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Employment

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Law and Practice

Heuking Kühn Lüer Wojtek

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Law and Practice

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CONTENTS

Heuking Kühn Lüer Wojtek (Düsseldorf - HQ) is a partnership of approximately 350 lawyers, tax advisers, and civil law notaries with eight offices in Germany and offices in Brussels and Zurich, making it one of the major commercial law firms in Germany. The firms supports international clients and co-ordinate work in various jurisdictions. Internationally, the firm collaborates with leading law firms on a "good-friends basis." There are approximately 38 lawyers working on employment issues on a regular basis covering all aspects of employment law aspects.

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1. Terms of Employment

1.1 Contractual Relationship

Basically, the employer and employee are free to negotiate employment agreements. These agreements may be put down in writing or be concluded orally. A general form requirement does not exist under German law. The employer is only obliged to provide the employee with a text that proves the core terms and conditions of the employment. Obviously, a written agreement is advisable to ensure that evidence of the employment relationship and its terms and conditions exists.

If the employment is concluded for a fixed term, the fixed-term clause must be concluded in writing – meaning true ink on paper; otherwise the fixed-term clause is void and the employment agreement is considered to have been concluded for an indefinite period of time.

Furthermore, any post-contractual non-compete obligation must be agreed upon in written form as well. Again, such a clause is void if the requirement for a written form is not fulfilled.

The employment agreement can be written in any language; German is not required by law. A German translation is necessary only should any dispute be brought before a court.

The employment agreement should stipulate commencement and the terms of the employment relationship, place of employment, job, remuneration, working hours, annual vacation, notice period for termination, and applicable collective bargaining agreements.

1.2 Working Hours

Work hours during working days may not exceed eight hours — §3 sentence 1 ArbZG (Working Hours Act, *Arbeitszeitgesetz*) — and 48 hours per week for a six-day work-week. This can be extended to ten hours per day if the average shift within six months or 24 weeks does not exceed eight hours a working day (§3 sentence 2 ArbZG). As most employees in Germany work a five-day week, that means in effect that employees may work up to 9.6 hours per day; then, the weekly maximum of 48 hours is not exceeded and, in addition, on average (based on the six-day-week calculation of the law) a daily working time of eight hours is not exceeded.

Usually, weekly working hours of 35 to 40 hours are agreed upon in most collective bargaining agreements. If the daily work does not exceed six hours, a break (unpaid) of at least 30 minutes is statutory; if the daily work does not exceed nine hours, the break must last at least 45 minutes.

After their daily work, employees must have a continuous rest period of at least 11 hours (§ 5 (1) ArbZG) starting upon leaving the workplace; shorter rest periods may be, and often are, agreed in collective bargaining agreements.

Pursuant to §7 ArbZG, extensions of working hours are possible on the basis of a collective bargaining agreement or a works agreement.

In addition, further restrictions are applicable for special groups of employees, in particular pregnant or breast-feeding employees, and employees younger than 18 years.

1.3 Compensation

With effect from 1 January 2017, the MiLoG (Minimum Wage Act, *Mindestlohngesetz*) stipulated a minimum wage of EUR8.84 gross per hour for any employee in Germany. The minimum wage does not apply to minors, apprentices, volunteers, former long-term unemployed workers and some trainees, however. In particular with regard to trainees/interns, this is always subject to a case-by-case assessment. Since 1 January 2018, the statutory minimum wage has been in force in all sectors without exception. If the minimum wage is not paid, employees can claim the difference between their actual pay and the minimum wage from their employer. These claims cannot validly be excluded. Infringements of the MiLoG can result in fines of up to EUR500,000.

In general, overtime work must be paid in Germany – except where stipulated differently in the employment agreement. A general exclusion of overtime pay is permissible only with employees who earn more than the social security contribution ceiling (currently EUR78,000 gross per year for the former West German federal states and EUR69,460 for the former East German federal states); for all other employees, an exclusion of overtime pay is permissible only if the exclusion is limited to a specific number of working hours and the overtime is not more than 20% of the weekly working hours.

Payment of overtime premiums is obligatory only where stipulated by a collective bargaining agreement or by employment agreement. Such premiums are, however, market standard in Germany.

Executive Compensation

There are no regulatory requirements with regard to executive compensation; an employer can freely choose this form of compensation. According to European and German regulatory requirements, however, the remuneration of employees in the financial services sector is subject to several restrictions. These restrictions are aimed, in particular at cutting back annual bonuses and aligning the long-term targets of the employer and the employee. As a consequence, in this industry, the percentage of bonuses as part of the total compensation is limited; furthermore, it is necessary to have long-term incentives rather than (only) short-term incentives; and last but not least, part of the compensation must be held back to cover the future detrimental effects of a business that triggers bonus payments.

1.4 Other Terms of Employment

Confidentiality and Non-Disparagement Requirements

Employees are subject to statutory confidentiality obligations regarding the trade and business secrets of their employers. Additional confidentiality obligations must be agreed upon between the employer and employee. Such a confidentiality agreement should clearly define the scope of the confidential information. In this regard, it is important to highlight that a confidentiality agreement may not oblige an employee to keep everything they have learnt during the employment confidential; otherwise the entire agreement would be considered void, as it would seriously hamper the future professional career of the employee.

Following the EU directive 2019/943, a new law for the protection of trade secrets has been enacted. As a consequence, only such secrets as have been subject to the adequate protection measures of the company are protected by law. As a consequence, it will be necessary to make employees party to greater and more specific confidentiality agreements in future.

Required Leave

According to §3 MuSchG (Maternity Protection Act), there are special protection periods before and after birth during which female employees are subject to an employment ban. Maternity leave generally takes effect six weeks before the calculated delivery date. During this time, expectant mothers may only carry out their work if it is their express wish to do so. Heavy physical work during maternity leave is generally prohibited. Added to this are night work, holiday work, piecework, Sunday work, assembly line work and overtime. After childbirth, the retention period continues for eight weeks. According to the law on maternity protection, there is an absolute ban on employment during this period. Even if women would like to work again, they are not allowed to. Special rules apply with regard to maternity protection in the case of premature birth, delivery of a handicapped child or multiple births. In such cases, a term of protection of 12 weeks shall apply. If the birth takes place before the date calculated, then the protection period of eight weeks after the birth will be extended by the number of days the birth happened before the calculated birth date.

According to the EFZG (Continued Pay Act, *Entgeltfortzahlungsgesetz*), every employee is entitled to six weeks of paid leave per year in case of sickness.

Pursuant to the BEEG (Parental Leave Act, *Bundeselterngeld- und Elternzeitgesetz*), both male and female employees are entitled to parental leave of three years – usually starting after completion of maternity leave. The employee has to inform the employer in good time regarding how long he or she intends to go on parental leave.

During parental and maternal leave, the employer may terminate the employment relationship only after having gained the permission of a state authority to do so.

Since 2008, the PflegeZG (Nursing Act, *Pflegezeitgesetz*) has granted every employee leave of up to ten days if necessary to organise the nursing and care of relatives. In companies with more than 15 employees, employees are entitled to unpaid

leave of up to six months, if they take over the care themselves. The illness of a relative and a medical certificate as proof thereof is a prerequisite for this entitlement.

Furthermore, the BUrlG (Federal Vacation Act, *Bundesurlaubsgesetz*) grants annual minimum vacation leave to every employee. An employee is entitled to four times the number of days they work per week in vacation leave (ie, for a five-day week, 20 days of vacation per year, for a three-day week, 12 days of vacation per year). Every started working day counts as one, even for half-day jobs. During vacation leave, remuneration must be continued (including variable components). Many collective bargaining agreements provide for an increase of the annual vacation leave up to 28, 30 or even more days. It is somewhat market standard to offer between 25 and 30 days of vacation per year to employees.

These vacation days should be taken every year – accrual over several years requires the employer's consent and pay in lieu of vacation is strictly forbidden, except at the end of the employment relationship.

According to §207 SGB IX (Social Code IX, *Sozialgesetzbuch IX*), severely handicapped persons must be exempted from overtime upon application. In this context, overtime is defined as any working time exceeding the eight-hour limit per day. In addition, they are entitled to an extra five days of paid leave in accordance with §208 SGB IX. The five days are valid in addition to the basic vacation.

2. Restrictive Covenants

2.1 Non-Competition Clauses

German statutory law provides for a strict non-compete agreement during the existence of an employment relationship. As long as an employment relationship lasts, an employee is not allowed to act as, or for, a competitor to the employer, § 60 HGB (Trade Act, *Handelsgesetzbuch*). In the event of a violation of a non-compete agreement, an employer may (depending on the individual case) summarily dismiss the employee and claim damages. Instead of claiming damages, the employer may alternatively take over the contracts the employee has concluded on behalf of the competitor (§ -61 HGB). Traditionally, German labour courts are very employer-friendly when it comes to (alleged) illegal competition from employees.

Furthermore, post-contractual non-competes are also permissible under German law. They must, however, be agreed in writing and observe the prerequisites set forth under §§ 74 ss. HGB. Most importantly, the non-compete period may not exceed two years and the post-contractual non-compete is valid and binding only if the employer pays the ex-employee an indemnification of at least half their last income (50% of total annual compensation) during the post-contractual non-compete period. Last but not least, the employer may waive the post-contractual non-compete agreement at any time; in which case, the obligation to pay the indemnification ceases, but only 12 months after the waiver.

2.2 Non-Solicitation Clauses - Enforceability/ Standards

Under German law, non-solicitation clauses with regard to employees are permissible, as long as they do not prevent the employee from exercising their freedom to terminate their employment with one employer and join a different employer (even a competitor) later.

Non-solicitation clauses are difficult to implement, however. If an employer cannot prove that one of their former employees solicited other employees, there are only a few legal measures at hand.

Non-solicitation of customers is part of a non-competition restriction and, consequently, this must be agreed in writing and an indemnification must be paid.

3. Data Privacy Law

3.1 General Overview of Applicable Rules

The use, collection and processing of personal data within an employment relationship are subject to the restrictions set forth in the BDSG (Federal Data Protection Act, *Bundesdatenschutzgesetz*) which, as in other European jurisdictions, has been altered significantly by the General Data Protection Regulation (GDPR). Personal data means any information concerning the personal or material circumstances of a given natural person, including an employee (§§ 1, 26 BDSG), and covers not only electronically processed data but also paper-based data. There are also state data protection laws providing legal requirements for data processing carried out by state-level public authorities or public bodies.

Apart from the general data protection laws, there are sector-specific regulations at both state and federal level that provide for data protection requirements; the Telemedia Act (*Telemediengesetz*) regulates the control of electronic communication and information services, and the Telecommunications Act (*Telekommunikationsgesetz*) addresses the processing of personal data concerning users.

The privacy of employees is further protected by their respective personal rights (*"allgemeines Persönlichkeitsrecht"*), which are guaranteed as fundamental rights in the German constitution. In particular, the fundamental right of informational self-determination is a significant constitutional guarantee which applies to employment relationships in Germany.

As a general rule, any processing, transfer etc, of personal data is permissible only if there is justification for it. Such justification may be the processing of the employment relationship (eg, bank account details are needed to pay remuneration), by individual consent of the employee (which must be very specific to be valid) and/or a works agreement concluded with the works council (§ 26 BDSG).

The restriction of transferring includes the prohibition to transfer personal data from one legal entity to another – even if they are part of one group of companies. From a data protection viewpoint, group entities are considered third parties like any other entity. Furthermore, the mere fact that personal data is transferred into a country outside the European Union (except for Canada, Switzerland and Argentina), raises additional legal challenges – in particular if the data is to be transferred to the USA or China. Such a transfer out of the European Union requires additional means of data protection and access restriction, eg the use of certain EU standard data processing agreements with the third-country provider.

Since 25 May 2018, the provisions of the European General Data Protection Regulation (GDPR) and the correspondingly amended "new" BDSG (Federal Data Protection Act, *Bundesdatenschutzgesetz*) have applied.

The new BDSG also contains restrictions on the processing of personal data of employees for the detection of criminal offences, and now expressly mentions the collective agreement (such as collective agreements and works agreements) as possible legal bases for the processing of employee data. Such agreements must now contain appropriate and specific measures to safeguard human dignity, legitimate interests and fundamental rights of the data subject, in particular as regards the transparency of processing, the transfer of personal data within a group of undertakings, or a group of undertakings engaged in a joint economic activity, and the monitoring systems at the workplace.

In addition, the possibility of processing special categories of personal data is recorded in the employment context and the term "employee" is defined. The employee can demand information from the employer about the processing of his personal data in accordance with Article 15 GDPR (DSGVO). If the employee exercises this right, the employer must disclose the purposes for which the employee's data has been processed, what type of data has been processed, who has access to the data and how long the data is expected to be stored, the rights of employees with regard to the data, how the employer obtained the data, unless communicated directly by the employee, and whether automated decision-making (including profiling) has taken place.

More detailed rules have been laid down as to when the consent of an employee concerning the processing of data is valid.

In companies with more than ten employees processing personal data, the position of company data protection officer must be created (§ 38 (1) sentence 1 BDSG). Finally, anyone processing personal data must establish a so-called list of processing activities. Employers have the burden of proof with regard to compliance with the applicable regulations.

The infringement fine increases to up to EUR20 million or 4% of global revenue (whichever is higher). Both the company and the responsible individuals can be held liable. In addition, there is the threat of consequences under criminal law.

4. Foreign Workers

4.1 Limitations on the Use of Foreign Workers

There are no limitations on the use of foreign workers in Germany – as long as the foreign workers have valid work and residence permits. Before hiring a foreigner from abroad, the German employment agency must check and certify that there is no adequate German person or a foreigner with unrestricted permission to work who is registered as unemployed and could take over the job (§ 39 AufenthG – Residence Act, *Aufenthaltsgesetz*).

4.2 Registration Requirements

A foreigner who is not a citizen of an EEA member state, must have a residence title (§ 4 (1) sentence 1 AufenthG). In this case, the foreigner must apply for this residence title at the Foreigners Registration Office before entering Germany. There are four different types of residence titles:

- visa (§ 6 AufenthG);
- residence permit (§ 7 AufenthG);
- settlement permit (§ 9 AufenthG); and
- permanent EC residence permit (§ 9a AufenthG).

The residence permit (§ 7 AufenthG) also includes the Blue Card (§ 19a AufenthG), the ICT card (§ 19b AufenthG) and the mobile ICT card (§ 19d AufenthG). The EU Blue Card is a residence permit, in principle limited to four years on first issue, which third-country nationals with a university degree or comparable qualification may obtain in order to pursue employment commensurate with their qualification. As part of the implementation of the EU Directive on internal company transfers, the ICT card is a new residence permit for third-country nationals who work as managers, specialists or trainees in a company in another EU country and are posted to a branch of the same company in Germany. Third-country nationals who already hold a residence permit according to

the ICT Directive for an EU Member State and are planning a longer stay (over 90 days) in Germany can apply for a separate residence permit, the Mobile ICT card.

For a work permit, a job offer to the employee is essential (§ 18 Abs 5 AufenthG). The lack of such a work permit may be regarded as an administrative offence, which could lead to the imposition of heavy fines upon the employer and the employee (§ 404 (2) no 3 and 4 SGB III).

5. Collective Relations

5.1 Status of Unions

Union membership rates have fallen heavily since the early 1990s. Today, only certain industries have significant trade union representation, in particular the metal industry (IG Metall), the chemical industry (IGBCE), construction (IG BAU), public and banking services (Ver.di), as well as transportation (VC Cockpit, GDL, Ver.di, EVG, GDF) and the health sector (Marburger Bund, Ver.di). In these sectors, in particular, the major trade unions still manage to call for industry-wide strikes.

In addition, in the last few years highly specialised groups of employees (eg pilots, train conductors, doctors) have unionised and called for strikes in order to drastically increase their remuneration.

It is important to note that in Germany, unlike in other European countries, trade unions may not call a strike for political reasons. They are entitled to strike only for issues that can be stipulated in collective bargaining agreements.

It is also important to understand that trade unions have no legal power to force employers into negotiations or the conclusion of collective bargaining agreements; their only route is to threaten/damage the employer by going on strike so that the employer "voluntarily" negotiates with the aim of finalising a collective bargaining agreement.

Employees may not bring representatives to any work-related meetings.

If a meeting concerns the employee's performance and/or professional development, however (ie in particular grievances, warnings and dismissals), the employee is entitled to be accompanied by a member of the works council (§ 81 (4) BetrVG – Works Constitution Act), if such a council exists. There is no obligation for the employer to allow trade union representatives or lawyers to be present in any such meeting.

5.2 Employee Representative Bodies - Elected or Appointed

Union representatives are set up and elected by the organised workers of a company. However, the union is not entitled to have its representatives elected on the premises of the company, even if the election takes place outside working hours, because the election is an "intra-trade union act". Elections are therefore regularly held in an elective bus or in a rented room near the company grounds.

Union representatives have no right to visit the union's members during working hours. The cost of the activity of the trade union representatives must be borne by the union itself. Tasks include, in particular, advertising for new members and informing employees about union activities, as well as collective bargaining with the employer.

Freedom of union organisationis protected by constitutional law and it stems from the freedom of coalition in Article 9 (3) GG (Constitution Law, *Grundgesetz*). At the same time, an employer may freely choose not to liaise with trade unions, that right being likewise safeguarded by Article 9 (3) GG.

Apart from the trade unions, German law (Works Constitution Act, *Betriebsverfassungsgesetz*) provides for another type of employee representation – the works councils. In companies with at least five employees, the employees are free to elect a works council – a representative body composed of employees of the company. The works council, from a legal point of view, is completely independent of the trade unions, although in many cases works council members are active trade union members as well.

The works councils have very strong information and co-determination rights; for instance, the works council's permission is necessary before asking employees to work overtime or before implementing new IT tools. Works council members enjoy protection against dismissal and may drop their work immediately when they need to function as works council members. The employer may commit an administrative offence or even a criminal act if the employer hinders works council members during their activities in the works council, or if the employer treats works council members differently from other employees (ie, if the employer pays them better or worse than comparable employees). In summary, the works council can be an enormous obstacle to the employer's business decisions and consequently, many German companies seek a collaborative approach with their works councils.

6. Termination of Employment

6.1 Grounds for Termination

Whether a cause is required for termination of employment depends on which party wishes to terminate the employment relationship. Employees may always give notice without any reason or cause needed to justify the notice of termination.

Employers in companies with more than ten employees, however, need to have a justifying reason before giving notice to an employee, if the employee has been employed by the company for more than six months. During the first six months, no reason is required.

The following reasons can be used to justify termination of employment:

Operational Reasons (*Betriebsbedingte Kündigung*)

- As a consequence of the entrepreneurial freedom guaranteed by the German constitution, any employer is free to change the organisation of its company and to reduce it or shut it down. Such an entrepreneurial decision will be checked by the German courts only insofar as to determine whether the decision was utterly unfair regarding one employee (ie, made on purpose to dismiss just one employee). It is, for example, not necessary to prove the company is making a loss in order to justify the entrepreneurial decision.
- In the case of dismissal for operational reasons, however, the employer must apply a social selection with all the employees who are comparable to those affected directly by the entrepreneurial decision; the employer may then terminate only the "socially strongest" employees (§ 1 (3—5) KSchG - Employment Protection Act, *Kündigungsschutzgesetz*).

Conduct-Related Reasons (*Verhaltensbedingte Kündigung*)

- Obviously, severe breaches of contract or committing criminal acts while in the employ of a company may justify dismissal.
- According to German jurisdiction, the employee must have culpably committed an unlawful breach of duty and the dismissal must be proportionate, ie, there must be no milder means than termination. "Milder means" could be a formal warning, or transfer to another job. When weighing the conflicting interests, ie, the employer's interest in terminating the employment relationship and the employee's interest in continuing the employment relationship, the employer's interest in terminating the employment relationship must prevail. This step of the legal review is called "balancing of interests". It must be in favour of the employer for the dismissal to be legal.

Personal Grounds (*Personenbedingte Kündigung*)

- In some cases, reasons relating to the person of an employee (albeit the employee may have no influence on them) may justify dismissal. Typical reasons are the loss of a driver's licence for drivers, the loss of state permits which are prerequisite for a job (eg, a work permit, permit to work on airports etc), or sickness. Unlike in many other countries, sickness may be a valid reason for dismissal and employees may even be dismissed during sick leave. However, the employer must be able to prove that no milder means exist, in particular, that a transfer of the employee to an easier/different job is not possible (and would not alleviate the health issues of the employee).

Certain groups of employees enjoy special, ie stronger, protection against dismissals, eg pregnant women, employees on parental leave, works council members, severely disabled persons, and data protection officers. Such employees can be dismissed only after the employer has achieved permission from the works council, a state authority or a Labour Court.

Furthermore, there is a distinction between ordinary dismissal and dismissal without notice – a dismissal for good reason. Whilst an ordinary dismissal terminates the employment relationship after expiry of the notice period, dismissal without notice ends it immediately. In that case, the cause (as set forth above) for the dismissal must be so strong that it becomes unacceptable for the employer to expect the notice of termination to expire. Where a dismissal without notice is intended, the dismissal must be delivered to the employee within 14 days after a responsible employee of the employer has become aware of the facts justifying the dismissal.

If the employee's behaviour that justifies the dismissal for cause is perpetuated (eg the continued absence from work without excuse), the critical 14 days' deadline, however, commences only at the end of the perpetuated beach of contract, ie at the day of the employee's return to work.

In the case that not a single breach of contract/misbehaviour but a series of breaches in the aggregate justifies a dismissal for cause, the the 14-day period commences only after the last breach of the series becomes known by the manager authorised to give notice.

In the case of criminal acts committed by an employee, the employer may even wait for the criminal proceedings to end. Only then does the two-week notice period begin.

Procedures for Implementing Terminations

There are two kinds of internal procedures to be observed before issuing a dismissal:

Firstly, consultation of the works council:

- Before all dismissals, the employer must consult with the works council, so that the works council has a chance to convince the employer not to dismiss the employee (§ 102 BetrVG - Works Constitution Act, *Betriebsverfassungsgesetz*)
- Upon consultation, the works council has one week (for ordinary notices of termination)/three days (for dismissals without notice) to consider its approach and reply to the employer. Only after the works council's statement or lapsing of the deadline, may the employer validly give notice of termination to the employee.
- Whether or not the works council supports or objects to the envisaged dismissal is of no importance – unless a works council member is to be dismissed; then the works council's consent is required. As already mentioned, an objection by the works council to an ordinary termination announced by the employer does not prevent the termination. However, it can help the employee in an action for protection against dismissal: if the works council has objected to the dismissal on the grounds of an objection set out in § 102 (3) BetrVG, the employer must, upon request, continue to employ the employee after expiry of the period of notice until the legal dispute has been finally concluded, under unchanged working conditions (§ 102 (5) sentence 1 BetrVG).
- The employer does not necessarily have to inform the works council in writing of a dismissal, but this is strongly recommended and is always done in practice.
- If the envisaged dismissal concerns a severely handicapped employee, it is further necessary to consult with the severely handicapped employee's representative as well. Where more than five severely handicapped employees are employed within an operation, these employees may elect their representative (*Schwerbehindertenvertreter*).

Secondly, procedures dependent on the cause of dismissal:

Operational reasons – where a redundancy measure is intended, the employer may be required to:

- notify the employment agency of the envisaged (mass) dismissals before giving notice;
- consult with the works council and negotiate a reconciliation of interests (*Interessenausgleich*) and social plan (*Sozialplan*);
- apply a social factor test where necessary;
- consult with the works council (and the severely handicapped employees' representative where applicable) with regard to the individual dismissal; and
- involve state authorities in order to achieve permission to dismiss employees who enjoy special protection against dismissal.

Conduct-related reasons – before dismissing employees because of their behaviour:

- it is in most cases necessary to have discussed the issue(s) with the employee beforehand in a grievance procedure, in particular to have issued warning letters in this regard to the employee;
- consult with the works council (and the severely handicapped employees' representative where applicable) with regard to the individual dismissal; and
- involve state authorities in order to achieve permission to dismiss employees who enjoy special protection against dismissal.

Personal reasons – the dismissal of an employee for personal reasons requires internal procedures as well, in particular:

- it is necessary to have invited the employee to a discussion of any possible connection between his or her job and sickness (so-called *"betriebliches Eingliederungsmanagement"*), to have had such meetings (if the employee consents to them) and to have discussed possible solutions as to how the health status of the employee might be improved by any measures implemented on the job level;
- to consult with the works council (and the severely handicapped employees' representative where applicable) with regard to the individual dismissal; and
- to involve state authorities in order to achieve permission to dismiss employees who enjoy special protection against dismissal.

6.2 Notice Periods/Severance

The law (§ 622 BGB) provides for statutory notice periods according to the following scheme:

- if the employee has up to two years of seniority with the company, the notice period is four weeks to the end or the 15th of a calendar month;
- if the employee has more than two but less than five years of seniority with the company, the notice period increases to one month;
- if the employee has more than five but less than eight years of seniority with the company, the notice period increases to two months;
- if the employee has more than eight but less than ten years of seniority with the company, the notice period increases to three months;
- if the employee has more than ten but less than 12 years of seniority with the company, the notice period increases to four months;
- if the employee has more than 12 but less than 15 years of seniority with the company, the notice period increases to five months;

- if the employee has more than 15 but less than 20 years of seniority with the company, the notice period increases to six months; and
- if the employee has more than 20 years of seniority with the company, the notice period increases to seven months.

If the parties agree to a probationary period, then for the duration of the probation, but no longer than six months, the notice period will be two weeks (§ 622 (3) BGB). The scheme above applies only to notices of termination given by the employer. According to the law, the applicable notice period for employees is always four weeks to either the 15th or the last day of a calendar month. The parties are free to agree on different periods of notice, provided that they are not shorter than the statutory periods and the period of notice to be observed by the employees is not longer than that applicable to the employer. Furthermore, an employee's right to give notice may not be hindered by economic disadvantages (ie, no "golden handcuffs").

Severance
There is no general statutory severance under German employment law. Only in very exceptional cases, may the courts award severance to an employee – if a senior executive sues his or her employer or where a court finds the continuation of the employment unbearable for the employee.

Further exceptions giving rise to claims can be found, for example, in social plans and collective agreements as well as in termination agreements with severance arrangements. Finally, the employer can offer a severance payment with reference to § 1a KSchG (Protection Against Dismissal Act *Kündigungsschutzgesetz*) by giving notice for operational reasons. This can also lead to a claim for compensation.

It is, however, very common to agree on settlements/termination agreements providing for severance payments.

Notice Requirements for Collective Redundancies:
- Notices of termination must be made in writing (that is, actual ink on paper), signed by a person authorised to do so (ie, a managing director), and declared clearly and unambiguously. Also the will to end an employment relationship and the point in time at which it should end must be stated with absolute clarity in the dismissal notice.
- Furthermore, notice periods need to be observed. The law, § 622 BGB (Civil Code, *Bürgerliches Gesetzbuch*) stipulates the statutory minimum notice periods – ranging from four weeks to seven months depending on the service term of the employee (see above). Likewise, most collective bargaining agreements and employment agreements provide for (longer) notice periods.
- Where a redundancy measure is intended, the employer may be required to notify the employment agency of the envisaged (mass) dismissals before giving notice and, furthermore, consult with the works council and negotiate a reconciliation of interests (*Interessenausgleich*) and social plan (*Sozialplan*).
- The reconciliation of interests provides for the "how" to implement the redundancy, ie when to dismiss whom on the basis of which selection criteria. As this triggers the entrepreneurial freedom, the works council cannot, in the end, enforce any changes to the entrepreneurial decision. It can, however, significantly delay the process. In some regions of Germany (depending on the legal standpoint taken by the local court), the works council can even prevent the employer from implementing redundancy measures before the negotiations on the reconciliation of interests have officially been concluded or have failed. That process may easily take three to nine months.
- The social plan, instead, stipulates the compensation for the dismissals, ie the severance amounts and their calculation. The works council may enforce the conclusion of this social plan – by invoking a conciliation committee (*Einigungsstelle*). The conciliation committee may – even against the employer's wishes – decide on the budget of the social plan, ie define the total volume to be spent on severances.

6.3 Termination Agreements
It is permissible and usual in Germany to obtain releases in connection with termination agreements.

The following statutory requirements apply:

Termination agreements must be in writing, § 623 BGB (actual ink on paper). Both parties must sign the agreement. Beyond that, only general contractual law applies, eg, the employer may not threaten the employee, the contractual clauses shall not be unfair, a consideration must be agreed etc.

The works council does not have to be heard in accordance with § 102 (1) BetrVG (Works Constitution Act, *Betriebsverfassungsgesetz*) before the conclusion of the contract, since this regulation applies only to notices of termination and not to termination agreements.

6.4 Protected Employees
See above **6.1 Grounds for Termination**.

7. Employment Disputes

7.1 Wrongful Dismissal Claim
An employee may challenge the validity of any notice of termination by issuing a lawsuit against their employer within three weeks of receipt of notice of termination. The court will then check whether the legal prerequisites of a dismissal were met, and can only then decide whether the dismissal

was valid. Thus, as a result of the court proceeding, either the employee will return to his or her workplace (if the dismissal was invalid) or stay out of the company (if the dismissal was valid). In order to avoid the uncertainty of this situation, settlement agreements are usually concluded at the Labour Courts, providing for termination of the employment and payment of a severance. The severance in such settlements is subject to the free negotiations of the parties; the judges may only make unbinding proposals (referring to the prospects of success in the lawsuit).

Apart from this, employees may as well file lawsuits in order to raise any claim under the employment contract, or statutory claims relating to the employment relationship.

Retaliation/Whistleblower Claims
According to statutory law (§ 612a BGB), retaliation against an employee who makes claims or who (rightfully) raises a complaint against their employer, is forbidden.

At the same time, it is true that – given historical experiences with informers – whistle-blowers do not enjoy a good reputation. As a consequence, Labour Courts are reluctant to protect whistle-blowers against retaliation unless:

- they can prove that their complaint was true and founded;
- they tried to escalate the disclosed issue internally first; and
- any negative measure taken with regard to them was actually retaliation rather than any unconnected business decision.

Over the last few years, many companies have introduced ethical guidelines that oblige employees to inform their employers about undesirable behaviour by other employees. Such whistle-blower regulations in ethical guidelines concern the so-called conduct of employees and are therefore subject to co-determination pursuant to § 87 (1) No 1 of BetrVG (Works Constitution Act, *Betriebsverfassungsgesetz*). The right of co-determination of the works council in the introduction of whistle-blowing regulations means that the employer can only introduce, amend or repeal such regulations together with the works council.

In general, German labour law requests the employee to complain first internally before going public. An infringement of this duty may, under German law, actually justify the dismissal of the employee.

7.2 Anti-Discrimination Issues

The Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, AGG) implements the European Equal Treatment Directives and contains special rules prohibiting discrimination in the employment relationship based on the following specific characteristics:

- race or ethnic origin;
- gender;
- religion or belief;
- disability;
- age; or
- sexual orientation.

This applies in particular to the areas of job vacancies and application, the selection of employees and selection criteria, the conditions of employment and working conditions, as well as remuneration and the definition of conditions of discharge. The personal scope of application covers all kinds of employees, including trainees or employees working at home. Since 1 January 2018, the law has also stipulated that the representation of severely disabled persons must be included before a severely disabled person is dismissed.

Damages or Other Relief in Cases of Discrimination
- Past remuneration: If the employee has been degraded, or fired, or has suffered lower pay because of discrimination, he or she may be entitled to recover the pay that he or she would have received had the discrimination not occurred. This includes not only wages, but also the value of lost benefits, vacation time, bonuses, and promotions etc.
- Future remuneration: While the courts prefer to see the employee restored to the position he or she was denied, the employee may be awarded (hypothetical) future pay if it would be unreasonable for the employee to work for the employer again. The payment of future remuneration is limited to the period until which the employee has, or would have, found an adequate new job.
- Emotional distress/compensatory damages: Compensatory damages may be awarded in cases involving discrimination. This pays victims for expenses caused by the discrimination, such as costs associated with a job search or medical expenses, and compensates them for any emotional harm suffered. According to § 15 (2) AGG (General Equal Treatment Act, *Allgemeines Gleichbehandlungsgesetz*), the employee can get indemnification for non-pecuniary damage.
- Punitive damages: These may be awarded as indemnification. Given that the concept of punitive damages is alien to German law in general and was introduced only through the Equal Treatment Directives, German Labour Courts are extremely reluctant to grant such.
- Attorney's fees: In general, the winning party of a Labour Court dispute may not ask for compensation of attorney's fees – in contrast to the general German law concept. Exemptions may apply only in rare cases where the employee can prove that the employer purposefully caused the employee to be charged attorney's fees just to damage the employee financially. If the proceeding is continued at the level of the Higher Regional or Federal Labour Court, however, general concepts again apply, ie, the winner of the case is entitled to reimbursement of his or her legal costs. This reimbursement, however, is limited to the statutory

attorney's minimum fees pursuant to the Attorney Fee Act (*Rechtsanwaltsvergütungsgesetz*).
- Reinstatement: In general, no reinstatement can be ordered by the courts on the grounds of discrimination. Only in small operations with fewer than ten employees, where general dismissal protection does not apply, may a court award a reinstatement on the grounds of discrimination.

8. Dispute Resolution

8.1 Judicial Procedures

In the case of legal disputes between an employee, works council, trade unions and/or employer, the Labour Courts are competent to decide the cases. The deciding chamber of a Labour Court consists of three judges, one "professional" judge who has studied law and one lay judge each for the employee and the employer – appointed by trade unions and employer associations.

The courts for labour law matters are organised into three levels:

- the court of first instance named the Labour Court (*Arbeitsgericht*);
- the appellate courts – the Regional Labour Court (*Landesarbeitsgericht*) in the second instance; and
- the Federal Labour Court (*Bundesarbeitsgericht*) in the third instance.

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The Labour Courts have exclusive jurisdiction over all disputes arising from an employment relationship, irrespective of the value of the matter in dispute. Appeals are heard in the Regional Labour Courts; the value of the matter in dispute must generally exceed EUR600 to be admitted for appeal. The Federal Labour Court can, upon special petition, rule on appeals of the final decisions of the Regional Labour Courts, and serves as the final court of appeal.

There is no provision for class action claims.

8.2 Alternative Dispute Resolution

Under German law, arbitration procedure agreements and mediation agreements cannot validly be concluded with employees – unless they are stipulated by collective bargaining agreements.

8.3 Awarding Attorney's Fees

In the first instance at the Labour Courts, each party bears its own attorney's fees, whether or not it has won the litigation. This provision was intended to prevent an economically weaker employee from enforcing his or her claims because of the cost risks. If an employee loses his or her court case against the employer, he or she must bear his or her own costs, but not the employer's costs.

However, this principle applies only in the first instance. At the appellate courts of the second and third instance, the losing party is obliged to compensate the counter party for court and attorney's fees – although these are limited to the statutory attorney's minimum fees pursuant to the Attorney Fee Act (*Rechtsanwaltsvergütungsgesetz*).

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Trends and Developments

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Heuking Kühn Lüer Wojtek (Düsseldorf - HQ) is a partnership of approximately 350 lawyers, tax advisers, and civil law notaries with eight offices in Germany and offices in Brussels and Zurich, making it one of the major commercial law firms in Germany. The firms supports international clients and co-ordinate work in various jurisdictions. Internationally, the firm collaborates with leading law firms on a "good friends basis." There are approximately 38 lawyers working on employment issues on a regular basis covering all aspects of employment law aspects.

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German employment and labour law has seen several noteworthy changes and developments over the last year.

Obviously, the implementation of the GDPR has caused a huge amount of work and has raised a multitude of new legal questions. As in other EU countries, the government in Germany wants to get things right from the beginning and there is a lot of pressure on companies to implement the changes correctly and on time.

Apart from that meta-topic, another development worthy of mention here is the following:

Since the German economy is still doing exceptionally well, the question under discussion is not so much how to facilitate business, as how to improve the protection and well-being of employees and the unemployed.

Consequently, the German coalition of governing parties – after its lengthy formation – has agreed to implement the following legal changes:

Employees will in future be entitled to claim a reduction of working hours for a fixed period of time. According to the first drafts circulated of the new law, the right to claim this will apply in companies with more than 45 employees; furthermore, the fixed period of the reduced working hours may last up to five years. Several details still need to be defined (such as, how often may such a reduction be requested; how long must an employee wait before requesting a second reduction period; when can an employee's request be denied by an employer, etc).

The boom in the German labour market during the last two decades is partly due to the conclusion of fixed-term employment contracts having been facilitated. As the unemployment rate has dropped significantly since then, the courts and legislator are both currently working to reduce the remaining flexibility in these contracts. A new law is currently being drafted, according to which, fixed-term contracts may be concluded for a maximum duration of 18 months without further justification (currently, 24 months is permitted) and only if the employee has not been employed by the employer during the five years preceding the commencement of such a fixed-term contract.

The national minimum wage has been increased.

In addition, Germany – like many other European countries – has introduced a new law on remuneration equality and transparency in order to fight the so-called gender pay gap, ie, the fact that the remuneration of female employees is statistically less than that of male employees (between two and 20% less, depending on the source of the statistics). According to this new Remuneration Transparency Act (*Entgelttransparenzgesetz*), employees may request the disclosure of the median pay of a group of comparable employees of the opposite sex (if the group is composed of at least six employ-

ees of the opposite sex). Although this Act came into force in July 2017, so far it has been widely ignored by German employees and, thus, it has not played a significant role in practice.

Last but not least, the German legislator is preparing for Brexit – both by facilitating the naturalisation of British citizens in Germany and by preparing changes in the laws on dismissal protection. Germany, Frankfurt in particular, is aiming to get a share of the London financial services industry after Brexit. As the strict German laws on dismissal protection are apparently seen as an obstacle to banks moving to Frankfurt, Germany is presently in the process of changing this law. According to the plans circulated, employees with an annual pay of more than EUR234,000 will, in future, be exempted from dismissal protection. Whilst this may seem to be a small step, it is actually a major step forward that affects other industries (legal services, professional sports, the movie industry, etc) as well.

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