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The cover features several large, dark green leaf-like shapes scattered across the background, creating a natural, organic feel. The leaves vary in size and orientation, with some pointing upwards and others downwards.

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# Employment

Second Edition

Germany: Trends & Developments  
Heuking Kühn Lüer Wojtek

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# 2019

# Trends and Developments

*Contributed by Heuking Kühn Lüer Wojtek*

**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 Zürich, 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.

## Authors



**Regina Glaser** is a partner at the firm. As a certified specialist lawyer, she advises German and foreign companies on all areas of employment law, eg, restructuring and reorganisation, privatisations, employment contracts, pension and social

plans, individual and collective bargaining, works council aspects, as well as individual and mass layoffs. Regina has good negotiation skills and a clear-thinking approach to solving complex issues. She is fluent in both English and German and is a member of the American and German Bar Associations, as well as a counsel of the Global Employment Institute.



**Bernd Weller** is a partner and co-head of the employment and labour law practice group of Heuking Kühn Lüer Wojtek. He is widely acknowledged for his practical, solution-driven approach and his negotiation skills, and for his expertise in

all collective labour issues, eg, negotiations and litigation both with works councils and trade unions. A recommended expert in his field, Bernd is a thought speaker and lecturer both at a national and international level, and he regularly publishes articles in German and international law gazettes. He is fluent in English, Italian and German.



**Johan-Michel Menke** is a partner of Heuking Kühn Lüer Wojtek. He advises enterprises from all sectors on employment law issues, including transactions, due diligence, post-merger restructurings, insolvency procedures,

mass redundancies and collective law topics, particularly works council and trade union negotiations. Johan has a reputation for being a troubleshooter who gets straight to the point. He is a regular contributor to both law publications and periodicals; and he gives lectures to certified labour law specialists, university students and human resources business partners. Johan is a member of the German-American Lawyers' Association and the Anglo-German Club.



**Dirk W Kolvenbach** has been a partner at the firm since 1988. He works in both the Düsseldorf and Zürich offices, where he specialises in counselling both national and international clients on issues of German commercial, labour and

employment law, as well as advising on M&A. His expertise and assurance help clients navigate through difficult discussions and negotiations between all the parties involved in employment-related matters, especially where a robust and strategic approach is necessary to safeguard the client's interest. Dirk is a frequent speaker at international seminars and conferences as well as a long-standing member of the International Bar Association and a member of the board of directors of World Services Group.

The labour and employment sector has once again seen many changes – both in terms of the initiatives of the legislator as well as changes in the way the sector works.

One important change has been the implementation of the Law on Protection of Business Secrets (*Gesetz zum Schutz von Geschäftsgeheimnissen* – GeschGehG).

The economic relevance of business secrets is very high. No company can afford to forego reasonable measures to protect its know-how, special market knowledge and its customer and sales data. For technology-intensive companies, business secrets often have a value equivalent to or even exceeding that of a patent portfolio. Having an entire law to regulate this does it far greater justice than the previous fragmented regulations. Since the law is based on an EU directive, other member states are obliged to pass similar legislation with equivalent protection. This makes it easier for companies to exchange sensitive information across borders. In the event of a dispute regarding business secrets, the new protective measures available to the courts are of particular value. Up to now in Germany, protection in this respect did not come close to being adequate.

At the same time, however, the Law on Business Secrets requires new organisational measures to be taken by companies:

- in future, information will only be deemed a business secret if reasonable measures to keep it confidential, in view of the circumstances, have been put in place. These may be in the form of contractual, organisational or technological measures. The key to finding measures that are tenable in each company's case will be to first evaluate and categorise its know-how, in order to focus the measures on information that is really worth protecting. There should also be a more targeted focus on the effectiveness of confidentiality agreements. Likewise, labour law and data protection must be observed, especially with regard to monitoring employees;
- compliance departments will need to become increasingly focused on the protection of business secrets. Whereas liability for breach of confidentiality was previously mainly limited to a few cases under the criminal code, a breach of obligations regarding business secrets can in future be subject to a high liability risk even in cases of slight negligence. For this reason, companies should take great care to ensure that no third-party know-how comes into the company in any way that might be illegal, for instance, through a new employee or in the course of a joint venture; and
- companies will have to wait and see what effect the whistle-blower limitations will have on business secrecy. The limitations do not agree in all aspects with the EU directive regarding whistle-blowing, which is also soon to be enacted. Companies are recommended to keep a close

eye on case-law development in this area, particularly with regard to the organisation of internal systems to handle whistle-blowers.

### Conclusion

The new Law on Business Secrets does greater justice to the economic and competitive relevance of business secrets and places more value on their protection. For a company to enjoy the rights of this new protection, however, it is important for it to take suitable measures towards this end in its contracts, its organisation and its technology, and to direct these measures in a more targeted and strategic way than it has previously done.

Another major cornerstone of the German employment market has been the introduction of a new law making it easier to employ foreigners.

New immigration rules will come into force in March 2020 to facilitate and accelerate the immigration process of a qualified and skilled workforce. With these new rules the German government wants to encourage qualified specialists to come and work in Germany. The new law defines what kind of workforce will be considered 'qualified' and will therefore have easier access to the German labour market. University graduates and people with a vocational qualification, where the university degree and vocational education are comparable to German standards, will be considered 'qualified'. For such immigrants, the so-called priority check by the German employment agency will be eliminated (§39 AufenthG rev). The same privilege will apply for IT and communication specialists with five years of work experience within the last seven years (§6 BeschVO rev).

Under the current law, the employment agency will still need to verify that no German or EU national is available on the labour market to fill the respective position.

To improve and accelerate the administrative process for qualified migrants, a special 'accelerated skilled worker procedure' will be introduced. In such a case, the German employer and the immigration authority will work closely together to make the immigration process as smooth as possible (§81a AufenthG rev). This also includes the process with the respective German diplomatic missions, where foreigners normally have to apply for their visa before entering Germany. The employer can provide the necessary documents to the agency and will be a person of contact within Germany for the authorities. The diplomatic missions are also supposed to schedule appointments for qualified workers more quickly than they have done so far.

Residence titles for the qualified workforce as defined by the law will now be granted for four years, unless the duration of the employment contract is granted for a shorter period of time. The employer in Germany will have to verify whether

the foreigner has a residence permit, retain it for the duration of the employment, and notify the immigration office about the termination within four weeks after the end of the employment.

Finally, there is also a trend in Germany towards more agile collaboration concepts, where traditional hierarchies become less important while tasks are given to groups/teams of employees who are mainly self-organised. This trend is hindered, if not contradicted, however, by the protective labour and employment laws that derive mainly from the 1960s and 1970s aiming to protect employees from the dominant employer hierarchy. One of the current 'battlegrounds' of this inconsistency between law and reality is the monitoring and payment of time worked.

On the one hand, employees prefer to work whenever and wherever it suits them best – as their work requires more and more creativity and as they try to combine demanding jobs with a fulfilling family life. On the other hand, the Working Hours Legislation demands that they have a rest of 11 hours between the end of work on a given day and the commencement of work on the following day. Furthermore, employers refrain from monitoring employee working hours – as they are interested in the work results only, leaving the work organisation to the employees themselves. Now, the courts demand that the employers should actually (micro-) monitor each and every working hour of their employees. The German government has announced that it will start a new legal initiative in this regard – having an eye on both modern work environments, as well as the protection of employee rights. It will be interesting to see what comes out of this.

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