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Contents

Heuking Kühn Lüer Wojtek is a partnership of more than 400 lawyers, tax advisers and civil law notaries with eight offices in Germany as well as offices in Brussels and Zurich, making it one of the major commercial law firms in Germany. It supports international clients and co-ordinates work in various jurisdictions. Internationally, it collaborates with leading law firms on a 'good friends' basis'. About 44 lawyers at the firm deal with employment issues on a regular basis, covering all aspects of employment law.

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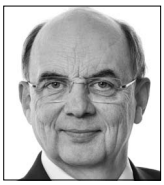

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1. Terms of Employment

1.1 Status of Employee

In Germany, an employee (*Arbeitnehmer*) enjoys a special status that is described as the personal obligation to perform work upon the employer's instructions, without entrepreneurial risks and in a situation of economic dependence (to a certain degree) on the employer.

Employee protection rights do not, therefore, generally apply to directors and board members of companies – as they act mainly without instructions from superiors. Where protection rights derive from European Union Directives, such board members and directors are treated as 'employees' under German law as well.

1.2 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. There is no general form requirement under German law. The employer is only obliged to provide the employee with a text that provides 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 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-competition 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.

1.3 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.

It is certainly worth mentioning that, pursuant to a recent decision of the European Court of Justice (14 May 2019 – C-55/18) each European member state is obliged to impose on employers the implementation of systems enabling the duration of time worked each day by each worker to be measured.

Before that decision, it was – at least in office environments – quite common to have a so-called 'trust-working time' where the employers did not monitor the actual time worked by their employees and thus, avoided the payment of overtime.

1.4 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, the minimum wage 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 contri-

bution ceiling (currently EUR80,400 gross per year for the former West German federal states and EUR73,800 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.

If employees travel as part of their job (either as sales representatives or 'just' to get to an internal/external meeting), that time spent must be paid as well. According to a decision of the Federal Labour Court, however, employer and employee could agree on different pay levels for mere (passive) travel time; even an agreement to include a certain number of travel hours in the base salary is possible. It must, however, be explicitly addressed; otherwise (unless the general ban of overtime work is permissible) the employer has to bear the extra payment costs.

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.

1.5 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 EU directive 2019/943, a new law for the protection of trade secrets has been enacted and 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, *Mutterschutzgesetz*), 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 must inform the employer in good time regarding how long he or she intends to go on parental leave.

During parental and maternity 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. After long political debate, the Law on Protection of Business Secrets or Law on Business Secrets (*Gesetz zum Schutz von Geschäftsgeheimnissen* – GeschGehG) was passed by the German lower house on 21 March 2019 and by the parliament on 12 April 2019. It came into effect on 26 April 2019. It was long overdue as the deadline for national implementation of the EU Directive on Business Secrets on which it was based expired in June 2018. Below is a summary of what is primarily new about the law and what changes came about at the last minute during the legislative process. The Law on Business Secrets introduces several new aspects in comparison to the previous law, particularly:

- *A new definition of 'business secret':* the definition of business secret is redefined (§2 No 1 GeschGehG) and is now more strongly based on international standards. For instance, for information to be deemed a business secret now, it will have to be shown that it has at least potential economic value and that it is subject to suitable confidentiality measures.
- *A more differentiated civil-law liability system:* whereas business secrets up to now were protected mainly through contracts, certain provisions of the criminal code or blanket clauses, the Law on Business Secrets for the first time provides a more differentiated civil-law liability system with regard to the specific conditions to be met under law (§4 GeschGehG) and legal consequences (§§6 et seq GeschGehG). This provides more legal certainty. For instance, reverse engineering of products that are freely available will now be allowed (§3 subsec 1 No 2 GeschGehG), a matter which had been a grey area in Germany up to now.
- *Limitations protecting legitimate interests:* for the first time, express limitations have been placed on a business's right to claim secrecy, making this subordinate to legitimate interests of whistle-blowers and investigative journalists (§5 GeschGehG).
- *Business secrets in litigation:* in future, courts will have more leeway to protect a party's business secrets in trials involving the breach of such secrets. For instance, the opponent may be subjected to obligations of secrecy, the breach of which would be separately punishable (§16 et seq GeschGehG). Even if opponents' access to business secrets based on the other party's duty of disclosure still cannot be restricted entirely, such access can now be limited to a narrow group of people (§19 GeschGehG).

2. Restrictive Covenants

2.1 Non-competition Clauses

German statutory law provides for a strict non-competition agreement during the existence of an employment relationship. For the duration of an employment relationship, 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-competition 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-competition 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-competition period. Finally, the employer may waive the post-contractual non-competition 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

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.

Employees' Personal Rights

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 transfer restriction 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 GDPR and the correspondingly amended 'new' BDSG 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 a possible legal basis for the processing of employee data. Such an agreement must now contain appropriate and specific measures to safeguard the 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 their personal data in accordance with Article 15 of the GDPR. 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.

Employer Liability

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 for an EU member state, according to the ICT Directive, 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, it is essential for the employee to have a job offer (§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 on the employer and the employee (§404 (2) No 3 and 4 SGB III).

New Immigration Rules from March 2020

In March 2020, new migration rules especially for highly qualified migrants will come into force. The aim is to encourage qualified specialists to come and work in Germany. University graduates and people with a qualified vocational education will then both be equally recognised as qualified workforce and will benefit from an easier and faster application process to gain a residence permit.

5. Collective Relations

5.1 Status/Role 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 over 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, *Betriebsverfassungsgesetz*), 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

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 activities of the trade union representatives must be borne by the union itself. Tasks include, in particular, advertising for new mem-

bers and informing employees about union activities, as well as collective bargaining with the employer.

Freedom of union organisation is protected by constitutional law and 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 by means of the Works Constitution Act or *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 be regarded as committing 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 have a collaborative approach to their works councils.

5.3 Collective Bargaining Agreements

Collective bargaining agreements (*Tarifverträge*) in Germany are understood as agreements between trade unions and individual employers or employers' associations. Such collective bargaining agreements set employment terms and conditions – legally binding – for the parties to the agreement and their respective members.

Works council agreements (*Betriebsvereinbarungen*) are agreements between employers and the works council of a given operation. All employees in the operation, irrespective of their membership in any trade union, are bound by such agreements. The agreements typically set the framework for most operational issues, such as working time models, shifts, codes of conduct at the workplace etc. Only senior executive employees, as well as the directors of the employer, are exempt from the application of the works council agreements.

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; or
- in the case of dismissal for operational reasons, 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; and
- 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, a permit to work at 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 the transfer of the employee to an easier/different job is not possible (and would not alleviate the employee's health issues).

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. While 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 of a responsible employee of the employer becoming aware of the facts justifying the dismissal.

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

In the case that a series of breaches, rather than a single breach, of contract/misbehaviour justifies cause for dismissal, 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) or 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 under unchanged working conditions after expiry of the period of notice, until the legal dispute has been finally concluded (§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*); and
- should the employee to be dismissed be a senior executive employee (*leitender Angestellter*) and should a representative body for senior executive employees (*Sprecherausschuss*) exist, such representative body must be informed before the dismissal of the senior executive; otherwise, the dismissal is void.

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 their 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 their 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 (ie, 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 the 'how' to implement the redundancy, ie, when to dismiss whom, on the basis of which selection criteria. This triggers entrepreneurial freedom, however, to which the works council cannot, in the end, enforce any changes. 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; and
- 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 Dismissal for (Serious) Cause (Summary Dismissal)

In exceptional cases, the cause for dismissal (see **6.1 Grounds for Termination**, above) may be so significant that even continuation of the employment relationship until the expiry of the applicable notice period is unbearable for the employer. Typically, this is in cases of misbehaviour, particularly if criminal offences are involved (fraudulent behaviour, physical assaults, etc). In such cases, the employment relationship ends at the moment that the employee is handed their notice of termination.

As this consequence is quite harsh, the law requires the employer to act quickly. Within a deadline of two weeks after first hearing of the factual circumstances that might justify such dismissal for serious cause, the employer must deliver the notice of termination to the employee; otherwise, the employer loses this option and can then only dismiss the employee observing the ordinary notice period.

6.4 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 (ie, actual ink on paper); and
- 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 before the conclusion of the contract, since this regulation applies only to notices of termination and not to termination agreements.

6.5 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 their 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 the termination of employment and payment of 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).

Employees may alternatively file lawsuits in order to raise any claim under the employment contract, or statutory claims relating to the employment relationship.

Retaliation/Whistle-blower 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, the 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.

However, in April 2019, the European Parliament accepted a new European Whistle-blower Directive, the regulations of which Germany will have to implement within the next two years. According to the Directive, the German point of view will have to change dramatically. Not only will the whistle-blower in future be allowed to escalate externally before

undertaking any internal steps, but the employer will need to prove that any disciplinary measures against whistle-blowers are not retaliation, but independent acts. Furthermore, the government will have to implement additional protection measures for whistle-blowers.

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. 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.

At present and 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 AGG (General Equal Treatment Act, *Allgemeines Gleichbehandlungsgesetz*) 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 addressed 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, they may be entitled to recover the pay that they 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 they were 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, 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 this.
- *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 union 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.

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.

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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 their claim because of the cost risk. If an employee loses their court case against the employer, the employee must bear their 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 Attorneys' Fees Act (*Rechtsanwaltsvergütungsgesetz*).