

## **I. INTRODUCTION**

Similarly to other countries, German labour law does not consist of a unified collection of legal provisions. German labour law regulations are spread over various sources. In addition to legislation regarding the direct relationship between employer and employee, German law provides for many rules and regulations regarding the relationship between the employer and the works council as well as the employers' associations and the employees' unions. Regulations regarding technical and social occupational health and safety are also in place.

However, German labour law is not only laid down in formal acts and regulations. The content of an employment relationship is, to a large extent, determined by the employment contract negotiated between the employer and the employee, works agreements concluded between the employer and a works council as well as collective bargaining agreements. In addition, case law has an important role to play with regard to the interpretation of labour law regulations and the issues which are not covered by any legislation or regulations.

## **2. THE DIFFERENT TYPES OF EMPLOYMENT CONTRACTS AND THEIR TERMINATION**

According to German law, an employment contract is an agreement between two parties whereby the employee is obliged to personally perform certain duties under the direction of the employer and the employer promises remuneration in return.

German law provides for open-ended contracts and fixed-term contracts, with employees being employed either full-time or part-time.

The main working conditions are set out in various labour acts, e.g. regarding notice periods, paid leave, sickness payments and the protection against dismissal. However, German law in general does not prescribe a minimum salary. Minimum salary provisions only apply in certain branches (e.g. construction, cleaning of buildings and postmen). It is up to the parties to agree adequate remuneration.

Fixed-term and part-time contracts are fully regulated under German law. Fixed-term contracts can only be agreed if the term is justified under one of the special reasons allowed by law. According to the law, this may be a temporary business need, for example, or that the nature of work itself is limited in time. In the absence of a special reason, the fixed-term contract for a newly hired employee cannot exceed two years. A fixed-term contract can be extended up to three times but is still subject to this two year limit. A further requirement is that a fixed-term contract must be in writing.

Apart from certain types of contracts (e.g. fixed term contracts, contracts with apprentices), it is generally not necessary to set out an employment contract in writing.

According to the law, an employer must give the employee a written statement summarising the main conditions of employment within one month of the commencement of the employment relationship. However, a breach of this rule will have no severe consequences for the employer.

In case of an oral employment contract, the parties may find it difficult to prove the agreed working terms and conditions. In such a case, statutory labour law regulations will apply but can be superseded by any applicable collective bargaining agreement.

A collective bargaining agreement under German law is a contract between an employees' union and an employers' association or a single employer. Typically, collective bargaining agreements provide for wages and other financial benefits, notice periods, sickness payments and paid leave. In most cases such agreements provide more favourable terms for the employees than the statutory law.

The parties to an employment contract may agree on a trial or probationary period up to a maximum of six months. During this period both parties are entitled to terminate the employment relationship by giving the other party two weeks' notice. Such a probationary period may either be agreed as a single fixed contract expiring automatically at the end of the agreed term or in a contract with unlimited duration.

Employment agreements may be terminated upon the death of the employee, dismissal, resignation of the employee or by a termination contract concluded between the parties. A transfer of business, bankruptcy, the employee's age or long periods of sickness absence do not automatically terminate an employment contract.

By law the termination of an employment relationship requires written notice by one party to the other party. "Written" means that the other party shall be physically served the notice letter. Oral notice or a letter by fax or an email would therefore not be sufficient.

In the event of an "extraordinary dismissal", the employment relationship is terminated with immediate effect upon receipt of the notice letter. However, such an extraordinary termination requires a serious justification (e.g. fraud, insistent refusal to work or any other gross violation of duties).

In the case of an "ordinary" dismissal, the employment relationship comes to an end after the expiry of the notice period.

Pursuant to the law, both parties have to observe at least the minimum statutory notice periods. The "notice period" under German law is the time between the delivery of the notice letter and its coming into effect.

The statutory notice period starts with four weeks (ending on the fifteenth or the end of a calendar month) and can be increased up to a maximum of seven months (ending at the end of a calendar month) depending on the duration of service. However, it is possible to agree longer notice periods in the employment contract. Furthermore, collective bargaining agreements generally contain longer notice periods.

German labour law does not provide for the possibility of a payment in lieu of notice. Of course, it would be possible to mutually agree such payment and terminate the employment

relationship earlier. However, it is our experience that employees generally are rather reluctant to agree to such payment as it would reduce their unemployment benefits paid by the state.

The Act on the Protection against Dismissal (“Kündigungsschutzgesetz”) provides the employee with a general protection against dismissal.

To benefit from such protection, the employee must have been employed by the employer for at least 6 months at the time of the delivery of the notice letter. Furthermore, only employees in larger enterprises are protected. Due to a change in the law in 2003, employees who started their employment before 1st January 2004 are only protected if more than 5 employees are employed in their enterprise. Employees who started their employment after 31st December 2003 are only protected if more than 10 employees are so employed.

A dismissal by the employer has to be socially justified and must be for particular reasons, i.e. due to the employee’s conduct, to reasons relating to the employee’s person (for example sickness) or to urgent operational requirements which stand against the employee’s continued service. A dismissal by the employer which is not socially justified is null and void.

The most important reason for dismissal is “urgent operational requirements”. These can result from internal (e.g. management decisions, such as rationalisation measures, restructuring or reduction of the production) or external circumstances (e.g. lack of purchase orders or decline in turnover). However, a dismissal will only be justified if it is on the basis of such a reason (for example, a decision by the employer to completely shut-down the whole business will be sufficient to justify the termination; the reduction in turnover, however, does not necessarily justify the termination of one out of five sales people, because this position continues to exist).

When choosing who to dismiss from a pool of several employees, the employer has to take into account social factors, granting more protection to certain employees (for example on the basis of length of service, age, maintenance obligations and severe disability). If the employer does not or does not sufficiently take into account these social factors when choosing the person to be dismissed, the termination will not be justified despite urgent operational reasons.

Finally, German law provides for special protection against dismissal for certain groups of employees.

According to the Severely Disabled Persons Act (“SGB IX”), the dismissal of a severely disabled employee requires the prior consent of a specific authority in order to be valid. The same applies to pregnant or nursing women or employees on maternity leave.

Fixed-term contracts normally expire at the end of their term or when the agreed conditions are met. Furthermore, the possibilities of terminating fixed-term contracts are limited. Unless the parties agree on the possibility of an ordinary termination, a fixed-term contract may only be terminated by extraordinary notice and only if serious reasons are put forward as justification.

### 3. SOCIAL CONTRIBUTIONS AND THE DIFFERENT KINDS OF BENEFITS IN GERMANY

#### 3.1 PRESENTATION OF THE GERMAN SOCIAL SECURITY SYSTEM

The German social security system provides for mandatory pension insurance, health (incl. nursing) insurance, unemployment insurance as well as a statutory accident insurance. Freelancers, the self-employed, entrepreneurs and unemployed people are not obliged to join the social security system.

Employee and employer are obliged to each pay half of the **social security** contributions. Only the contributions towards accident insurance must be borne entirely by the employer. The social security contributions depend on the employee's gross salary up to a maximum insurable monthly earning. The employer has to deduct the employees' part from their gross salary and pay the total amount to the competent social security authority every month.

The **health insurance** mainly covers the risk of medical costs as well as dental treatment, including hospitalisation and surgery. The contributions to the health insurance are again borne by both the employer and the employee. The average contribution to the health insurance amounts to 14.9% of a maximum monthly income of € 3,750.00. The amount of the nursing insurance is currently set at 1.95%.

The **unemployment insurance** mainly provides for payments by the state in case of the termination of the employment relationship. The monthly contributions amount to 3.0% of a maximum insurable monthly salary of currently € 5,250.00 in the Western States of Germany and € 4,550.00 in the East.

The **accident insurance** insures the employee against the risks of occupational accidents and occupational diseases. In case of an occupational accident or disease, the workmen's compensation mainly provides for medical treatment, rehabilitation and pensions. The contributions to the workmen's compensation vary according to the risk linked to their particular job. Typically, the contributions vary between 1% and 5%.

Due to the so-called "territorial-principle" all employees working in Germany are subject to these mandatory insurances notwithstanding their nationality, the residence of their employer or the term of their occupation. However, for foreign citizens who are temporarily dispatched to Germany, e.g. for a secondment to a German branch, exemptions may be granted.

The main precondition for such an exemption is that the employee is able to prove to the competent authority his intention to return to his home country. Another important factor is whether the employee remains on the payroll of the foreign employer.

#### 3.2 THE STATE PENSION INSURANCE

The pensions insurance mainly provides for old-age, disability as well as survivors' and orphans' pensions. Currently the general age at which an employee can receive an old-age pension is set at 67. The combined contribution to the pension insurance currently amounts to 19.9% of the

employee's gross income. The maximum insurable income is currently €5,250.00 monthly in the Western States of Germany and € 4,550.00 per month in the East.

#### **4. FOREIGNERS WORKING IN GERMANY – TRANSFERS OF UNDERTAKINGS**

##### **4.1 FOREIGNERS WORKING IN GERMANY**

A new Immigration Act has applied in Germany since 1<sup>st</sup> January 2005. This Act is subdivided into two articles. Article 1 contains residence and immigration regulations and Article 2 stipulates the freedom of movement for nationals from countries within the European Union.

Nationals from countries outside the European Union must obtain a prior residence permit in the form of the so-called “Shengen-Visa” to enter Germany. This visa will be granted by an official representative of Germany, i.e. by a German embassy in the foreigner's home country. This visa entitles the foreign national to short-term stays in Germany for up to three months.

For longer stays in Germany and every kind of gainful employment, nationals from outside the European Union require additional residence entitlements. This may either be a residence permit or a settlement permit. Currently, nationals from the new European Union member countries which joined the European Union on 1<sup>st</sup> May 2004, except nationals from Malta and Cyprus, also need such a permit.

A residence permit is only valid for a limited period of time and is granted for specific purposes of residence only, for example studies at a German university. However, the foreign national may apply for a residence permit which allows gainful employment in Germany.

According to the new law, a residence permit which includes a right to work requires that the employee proves that he has a firm job offer and the Federal Employment Agency approves the employment. In most cases the Federal Employment Agency will only grant its approval if preferred employees (particularly Germans as well as other citizens from the European Union) are not available and the employment of the foreigner will have no negative effect on the German labour market. Furthermore, the Federal Employment Agency will not grant its approval if the foreigner is employed under less favourable working conditions than similar German employees.

The settlement permit is not limited in time and includes the right to gainful employment in Germany. Such a settlement permit is granted to a person from abroad after his or her marriage with a German citizen, for example.

However, although the intention of the new immigration law is to make access to gainful employment in Germany more simple for foreign employees things have unfortunately become more difficult for employees in the IT-sector. Before the application of the new law, very favourable special regulations applied to IT-employees (so-called "IT-Green Card"). However, due to the new act exemptions are no longer granted to IT-employees.

## 4.2 TRANSFERS OF UNDERTAKINGS

German law (Section 613 a para. 1 to 6 Civil Code) provides that in case of a transfer of a business or part of a business all employment relationships (which only includes regular employees but not freelancers, sales people, or managing directors) working in the business or part of the business will transfer automatically to the new owner with no change to their working conditions, e.g. duration of service, remuneration etc. This law implemented the Directive 77/187/EEC of 1997 of the European Union into German law.

As a first requirement, the business or the part of the business must be a so-called definable organisational unit which can be independently transferred to a new owner. This means the unit must have its own structure which makes it independent from other business units, e.g. by having its own control hierarchy.

Furthermore a transfer of business requires that the main assets of the business or part of the business are transferred to the new owner. The assets may be movable or immovable assets or the personnel. Especially in service companies with few material assets, focusing on the staff is essential to determine whether a transfer has occurred or not. According to the German labour courts, a transfer of a business may take place if a certain number of specialist key employees are transferred to the new business.

Despite latest decisions by the European Court, according to the German Federal Labour Court a transfer of a business applies only if the organisational unit of the business or a part of the business remains to a large extent unaffected after the transfer. Therefore, it might be possible to avoid a transfer of a business through substantial restructuring measures in connection with the transfer of assets.

The main consequence of a transfer of business is that all employees working in the transferred business or part of the business will retain all their rights and obligations and the new owner automatically becomes their new employer. As the employer, the new owner must therefore pay the same wages and salaries, including all fringe benefits that were made available before the transfer, including accrued, unpaid or overdue payments. However, since only existing employment relationships are transferred to the new owner of the business, employment relationships with dismissed employees will not be carried over.

As the new employer, the new owner of the business or part of the business will be liable for all obligations towards the employees which arose before the date of the transfer. However, the seller of the business or part of the business also remains liable for all claims by the employees which arose before the transfer and which fall due within one year after such transfer.

Furthermore, a works council, if one has been established, continues in its original form in cases where the whole business is transferred. In case of the transfer of only parts of a business, special regulations apply to ensure the continuance of the works council. Collective bargaining agreements continue to apply to the new owner at least for a period of one year, unless the new employer is already bound by a collective bargaining agreement.

Dismissals arising as a result of the transfer will, as a matter of law, be null and void. However, dismissals for other reasons in connection with a transfer of business, e.g. urgent operational requirements like technical or organisational measures, remain permissible in principle.

An employee cannot be obliged to work for the new owner of the business. According to the law, the employees have the right to object to the transfer of their employment within one month after being notified of the transfer. The employee is entitled to notify his objection to either the seller or the prospective buyer.

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