family cannot be dismissed without the prior approval of the competent authority.
- Employees who are Data Protection Officers in the employer's organisation.

REDUNDANCY/LAYOFF

19. How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs?

Definition of redundancy/layoff

Dismissals are considered to be mass layoffs under section 17 of the Protection Against Dismissal Act if a certain number of employees (depending on the size of the establishment concerned) is to be dismissed within any 30-day period (for example, more than five employees in an establishment employing more than 20 but less than 60 employees).

Procedural requirements

Each individual dismissal must comply with the formal requirements and be socially justified under the Protection Against Dismissal Act.

In addition, the employer is obliged to notify the competent employment agency and the works council of the planned mass layoff. A violation of these duties renders the dismissals ineffective.

Employers where a works council exists and with more than 20 employees planning an operational change (for example, the closure of an establishment and/or a mass dismissal) must attempt to agree on a reconciliation of interests plan (*Interessenausgleich*) with the works council prior to the implementation of the mass dismissal. A reconciliation of interests plan describes the scope and timing of the operational change. Its conclusion is not enforceable by the works council but the negotiations may take several months before they can be declared as failed. In some parts of Germany, depending on the opinion of the Regional Labour Court, the works council can seek injunctive relief in case the employer violates this duty. However, in general, the works council can force the employer to agree on a social plan (*Sozialplan*) which provides for financial compensation (in particular severance pay) to the employees concerned. To avoid misunderstandings, the works council can force the employer to offer a reasonable budget for the social plan.

Redundancy/layoff pay

Unless provided for in an applicable social plan or CBA, there is no legal entitlement to severance pay for an employee affected by a mass layoff.

EMPLOYEE REPRESENTATION AND CONSULTATION

20. 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 stock corporations (*Aktiengesellschaften*), partnerships limited by shares (*Kommanditgesellschaft auf Aktien*) and limited liability companies (*Gesellschaft mit beschränkter Haftung*) employ more than 500 employees, one third of the members of the supervisory board (*Aufsichtsrat*) must consist of employee representatives. If these companies employ more than 2,000 employees, the supervisory board must consist of an equal number of shareholder and employee representatives. The supervisory board is established at company level principally to monitor, appoint and remove the members of the management board. The employee representatives may be both elected staff members and trade union representatives.

Consultation

In any establishment that regularly employs at least five employees aged 18 or over, the employees or the trade union can initiate the election of a works council. With respect to matters affecting the employees of that establishment, the works council has numerous information or consultation rights (for example, before dismissals, see *Question 17*) as well as participation or even co-determination rights against the employer. Where co-determination rights apply the employer needs the works council's agreement before they can implement the planned measure. Co-determination rights involve certain social matters (for example, the working hours or the wage structure and IT use). In other cases, the works council has veto-rights, for example with regard to the hiring or relocation of employees. In economic matters (operational changes, for example, the closure of the establishment, mass dismissal, and so on, see *Question 19*), the works council has extensive information and consultation rights. The business decision as such, however, is not subject to co-determination.

Works councils in companies with more than 100 employees must establish an economic committee (*Wirtschaftsausschuss*), which is entitled to receive information on certain economic matters, for example, the financial and economic situation of the company, rationalisation projects and other matters which can substantially affect the employees' interests.

The following other representative bodies can exist:

- A joint works council.
- A group works council.
- A committee of spokesmen representing managerial employees.
- A representative body for disabled employees.
- A youth and trainee representation.

Major transactions

In general, the companies involved must inform their economic committees about the intended share or asset sale. If the preconditions for establishing an economic committee are not fulfilled, the works council will have the right to be informed about specified share sales but not about asset sales (although this is recommended).

As a rule, the works council has no right to be informed about an intended share sale. It is disputed whether this is also true with respect to an intended asset sale. However, any operational change to the establishment, which in practice often takes place simultaneously with an asset sale, triggers the works council's co-determination rights.

In the case of mergers or transformations of the company, a copy of the underlying agreement must be submitted to the works council at least one month before the shareholders agree on the merger/transformation.

Consent is not required from the following for major transactions:

- The employees.
- The economic committee.
- The works council.

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

Remedies

If an employer violates any participation right of the works council, the works council can file proceedings with the labour court to enforce its rights. That includes the possibility to seek for injunctive relief. Furthermore, the works council may demand

the labour court to fine the employer (up to EUR10,000 for each violation). In extreme scenarios, violations of the works council's rights may constitute a criminal offence. The employer's measures that violate the co-determination rights must be disregarded by the employees (for example the order to work overtime).

Employee action

The employees may claim that measures affecting them are invalid provided that the works council's co-determination rights in social or personnel matters have not been observed. They cannot take action to prevent any operational change going ahead if the employer violates co-determination rights in economic matters.

CONSEQUENCES OF A BUSINESS TRANSFER

22. Is there any statutory protection of employees on a business transfer?

Automatic transfer of employees

If a business, or part of a business, is transferred in the meaning of the Acquired Rights Directive, the employment relationships attributable to the business, or part of the business, automatically transfer to the buyer, taking account of the employees' full length of service, unless the employees object to the transfer of their employment (*section 613a, Civil Code*).

Protection against dismissal

Employees cannot be dismissed because of the business transfer, either before or after the transfer. This does, however, not affect the right to dismiss employees on any other grounds, namely a reorganisation of the workforce.

Harmonisation of employment terms

As a rule, the terms and conditions of employment set out in an employment contract, CBA or works agreement continue to apply after the transfer. The ability to harmonise these terms with the (less beneficial) terms already existing in buyer's business is severely restricted. Harmonisation can be achieved by:

- Mutual agreement with each employee for good reason.
- Dismissal with the option of altered conditions of employment if socially justified in terms of the Protection Against Dismissal Act.
- Works agreements with the works council replacing the terms and conditions of "transferred" works agreements.

EMPLOYER AND PARENT COMPANY LIABILITY

23. 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?**

Criminal liability

German law does not recognise the concept of corporate criminal liability.

Employer liability

The employer is liable vis-à-vis a third party for any damage caused by their employees in the course of the employee's work for the employer.

In principle, the employee is liable for damage they have caused to a third party. However, against their employer they are entitled to be released from this liability to the extent they would not be liable to their employer if the latter had suffered the damage. For damage caused to the employer, the employee is not liable if they acted negligently. In the case of medical negligence they are only liable for a portion of the damage. The employee is fully liable only for damage caused intentionally or by gross negligence, though even in the latter case the courts often order the employees to pay merely a portion of the damage. In practice, the employer bears the damages.

Parent company liability

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

HEALTH AND SAFETY OBLIGATIONS

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

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

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 any costs arising as a result of the measures that must be taken under the Labour Safety Act. The specific measures that an employer must take depend on the nature of the individual workplace.

TAXATION OF EMPLOYMENT INCOME

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

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

Foreign nationals

Employees 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 stayed in Germany for a minimum of 183 days in one calendar year. However, different rules can apply under a double taxation treaty.

Nationals working abroad

Employees who are not domiciled or resident in Germany only pay German income tax on German-source income. Different rules can apply under a double taxation treaty.

26. What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

Rate of taxation on employment income

Employment income is taxed at progressive rates, which in 2012 ranges from 14% to 45%. All types of employment income are taxed (for example, wages, bonuses and other benefits in kind, such as a company car). The employees must additionally pay both:

- A solidarity tax for the costs of Eastern Germany's reconstruction of 5.5% on the amount of income tax paid:
- A church tax of 8% or 9% on the amount of income tax paid if employees are members of a church and (not including Bavaria) up to a cap ranging from 2.75% to 4.0% of the taxable income.

The amount of tax payable is affected by:

- The employee's marital status.
- The number of children the employee has.

Income tax on employment income is typically levied by tax withholdings calculated and deducted from salary by the employer.

Social security contributions

Employees are covered by the national social security system (*Sozialversicherung*). In 2012, the following contributions must be made to the following four insurances provided:

- Pension insurance (*Rentenversicherung*). 19.6% of gross salary up to a ceiling of EUR67,200 (West Germany) or EUR57,600 (East Germany).
- Unemployment insurance (*Arbeitslosenversicherung*). 3.0% of gross salary up to a ceiling of EUR67,200 (West Germany) or EUR57,600 (East Germany).
- Health insurance (*Krankenversicherung*). 15.5% of gross salary up to a ceiling of EUR45,900.
- Nursing care insurance (*Pflegeversicherung*). 1.95% of gross salary (or 2.2% for employees without children).

The contributions must be split equally between the employer and the employee, except for the contributions to the health insurance, where 7.3% must be borne by the employer and 8.2% by the employee. The employer is liable for the full payment of the contributions to the social security system, though they can withhold the employee's share from their salary. In addition, the employer must solely pay a contribution to the statutory accident insurance. However, this prevents the employee from claiming damages from the employer because of workplace accidents (unless these were caused intentionally by the employer).

PENSIONS

State pensions

27. Do employers and/or employees make pension contributions to the government in your jurisdiction?

Contributions paid to the government

The employer and the employee both make contributions to the statutory pension insurance (*see Question 26, Social security contributions*).

Taxation of contributions

The contributions can be deducted by the employer as operating expenses (*Betriebsausgaben*), and by the employee as special expenses (*Sonderausgaben*). Retired employees must pay tax on state pensions.

Monthly amount of the government pension

As a rule, the regular retirement age is 67. The amount of the monthly pension largely depends on the total amount of contributions made during employment. The monthly pension of retired employees who have worked for 45 years and who have received the average salary (currently around EUR30,000 per year) amounts to approximately EUR1,200. However, the state pension can be much lower.

Supplementary pensions

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

- **Is linked to the employee's salary?**
- **Is linked to employer and/or employee contributions and investment return on those contributions?**

Linked to the employee's salary

On the employee's request, the employer must offer a supplementary pension scheme in the form of deferred compensation. Unless provided for in CBAs, the employer is not obliged to offer other supplementary pension schemes. However, the establishment of supplementary pension schemes by the employer is common in practice and it depends on the structure of the scheme whether the pension amount is linked to the employee's salary or to the contributions and investment return.

Linked to employer and/or employee contributions

See above, *Linked to the employee's salary*.

29. Is there a regulatory body that oversees the operation of supplementary pension schemes?

Regulatory body

The *Pensionfonds* and the *Pensionskasse* (*see below, Regulatory framework*) are legally independent institutions which grant

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the employees (and surviving dependants) a direct claim to the pension benefits. These institutions are subject to the supervision of the Federal Institute for Financial Services Supervision (*Bundesanstalt für Finanzdienstleistungsaufsicht*) and must comply with the guidelines contained in the Insurance Supervisory Law (*Versicherungsaufsichtsgesetz*).

Regulatory framework

There are five different methods of funding a supplementary pension for the benefit of the employee:

- Direct pension promise by the employer (*Direktzusage*).
- Direct insurance (*Direktversicherung*).
- Support fund (*Unterstützungskasse*).
- *Pensionsfonds*.
- *Pensionskasse*.

Tax on pensions

30. Are any tax reliefs available on contributions to supplementary pension schemes (by the employer and employees)?

Tax relief on employer contributions

Employer contributions to the direct insurance, support fund, *Pensionsfonds* and the *Pensionskasse* can be deducted by the employer as operating expenses. For direct pension promises book reserves must be accounted for in the company's trading and tax accounts.

An employer's contributions to a direct insurance, *Pensionsfonds* or *Pensionskasse* are subject to income tax; however, 4% of the social security contribution ceiling are as a rule exempt from taxation. Other tax relief may be available to the employee under certain circumstances.

Tax relief on employee contributions

Under certain circumstances, employee contributions (to a *Rürup pension* or *Riester pension*) can be deducted by the employee as special expenses.

31. Is there any legal protection of employees' pension rights on a business transfer?

Automatic transfer of pension rights

In the case of a business transfer, the buyer automatically assumes all duties regarding the transferring employees under a supplementary pension scheme established by seller. The buyer is liable for the pensions as promised by the seller. It is responsible for the pension entitlement accrued up to the transfer as well as for the pension entitlement to be accrued after the transfer.

Other protection for pension rights

There are no other provisions specifically dealing with the protection of pension rights on a business transfer.

ONLINE RESOURCES

Federal Secretary of Justice (*Gesetze im internet*)

W *www.gesetze-im-internet.de/Teilliste_translations.html*

Description. Site of the Federal Secretary of Justice with selected translations of German laws. The translations are for guidance only and not binding. Regularly updated.

Centre for German Legal Information

W *www.cgerli.org/*

Description. Collection of German laws in non-binding translations. Not updated on a regular basis.

32. 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.

The tax deductions set out in *Question 30* 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.

33. Is there any protection provided for pension scheme benefits where the sponsoring employer becomes insolvent? If so, who provides the protection, and how does this operate?

Retired employees and employees with vested pension entitlements under a direct pension promise, support fund or a *Pensionsfonds* are protected by law against insolvency. In the case of insolvency, the carrier of the insolvency insurance (*Pensionssicherungsverein*) is obliged to pay the pensions up to a certain limit. The *Pensionssicherungsverein* is financed by contributions which are paid by all employers offering one of the pension schemes in question. Pension entitlements can also be reinsured by life insurances.

BONUSES

34. Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

It is common for employers to grant contractual or discretionary bonuses in addition to the fixed salary.

There are several types of bonuses, which include:

- Performance-related bonuses (based on personal and/or company performance).
- Profit-sharing bonuses.
- Christmas and holiday bonuses.
- Jubilee payments.

Collective agreements can lay down the bonuses that are to be paid. Beyond that, the employer is free to decide what type of bonus promise, if any, they want to make.

The employer must observe the principle of equal treatment when establishing a bonus system and/or granting a bonus to the workforce, or part of the workforce. In addition, the concept of discretionary bonuses is subject to severe restrictions under German law, often resulting in court disputes.

INTELLECTUAL PROPERTY (IP)

35. If employees create IP rights in the course of their employment, who owns the rights?

Under the Employee Invention Act (*Arbeitnehmererfindungsgesetz*) the exploitation rights arising from a patentable employee invention transfer to the employer if the employer wants to use the employee invention. The employee is entitled to reasonable compensation for the transfer of the exploitation rights.

The utilisation rights in works that are eligible for protection under copyright, trade mark law and/or any other intellectual property law are, as a rule, expressly or implicitly transferred to the employer. The moral rights (*Urheberpersönlichkeitsrechte*) of the employee who created the works are, however, not transferable.

RESTRAINT OF TRADE

36. 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 continue to pay the former employee while they are subject to post-employment restrictive covenants?

Restriction of activities

During the term of employment, employees are subject to a non-compete covenant by law. Moreover, employment contracts usually require employer's prior approval to any side activity, which can be refused if the company's interests are impaired.

Post-employment restrictive covenants

Post-employment non-compete covenants must comply with mandatory provisions in order to be enforceable (*sections 74 et seq, Commercial Code,* (*Handelsgesetzbuch*)). In particular, these covenants must:

- Be in writing.
- Provide for a compensation of at least 50% of the employee's last remuneration for the duration of the non-compete period.
- Not exceed a duration of two years.

PROPOSALS FOR REFORM

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

As the Federal German Parliament will be re-elected in 2013, no significant reforms are underway or in discussion.

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Areas of practice. Labour law; works council issues and industrial actions; restructuring; compliance.

Recent transactions

- Advising and representing a German logistic group with regard to compliance investigations and resulting disciplinary measures.
- Drafting and implementing a compliance system in German and UK subsidiaries of a global pharmaceutical service provider.
- Implementing a code of conduct and whistleblowing hotlines in German subsidiary of insurance.
- Shut down of a financial service provider and transferring remaining business to a competitor.
- Shut down of German production for a Canadian automotive supplier and offshoring.