



EMPLOYMENT LAW OVERVIEW
GERMANY 2021-2022

Pusch Wahlig Workplace Law / Proud Member of L&E GLOBAL

TABLE OF CONTENTS.

I.	GENERAL OVERVIEW	03
II.	HIRING PRACTICES	05
III.	EMPLOYMENT CONTRACTS	06
IV.	WORKING CONDITIONS	08
V.	ANTI-DISCRIMINATION LAWS	10
VI.	PAY EQUITY LAWS	12
VII.	SOCIAL MEDIA AND DATA PRIVACY	13
VIII.	TERMINATION OF EMPLOYMENT CONTRACTS	14
IX.	RESTRICTIVE COVENANTS	18
X.	TRANSFER OF UNDERTAKINGS	19
XI.	TRADE UNIONS AND EMPLOYERS ASSOCIATIONS	20
XII.	EMPLOYEE BENEFITS	22



I. GENERAL OVERVIEW

1. INTRODUCTION

German employment law is divided into two areas: individual employment law and collective employment law. Individual employment law concerns relations between the individual employee and the employer, while collective employment law regulates the collective representation and organisation of employees as well as the rights and obligations of employees' representatives.

German employment law is not consolidated into a single labour code: the main sources are Federal legislation, case law, collective bargaining agreements, works council agreements and individual employment contracts.

2. KEY POINTS

- Employees who are not from the EU/EEA require a residence title for the purpose of taking up employment.
- A statutory minimum wage of 9.35 EUR (2020) / expected to be 9.50 EUR for 2021 per hour, currently applies to all employees in all sectors of business. Aside from the statutory minimum wage, there are special regulations and collective bargaining agreements within certain sectors.
- Overtime pay is not expressly regulated by law, but is subject to the employment agreement, collective bargaining agreements and works council agreements.
- Trade union representatives support employees and works councils, but do not have participation rights within a company.
- Due to the high level of protection against dismissal, it is reasonably common for employment to be terminated by a separation agreement.
- Severance payments are paid if a number of conditions are fulfilled.

3. LEGAL FRAMEWORK

German labour and employment law is not consolidated into a single labour code. Separate laws for particular issues exist – e.g. the Federal

Vacation Act, the Working Time Act or the Maternity Protection Act. The main sources of German employment law therefore are Federal legislation, collective bargaining agreements, works council agreements and individual employment contracts. Many labour and employment law matters are heavily influenced by case law so that judicial precedent is an important part of the legal framework. Numerous separate laws and case law generally make German employment law difficult to navigate. There have been discussions about introducing a uniform Labour Code. The project was however abandoned and an introduction in the short- or mid-term is very unlikely.

4. NEW DEVELOPMENTS

A. NEW REGULATIONS DUE TO COVID-19

The Covid-19 pandemic is fundamentally changing daily operations. The legislator has therefore enacted various short-term packages of measures and laws in connection with the pandemic, which are initially limited until 31 December 2020, but may be extended at short notice, including e.g., compensation for child care and an easier deferral of social security contributions to be paid by the employer.

In April 2020, the Federal Ministry of Labour and Social Affairs issued the so-called Occupational Safety Standard, which was further specified in September 2020 by the Occupational Safety Regulations. These rules are intended to ensure the safety of all employees in the workplace during the pandemic and to minimise the spread of the virus. The regulations are only recommendations and therefore they are not legally binding. Nevertheless, the employer is obliged under public law to comply with occupational health and safety regulations and has a duty of protection and care towards employees.

Due to the pandemic, the legislator has also decided to ease the access to short-time work benefits. Depending on the duration of the short-time work, the corresponding short-time work allowance increases continuously over months. At present, discussions are underway to extend the regulations beyond 31 December 2020.

In addition, changes have been introduced for a limited period, until December 2020, to allow for secondary income while receiving short-time work benefits. An employee's additional income while receiving short-time work compensation, under certain circumstances, may not be taken into account.

Draft laws are currently under discussion to stabilise the labour market also in 2021. In particular, employees should be able to receive short-time work benefits for 24 months (instead of 12 months).

B. IMMIGRATION LAW

Since 1 March 2020, the general conditions for the immigration of skilled workers from third countries (countries outside the EU/EEA) have been facilitated. As a result, the German labour market is now open not only to highly qualified individuals, but also to individuals with recognised vocational training.

As a result of the changes in the German Residence Act, the so called "job market test" is no longer required if an employment contract can be presented. With the "job market test" which, up to March 2020 had to be carried out for every application for a work permit, the Federal Labour Agency checked whether German/EU/EEA nationals

or nationals with an unrestricted residence permit were also eligible for the job.

In addition, skilled workers from third countries can now immigrate to Germany for a limited period of time to look for a job, provided they can prove they have the necessary German language skills and can secure their living.

C. WORK OF TOMORROW ACT

Special provisions were inserted into the Works Constitution Act to deal with the Covid-19 pandemic. Participation in meetings of the works council and other bodies under the Works Constitution Act and the adoption of resolutions by these bodies, can now be carried out by means of video and telephone conferences, if it is ensured that third parties cannot take note of the content of the meeting. The regulations are currently limited in time until 31 December 2020.

Works meetings can be held via video conferences until 31 January 2021.

D. DATA PROTECTION

The "Second Data Protection Adaptation and Implementation Act EU" of 21 November 2019, has relaxed the requirements for having a company data protection officer for smaller companies and voluntary associations. It is now mandatory for a company data protection officer to be appointed if 20 persons are regularly involved in the processing of personal data; previously the threshold was 10 persons.

In addition, to simplify the process of obtaining the employees' consent to data processing, this can now also be done by e-mail (instead of wet ink signature). Text form for example includes e-mail.

E. FORMAL REQUIREMENTS

With the Third Bureaucracy Relief Act, the electronic certificate of incapacity to work replaces the previous paper certificate. The health insurers inform the employer electronically upon request, about the beginning and duration of the incapacity to work for employees insured in the statutory health insurance. The regulation shall apply from 1 January 2022.

In addition, the notification of the employer's decision in response to an employee's wish to work part-time under the Part-Time and Fixed-Term Employment Act, is now also possible in text form (instead of wet ink signature). Therefore, e-mail will also now comply with the form requirements.

F. IMMIGRATION - A1 CERTIFICATION

In principle, all employees are subject to the legislation of the member state within the European Union in which they perform their work activities. Therefore, if an employee is only temporarily working in another member state within the European Union (so-called posting), the law of the posting country still applies as an exception, and the employee can prove whether he/she is subject to the law of his/her country of residence (sending country) or the regulations of the foreign country with a so-called A1-certificate.

Also, an employee regularly working in several member states needs an A1-certificate. The advantage of this, is that simultaneous payment of social security contributions in several member states, and switching between social security systems, is avoided. An A1-certificate may also be issued in the event that Germany has signed a bilateral social security agreement with countries outside of the European Union (e.g. India, Brazil, United States of America).

Especially for short-term assignments, this has led to problems since the employee could not prove that his/her employer applied for the A1-certificate.

Therefore, the employer now has the option of having the proof that the application has been issued, which the employee can use to prove that his employer submitted an application for an A1 certificate prior to the posting. This should facilitate short-term assignments of up to one week.

G. MAXIMUM COMPENSATION FOR MEMBERS OF THE BOARD OF MANAGEMENT (ARUG II)

The remuneration of members of the Board of Management, in particular of the Board of Management of large listed stock corporations, is the subject of ongoing discussions. The Supervisory Board determines the remuneration system for members of the Board of Management, whereas the General Meeting is responsible for concluding the contracts with members of the Board of Management and therefore, decides on the compensation of the members of the Board of Management.

Now, the Supervisory Board additionally has to determine the maximum compensation of the members of the Board of Management as part of the compensation system (containing inter alia, also detailed provisions regarding fixed and variable remuneration elements). Current contracts are not affected by this.

The resolution on the remuneration system to be submitted by the Supervisory Board, must be adopted for the first time at the Ordinary General Meeting held after 31 December 2020.

II. HIRING PRACTICES

1. REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

In principle, every employee who would like to work in Germany requires a residence title and a work permit before entering Germany. This does not apply to persons who are: 1) of German nationality; 2) a European Union national; 3) a national of a European Economic Area (EEA) member state (Iceland, Liechtenstein, Norway); or 4) a national of Switzerland.

Residence title and work permit are granted together as a “residence title for the purpose of employment”. This title is generally only granted if the employment agency agrees or such consent is not required due to statutory regulations. The consent of the employment agency will be obtained in an internal procedure from the German embassy abroad in the country of origin (visa centre) or the responsible local immigration authority in Germany. The employment agency examines whether a concrete job offer with usual working conditions exists. The permit for taking up employment is awarded together with the residence title. The employment agency examines, in cases involving access to vocational training only, whether the job offer cannot be filled by an individual in the German market, including EU and EEA nationals or foreign nationals with an unrestricted residence permit (“job market test”). For skilled employment, such an assessment is no longer necessary.

Several types of employees are exempt from the consent requirement of the employment agency, including: 1) highly qualified persons (e.g. scientists with specific professional knowledge as well as, since 1 March 2020, people with qualified vocational training); 2) executives (e.g. board members, managing directors); and 3) employees on a short-term deployment of up to 90 days within a period of 180 days. In such cases, a residence title for the purpose of employment can be obtained

more quickly than in cases where the employment agency must be involved.

Highly educated or trained employees may also apply for a Blue Card EU allowing them to stay and work in Germany for up to four years (with the possibility of a prolongation). The Blue Card EU is a residence title only granted to employees who graduated from university (or have a comparable degree or have completed a vocational training) and have a concrete job offer with an annual gross salary of at least 55,200 EUR. This amount applies for 2020 and usually rises slightly each year (in 2019, the minimum annual gross salary was 53,600 EUR, for 2021 it is expected to amount to 56,800 EUR gross). A lower salary threshold of 43,056 EUR applies for jobs where there is a shortage such as scientists, mathematicians and engineers, as well as doctors and IT specialists.

With the implementation of the European ICT Directive through German legislation, intra-group transfers have been facilitated. As of 1 August 2017, non-EU citizens may, under certain circumstances, be entitled to a new residence title “ICT-Card”, which allows them to work for a German group entity for up to three years. This is possible if they have been posted by another group entity from outside the EU.

Moreover, third-country nationals already residing and working in another EU member state, based on the ICT Directive, can apply for a “Mobile ICT-Card” if they need to be posted to Germany for a period longer than 90 days. In case of a short-term assignment (i.e. no more than 90 days within a 180-day period) no residence title will be necessary at all; the competent authority (i.e. the Federal Office for Migration and Refugees) just needs to be notified. Hence, third-country nationals can work in different EU member states under a single permit.

2. DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

No. The employer will, however, be obliged under the statutory social security system to appoint a contact person in Germany, which can be an employee.

3. LIMITATIONS ON BACKGROUND CHECKS

There are no specific statutory regulations on the legitimacy of background checks carried out by a private employer. However, there is complex case law on the question of which information an employer may legitimately request from a job applicant during the course of a job interview, which can be considered as a benchmark for the legitimacy of background checks, using other sources than the applicant. In essence, employers may only request such information that has a direct relation to the applicant's future tasks and responsibilities in the particular job in question.

Therefore, the employer's right to carry out background checks without the employee's consent is very limited:

- A private employer has no right of access to an applicant's criminal record. The employer may, if at all, only request the applicant to submit a copy of their criminal record. It is controversial to which extent such a request is legitimate, as the document may also contain information on offences that are not relevant for the job in question.
- An employer generally has a legitimate interest in verifying the statements an applicant makes in the application, e.g. on academic credentials or employment history. The employer may therefore, e.g., require the applicant to present the original copies of their diploma (or other academic certificates) or the original copies of their reference letters. The employer is however

not allowed to contact prior employers without the applicant's consent.

- A check on an applicant's credit history or status will only be justified where the applicant's future tasks involve a special position of trust or fiduciary duty, as only in such case the employer may require the employee to give information on their economical/financial situation in a job interview.
- Due to data protection law, background checks in social networks are only allowed in professional networks that are intended to present professional qualifications, such as LinkedIn. The employer is not allowed to use information based on background checks in private networks, such as Facebook.

4. RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

Nearly every employment relationship requires an application process. The employer has a significant interest in receiving as much information as possible about the future employee. Especially due to the protection of the privacy of the employee, there are, however, a lot of restrictions for the employer during the hiring process in Germany.

A. JOB INTERVIEWS

Job interviews are a typical step in the hiring process. However, as the applicant is usually in a weaker position compared to the employer, certain questions regarding the situation of the applicant are prohibited. The employer is only entitled to ask for information, which is necessary for entering into the employment relationship, e.g. qualifications that are required for employment. Questions concerning pregnancy, age, race/ethnic origin, sexual identity, religion, trade union affiliation or severe disability are generally not allowed in a job interview.

B. DISCRIMINATION ISSUES

The General Equal Treatment Act is of special significance during the hiring process. The law aims to abolish unequal and unjustified treatment

of employees based on certain criteria: race and ethnic origin, gender, religion or belief, disability, age or sexual orientation. This regulation is already applicable during the hiring process and especially restricts job advertisements and applicant selection. For instance, the advertisement for a “young team member” might indicate discrimination based on age.

To avoid possible discrimination issues the employer should always base the rejection of an applicant on objective hiring criteria, such as job profile and required qualifications rather than on personal characteristics of the applicant. In rejection letters, the employer should always be careful when giving individual reasons for rejection because of the German anti-discrimination law. Furthermore, during the period of claims for damages due to discrimination, the employer should be able to prove his selection process and therefore should keep all documents.

C. DATA PRIVACY

The protection of data privacy of the applicant is of special interest during the hiring process. In accordance with Sec. 26 of the Federal Data Protection Act, Art. 6 para. 1 lit. b General Data Protection Regulation, personal data may only be processed for employment-related purposes where necessary for hiring decisions or, after hiring, for carrying out or terminating the employment contract.

Due to potential discrimination claims, the employer is only entitled to store personal data of the rejected applicant for 6 months after the end of the recruitment process; only in cases wherein explicit permission is granted, may the employer store personal data of the applicant beyond this period.

III. EMPLOYMENT CONTRACTS

1. MINIMUM REQUIREMENTS

The employer has a statutory obligation to provide the main contractual terms in writing to the employee no later than one month after the commencement of employment. The terms and conditions of employment are regulated mainly by statutes, collective bargaining agreements and works council agreements. As a rule, the employment contract may not deviate from these provisions to the detriment of the employee.

The written summary must contain at least the following:

- name and address of the employer and the employee;
- information on the starting date;
- the anticipated duration (only in case of fixed-term contracts);
- the place of work;
- the nature of the activity involved;
- the composition and amount of the remuneration;
- the working hours;
- the duration of annual leave;
- the notice period; and
- a general reference to the collective bargaining agreements, works or service agreements applicable to the employment relationship, if any.

To avoid future disputes, a version of the employment contract should be drafted in German. However, this is not required by law.

2. FIXED-TERM/OPEN-ENDED CONTRACTS

As a general rule, the employment contract is entered into for an unlimited period. A fixed-term

contract is possible, provided the term is agreed upon in writing before the employment commences. A fixed-term contract ends automatically without written notice at the end of its term.

A fixed-term employment relationship must be justified by objective grounds, some of which are set forth in statutory law (e.g. temporary increase in work volume, substitution of an employee during parental leave). If no objective grounds exist, the fixed-term employment is limited to a maximum duration of two years, provided that no previous employment contract with the same employer existed. If the parties continue the employment after the expiration of the fixed-term contract, the agreement is deemed to be concluded for an indefinite period.

3. TRIAL PERIOD

The employer and employee may agree upon a trial period, which is limited by law to a maximum duration of six months. The notice period within the trial period is two weeks, unless otherwise agreed. The Dismissal Protection Act does not apply during the first six months of employment, regardless of whether the parties agreed upon a trial period.

4. NOTICE PERIOD

The length of the notice period for the employer depends on the employee's length of service, ranging from 4 weeks for employees with less than 2 years' seniority, to 7 months for employees with more than 20 years' seniority. Unless otherwise stated in the employment contract, the extended statutory notice periods are only applicable to terminations by the employer, whereas the employee may terminate the employment with a notice period of four weeks to the 15th or the end of a calendar month. Most employment

contracts align the notice periods for employees with the extended periods applicable to employers. Collective agreements may specify longer or shorter notice periods, whereas individual contracts of employment may only specify longer notice periods.



IV. WORKING CONDITIONS

1. MINIMUM WORKING CONDITIONS

The terms and conditions of employment (such as maximum working hours, minimum paid vacation and sick leave) are regulated by statutes, collective bargaining agreements and works council agreements. The individual employment agreement cannot deviate from these provisions to the detriment of the employee. The rights of employees who are only temporarily sent to work in Germany are generally determined by foreign employment law. However, to ensure fair competition and to protect the interests of employees, the Posted Workers Act stipulates that in certain business sectors – including, but not limited to the construction, commercial cleaning and mail service sectors – certain minimum working conditions must be observed, including:

- maximum work periods and minimum rest periods;
- minimum paid vacation entitlements;
- remuneration, including overtime (pursuant to the relevant collective bargaining agreement);
- regulations on health, safety and hygiene at work;
- maternity/parental leave and youth protection;
- non-discrimination provisions including prohibitions on gender discrimination;
- allowances or reimbursement for travel, accommodations and meal expenses for employees who are away from their place of residence due to business reasons; and
- conditions for hiring-out of employees, in particular by temporary employment agencies.

2. SALARY

As a general rule, remuneration is determined by mutual agreement. The salary is set forth in the

individual employment contract, either concretely or by reference to a collective bargaining agreement. Furthermore, the contractual freedom of the parties to determine the remuneration by mutual agreement, is limited by public policy. A salary of less than two thirds of the relevant usual wage is contrary to public policy and such an agreement is generally considered to be void.

A. MINIMUM WAGE

A statutory minimum wage of 9.35 EUR per hour applies to all employees in all sectors of business. Employees under 18, trainees and interns are exempted from the regulation. Aside from the statutory minimum wage, there are special regulations and collective bargaining agreements within certain sectors, e.g. the construction sector. Most of these regulations contain a minimum wage above 9.35 EUR per hour.

However, the Vocational Training Act provides a statutory minimum salary of 515 EUR monthly in the first year of training. The statutory minimum salary will be subject to further annual increases, up to 620 EUR monthly in 2023. Additionally, the monthly minimum salary increases by 18 % in the second year of training, up to 40 % in the fourth year of training.

The current minimum wage of 9.35 EUR per hour will be subject to further increase within the next year. It is expected to increase to 9.50 EUR per hour from 1 January 2021.

B. REMUNERATION TRANSPARENCY ACT

To support gender equality regarding remuneration, the core of the Remuneration Transparency Act is an individual right to information on remuneration.

This right is granted to all employees working in establishments with more than 200 employees.

There is, however, no right to be informed on a specific remuneration - only the average remuneration of a comparison group must be disclosed. This group comprises employees of the opposite sex who perform the same, or similar tasks, as the employee requesting the information. However, as no specific remuneration shall be disclosed, the claim can and must be denied if providing the information can lead to the salary of specified employees becoming known. This is assumed if the relevant comparison group consists of less than six persons.

An employee has the right to information on:

- the criteria of how his/her remuneration is determined and/or -
- the criteria of how the comparable remuneration is determined and/or -
- the comparable average remuneration calculated by the statistical median of the monthly average remunerations, granted to employees in the same or a comparable position.

If the employer is bound by collective bargaining agreements, the reference to such agreements is sufficient for fulfilling the information claim. The information can be provided by the works council, the employer, or the parties of a collective bargaining agreement. If the employer does not comply with the employee's claim, no direct consequences are provided in the law. If the employee then, however, claims discrimination, the failure to inform will lead to a reversal of the burden of proof. The employer then has to prove that no discrimination took place. Employers remain free to pay employees differently, as long as this is based on objective reasons, such as qualifications, market value, or responsibilities.

In May 2020, the highest labour court in Germany ruled that freelancers may also have the right to information on remuneration, if the freelancer qualifies as an employee under directive 2006/54/EG, in accordance with aspects of equal treatment. Whether this is the case, must be assessed on the basis of the circumstances of each individual situation.

3. MAXIMUM WORKING WEEK

The statutory maximum working time is 8 hours per day from Monday to Saturday. Working on Sundays and public holidays is generally forbidden, unless explicitly permitted by statutory law. The statutory maximum weekly working time is 48 hours. The regular daily working time may be extended up to 10 hours, provided that on average 8 hours per working day are not exceeded within a reference period of 6 months or 24 weeks. An uninterrupted rest period of 11 hours after daily work must be guaranteed. There are no opting-out provisions under German law.

4. OVERTIME

Overtime pay and overtime surcharges are not expressively regulated by law, but are subject to the employment agreement, collective bargaining agreements or works council agreements. For regular employees, it is not possible to deem any overtime compensated by the regular remuneration. However, it is possible to contractually agree that overtime of 10 - 20 % of the regular working time shall be deemed as compensated by the regular remuneration. For board members and managing directors, any overtime worked is generally considered to be covered by their normal salary.

5. HEALTH AND SAFETY IN THE WORKPLACE

A. EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

During the Covid-19 pandemic, employers need to pay special attention to maintain a healthy workplace as the recommendations from the authorities are subject to change.

As the employer has the organisational control of its premises, and the employees are exposed to dangers of the workplace, the employer is obliged to provide a healthy and safe workplace. The employer therefore is obliged to set up and

maintain all rooms, devices and equipment and to organise the work in a way that the employees are protected against any possible harm. However, the regulations on a healthy and safe workplace depend on the type of industry sector and on the degree of danger faced in the specific workplace. Fulfillment of the applicable health and safety regulations are monitored by the administrative authorities.

B. COMPLAINT PROCEDURES

Employees are entitled to make suggestions to the employer regarding all matters of safety and health protection. In the event that an employer does not meet its obligations, employees are entitled to lodge a complaint. If the employer does not respond to the complaint appropriately, the employees can lodge a complaint outside the establishment (e. g. to the authority for work safety). However, this is intended as an absolute last resort.

If the employer does not fulfill the rules of occupational safety, the employees are entitled to refuse to work at the workplace without losing their claim to remuneration. Furthermore, the employee is entitled to demand that health and safety regulations are observed and may claim compensation for any damages. Also, the works council and the German administrative authorities may insist on the fulfillment of applicable health and safety regulations. This applies in particular, during the Covid-19 pandemic.

C. PROTECTION FROM RETALIATION

The employee must not suffer any disadvantage as a result of lodging a complaint. This applies as long as there was a reasonable indication that a breach of the employer's obligation to provide a healthy and safe workplace has occurred. However, if the employee lodges a complaint to the authorities without giving the employer a reasonable opportunity to correct the lack of safety, a dismissal can be justified.

V. ANTI-DISCRIMINATION LAWS

1. BRIEF DESCRIPTION OF ANTI-DISCRIMINATION LAWS

The General Equal Treatment Act provides comprehensive protection against discrimination on the basis of race and ethnic origin, gender, religion or belief, disability, age or sexual orientation.

2. EXTENT OF PROTECTION

No discrimination may occur with respect to the conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity is and at all hierarchical levels, including promotion. Additionally, all employment and working conditions, including pay, must be free from discrimination.

The General Equal Treatment Act provides protection against different behaviors. The general definition of discrimination therefore includes:

- 1) direct discrimination
- 2) indirect discrimination
- 3) harassment
- 4) sexual harassment
- 5) instructions to discriminate

Direct discrimination occurs where one person is treated less favorably than another in a comparable situation due to the criteria set forth in the AGG. Indirect discrimination occurs where an apparently neutral provision, criterion or practice puts any persons in a disadvantageous situation compared with other persons, on grounds of racial or ethnic origin, sex, religion or belief, disability, age or sexual orientation, unless that provision, criterion or practice is objectively justified by a legitimate

aim and the means of achieving that aim are appropriate and necessary.

3. PROTECTIONS AGAINST HARASSMENT

Furthermore, the law protects the employee against harassment, especially sexual harassment; such conduct will fall squarely within the categories of unlawful discrimination under German law.

Harassment occurs, when an unwanted conduct takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment, which is related to any grounds protected under the law. An indication for harassment is the violation of dignity and creation of a hostile environment.

A specific form of harassment is sexual harassment, where the harassment takes place by unwanted conduct related to the sex of a person. This includes in particular unwanted sexual acts or requests to carry out sexual acts, physical contact of a sexual nature, comments of a sexual nature, as well as the unwanted showing or public exhibition of pornographic images.

An instruction to discriminate against a person on any of the grounds referred to above will be deemed discriminatory. Such an instruction shall, in particular, be taken to occur (in relation to Section 2(1) Nos 1 to 4) when someone gives an order or instructs an employee to discriminate against another employee.

4. EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

In accordance with the law, the employer has several organisational obligations to protect his employees from discrimination at the workplace. The employer is obligated to take the necessary safeguarding measures, point out inadmissible discrimination and protect employees against discrimination from another employee or any third person. Discriminatory behavior of an employee is considered a breach of the employment contract. In order to protect the victim from discrimination, the employer is obliged to take the appropriate and necessary measures, such as a written warning of the offender, relocating them or terminating their contract.

Also, the employer needs to establish a complaints body for victims of discrimination for pursuing their complaints. The employer must also train its employees in an appropriate manner in order not to discriminate against any other employees.

5. REMEDIES

An employee who was discriminated against has the opportunity to register his/her grievances with the company's complaints body, if the discrimination relates to the employment relationship. Moreover, the employee is entitled to directly pursue all remedies (damages, compensation, etc.) available to him/her under a claim of discrimination.

If the employer is responsible for the discrimination, it is obliged to pay damages or a reasonable compensation. Compensation amounts are, however, relatively low compared to other countries. The employee needs to raise their claim in written form within a period of forfeiture of two months after they became aware of the discrimination. In case of discrimination during the hiring process, only monetary damages are granted by law; there is no right to be given the relevant job. An applicant may be entitled to a compensation of

three-monthly salaries even if they had not been hired in accordance with a discrimination-free application process.

6. OTHER REQUIREMENTS

In order to increase the number of women in management positions, a gender quota of 30 percent has been in force since 2016, for new supervisory board positions in companies which are listed or are subject to co-determination on board level.

VI. PAY EQUITY LAWS

1. EXTENT OF PROTECTION

The statutory minimum wage applies to all employees in all sectors of business and therefore, provides minimum equal payment. Additionally, the Remuneration Transparency Act (cf. IV. 2. b.) provides an individual right to information on remuneration. However, the Act does not provide regulations on how to enforce claims for equal payment based on such information.

2. REMEDIES

The employee may, if necessary, challenge the remuneration based on the general principles of discrimination law (cf. II. 4. b.) and the general principle of equal treatment in order to have the perceived disadvantage reviewed in court and, if necessary, corrected. Additionally, the employee may assert claims for damages or remuneration to compensate for the disadvantages sustained as a result of their unequal treatment.

It is possible that the employee may rely on a presumption of proof due to the information received, on grounds of the Remuneration Transparency Act.

Any employer who fails to comply with the applicable statutory minimum wage, may be fined pursuant to the German Minimum Wage Act.

3. ENFORCEMENT/ LITIGATION

All available relief measures, procedures and tangible employment actions are provided by the Minimum Wage Act. In the vast majority of cases, employees are unable to prove a violation of the principles of non-discrimination and equal treatment. Consequently, there is a notable absence (to date) of any meaningful litigation having to do with equal pay, premised on the Remuneration Transparency Act. However, as the Act is a fairly recent addition to German labour law, the legal consequences (an uptick in new litigation) may take time to materialise.

4. OTHER REQUIREMENTS

An employer located outside of Germany is required to register certain information, in writing, with the relevant customs authority, if it employs workers in specific business sectors – including, but not limited to the construction, catering and hotel or facility cleaning sectors.

Employers with more than 500 employees and which are obliged to provide a management report pursuant to the German Commercial Act, are required to include a detailed report on equality and equal pay every three/five years, to be published in the Federal Gazette.

VII. SOCIAL MEDIA AND DATA PRIVACY

1. RESTRICTIONS IN THE WORKPLACE

The employer is entitled to decide whether or not and to which extent the employees may use the company Internet, telephone or e-mail system for private matters, within or outside of the working hours. Without permission, the employee is generally not entitled to use the Internet for private matters. The Federal Labour Court held that even without an explicit prohibition, employees may not assume that the employer will tolerate private use. If the employee violates the prohibition of private use of work equipment, the employer is entitled to issue a warning and even to terminate the employment contract, depending on the circumstances.

In practice many employers permit the private use of Internet to a reasonable extent. However, even in case of permission, the use of the Internet for private matters should be restricted regarding the content and the time of use.

We strongly recommend prohibiting the private use of the employee's company e-mail address, as otherwise monitoring or accessing the employee's company e-mail account may be very difficult, or may be a criminal offence, even where the employer has a legitimate interest in such access (e.g. when the employee is off sick, on vacation, has left the company, etc.).

A. CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

The employer's rights in this respect depend greatly on whether private use is allowed or not. If the employer has prohibited the private use, the content

of an employee's electronic communications can be subject to monitoring activities by the employer, unless such communications are obviously private.

If the private use is allowed or tolerated, the employer may be qualified as a provider of telecommunication systems, such being subject to stricter laws, including criminal prosecution for accessing or ordering third parties to access employees' communications beyond what is necessary for security reasons. As long as this question has not been answered by a German court, we recommend not monitoring the use of an employee's electronic communications.

To be able to control the usage, the private use of Internet and e-mail should be made subject to the consent of the employee.

In case the private use has been prohibited, the employer may spot check whether this prohibition is being observed. The employees will have to be made aware of these controls, and certain procedures and steps have to be complied with.

B. DATA PRIVACY

The key principle of the Federal Data Protection Act and the General Data Protection Regulation (GDPR), is that processing of personal data is prohibited unless expressly permitted by law, a works agreement or a collective bargaining agreement. Furthermore, it is still possible for an employee to give his/her consent to the specific data processing.

Consent given under prior law will only remain valid insofar as such consent meets the requirements of the current regulations. In particular, the consent has to be separate from other terms, and the employer has to inform the employee about the purpose of the data processing, as well as the right

to revoke the consent with future effect, and must be done in text form.

In general, employers have to make sure that no 24/7 monitoring will occur. Monitoring of the employees requires an overall balance of interest between the privacy rights of the employee and the business needs of the employer.

2. EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

The employee is obligated not to violate the justified interests of the employer, even during their free time. This means that the employee is not entitled to disparage the employer towards any third person or on social media. Furthermore, the employee is obliged to settle any disputes with the employer internally, before leaking out internal information, especially to the media.

In addition, under the law the employee is obliged to keep business and trade secrets confidential. Such confidentiality obligation has effect during the employment relation and also after its termination. If the employee violates this obligation, the employer is entitled to claim damages and, if appropriate, to terminate employment. Under certain circumstances violations may even be a criminal offence.

VIII. TERMINATION OF EMPLOYMENT CONTRACTS

1. GROUNDS FOR TERMINATION

Under German law, the employment relationship can be terminated by mutual consent, by expiry of a fixed-term contract or by notice given by one of the two parties. Protection against dismissal is divided into general and special protection. Special protection is provided to employees who generally face a greater risk of dismissal such as handicapped or pregnant employees and members of the works council. In such cases, the permission of relevant government authorities is required prior to issuing a termination.

As to the general protection, the freedom of the employer to dismiss an employee is substantially restricted by the Dismissal Protection Act (“DPA”), which applies if: 1) a business establishment has generally more than ten employees; and 2) the employee has worked in the same company or business establishment for six months without interruption.

In case of severe breaches of obligations, the employment can also be terminated for cause with immediate effect by either party without observing a notice period. Among the valid reasons for immediate termination are crimes against the employer. The employer must provide notice within 2 weeks after becoming aware of the relevant circumstances.

2. COLLECTIVE DISMISSALS

Dismissals by reason of redundancy are considered ordinary dismissals under the DPA. In addition, specific rules apply if the dismissals form part of a so-called mass redundancy of a certain scale; e.g. prior notice must be given to the competent

employment agency and a violation of this formality will result in dismissals being void. In case of a so-called operational change of business (e.g. closure of the business), collective dismissals may, in addition, require the negotiation of a social plan and the attempt to negotiate a reconciliation of interests with the works council, if the undertaking employs more than 20 employees. Certain reprieves exist during the first four years of a company’s existence.

3. INDIVIDUAL DISMISSALS

If the DPA applies, a termination is only legally effective if it is “socially justified”. A termination is justified only if it is based on reasons related to: 1) the person; 2) the conduct of the employee; or 3) urgent operational requirements which preclude the continued employment of the employee in the undertaking.

Person-related reasons include, in particular physical or mental impairments, extensive absenteeism due to illness and reduced working capacity. Conduct-related reasons include a willful or severely negligent breach of contract. A dismissal based on the employee’s conduct, usually requires that a written warning be given to the employee. In terms of operational reasons, the employer must prove that the employee’s dismissal was necessary for compelling business reasons, such as reorganisation. These measures must result in the loss of the position and there may not be any alternative position available that the employee could occupy.

Additionally, dismissals due to operational reasons are only socially justified if a social selection has been carried out. Among employees having comparable personal and technical qualifications and working in similar jobs, the employer must select the employee with the weakest social standing based

on specific criteria which are; age, length of service, support obligations for dependents and severe disability. Employees whose further employment is crucial for the functioning of the undertaking may be excluded from this selection process. Such exclusion however is a rare exception and will usually not be possible. Poor performance is not a selection criteria, nor is not having a valid reason for a termination under the DPA.

Notice must be given in writing (wet ink signature) and signed by a duly authorised representative of the employer, in order to be legally effective. All other forms of notice (i.e. those given orally or by e-mail or fax) are void. Terminations that fail to adhere to the information / consultation / internal hearing processes and procedures afforded to the works council (if in place) or the representative body for severely disabled persons (if in place and in case of a termination of a severely disabled person) are also void.

The employee has the option to challenge their dismissal. In such case, they have to file a complaint with the competent labour court within 3 weeks from receipt of the termination notice. If the dismissal is ineffective, the employee is entitled to reinstatement and continued remuneration by the employer. In practice, most cases are settled in or out of court against payment of severance.

A. DISABILITY PROTECTIONS

An employee, who is severely disabled, enjoys several benefits in order to be treated with respect to such disability. Employees who are severely disabled are protected against termination. Authorisation by a public authority is necessary prior to a termination. Additionally, a consultation of the representation of severely disabled persons, if such representation is established in the company, is necessary prior to a termination. The consequence of a consultation, whether incorrect or omitted, is that the termination will be deemed invalid. They may also claim part-time employment, if this is necessary with respect to the disability. A severely disabled person may refuse to work overtime. The conditions of employment need to be organised, taking into account the restrictions of the disabled person. The employer may only deny such organisational measures that are unreasonable or disproportionate.

If the employer employs more than 20 employees, but does not employ disabled persons in a specified number, he is obligated to pay compensation. The number of disabled persons, who need to be employed, depends on the number of employees. Generally, at least 5 percent of the employees should be disabled persons.

B. IS A SEVERANCE PAY REQUIRED?

Severance payments are paid at the end of employment in the following cases: 1) the employment agreement provides for a contractual severance payment (which is very unusual); 2) the parties agree upon a severance payment (in or out of court) to settle a termination dispute; 3) the court dissolves the employment against payment of severance if it finds that despite the invalidity of the termination, continued employment would be intolerable either for the employer or the employee; or 4) a social plan concluded with the works council in connection with a collective redundancy provides for severance payments. The following (non-binding) formula is often used by labour courts and is regularly incorporated into separation agreements as well as social plans, to calculate severance:

monthly gross salary multiplied by years of employment multiplied by factor x

X is generally a factor between 0.5 and 1.5 and may be lower or higher, depending on the circumstances, business sector and region of Germany.

4. SEPARATION AGREEMENTS

A. IS A SEPARATION AGREEMENT REQUIRED OR CONSIDERED BEST PRACTICE?

Due to the high standards of protection against dismissal, it is not uncommon for the employment to be terminated by contract between the employer and employee, i.e. a separation agreement. This may occur at any time with or without severance payment. The provisions on protection against unfair dismissal do not apply in such cases.

Even employees enjoying special dismissal protection may conclude a separation agreement without requiring permission of the authorities. The employer will generally offer a severance payment to induce the employee to accept the termination by agreement.

B. WHAT ARE THE STANDARD PROVISIONS OF A SEPARATION AGREEMENT?

In a separation agreement, typically the following conditions are regulated:

- termination date
- severance payment
- outstanding bonus payments and treatment of other benefits upon termination
- release from duty to work by offsetting any vacation claim
- confidentiality
- letter of reference
- return of company documents and work items
- settlement clause

C. DOES THE AGE OF THE EMPLOYEE MAKE A DIFFERENCE?

Underage persons are generally only able to conclude a separation agreement (just like the employment or trainee contract) with the approval of their legal representatives, regularly their parents.

With respect to age discrimination, particularly regulations in social plans compensating for disadvantages to older employees, need to be drafted with due care.

The age of an employee may also have an impact on negotiations, as older employees may find it more difficult to find new employment and therefore typically ask for higher severance amounts.

D. ARE THERE ADDITIONAL PROVISIONS TO CONSIDER?

Besides the standard provisions of a separation agreement, the parties should consider agreeing upon additional provisions, such as:

- outplacement service
- post-contractual non-compete
- agreement on communication

5. REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

As there is generally no statutory entitlement to severance payments in Germany, the employee can only claim reinstatement. The burden of proof regarding the validity of the termination is on the employer, and in practice it is often difficult to establish the social justification for the dismissal. If the termination is deemed invalid, the employee returns to their position. In practice, most dismissal protection proceedings are settled in exchange for a severance payment.

6. WHISTLEBLOWER LAWS

There is no general legislation covering whistleblowing in Germany. In general, employees are obliged to report any kind of misconduct within the company as part of their ancillary employment duties (so called duties of good faith). In certain business sectors, special legal provisions exist, such as e.g. in the financial services sector. The Trade Secrets Act, implementing the European Directive on the Protection of Trade Secrets, has legally defined the term “trade secret” for the first time, focusing primarily on objective measures (with newly enhanced requirements) for the protection of sensitive trade secrets. Trade secrets will only be safeguarded if the owner has taken “confidentiality measures appropriate for the circumstances”.

Whistleblowers do not enjoy any special protection against dismissals, but are subject to the (rather strict) general rules. Such cases shall be decided on the basis of the question of whether the whistleblowing was “proportionate” (i.e. that the employee should first report misconduct internally before going public or involving the authorities).

IX. RESTRICTIVE COVENANTS

1. DEFINITION OF RESTRICTIVE COVENANTS

During an employment relationship, the employee is not allowed to work for any competitor pursuant to statutory law. However, after the expiration of the notice period, the employee is no longer bound by the statutory non-compete. Therefore, it may become necessary to agree upon a post-contractual restrictive covenant with the employee.

Under German law, the freedom to include restrictive covenants in an employment agreement is limited by statutory law. According to statutory law, a post-contractual restrictive covenant is only binding if:

- the agreement is in writing (wet ink signatures) and the employee received an originally signed copy;
- the employer has a justified commercial interest in the content of the restrictive covenant;
- the justified interests of the employee are not unlawfully restricted;
- the covenant does not exceed a period of two years; and
- the employer pays a compensation for the duration of the post-contractual restrictive covenant in the amount of at least 50 % of the prior overall earnings of the employee.

If the justified scope of the post-contractual restrictive covenant is exceeded, the employee may choose whether to adhere to the legitimate part of the restrictive covenant and to be compensated or whether to ignore the restrictive covenant overall, without being compensated. Therefore, the content of restrictive covenants must be drafted very carefully.

The employer may waive the post-contractual restrictive covenant. However, the obligation to pay the necessary compensation continuous for a period of twelve months, although the employee is no longer bound by the restrictions. Only in case of a termination for cause with immediate effect, the employer will be entitled to withdraw from the restrictive covenant. Therefore, if the employer no longer has an interest in the post-contractual restrictive covenant, he should waive those rights and obligations as soon as possible.

Especially with respect to the obligation of compensation payment in the amount of 50% of the last overall remuneration, the post-contractual non-compete is expensive in Germany and should therefore only be used with respect to key employees.

2. TYPES OF RESTRICTIVE COVENANTS

A. NON-COMPETE CLAUSES

Non-compete clauses can be divided into clauses, which regulate any activity of a former employee for competing companies (company-related), and clauses, which regulate the kind of activities of a former employee (activity-related).

B. NON-SOLICITATION OF CUSTOMERS

Such clauses regulate that a former employee is hindered to actively pitch to and contact former customers of the employer in order to transfer the business from the former employer to him/her or a company the employee works for. Customer-

related non-solicit clauses will be considered a non-compete under German law, and are therefore subject to the compensation requirement set out above.

C. NON-SOLICITATION OF EMPLOYEES

Such clauses regulate that a former employee is hindered to actively solicit other employees of the former employer to terminate their employment and to start working with him/her or a company the employee works for. It should be noted that these covenants (also called non-poaching covenants) do not require non-compete compensation and are therefore, far more common in Germany than actual non-compete or non-solicitation agreements with respect to customers.

3. ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

If the restrictive covenant is agreed upon lawfully, it can be enforced by the labour courts. There is a possibility of obtaining injunctive relief, whereby the employee can be forced to stop any competing activities. Furthermore, the employer is not obligated to pay any compensation during the time of violation of the restrictive covenant.

The employee has to compensate the employer for any damages, which result from the violation of the restrictive covenant. However, in most cases, it will be difficult for the employer to demonstrate and prove the amount of the damages.

The parties also have the opportunity to agree upon a contractual penalty for each case of violation of the restrictive covenant. This has the advantage that the damages incurred by the employer do not need to be demonstrated, as the amount of the contractual penalty is realised upon any violation.

4. USE AND LIMITATIONS OF GARDEN LEAVE

The employee has a right to work for the employer and therefore cannot be released unilaterally by the employer without a justified reason (criminal acts of the employee, concerns of the employer regarding the protection of its business and trade secrets or any competing acts of the employee). In practice, employees are nevertheless often released from their duty to work after a termination notice until the end of the applicable notice period. During such release, the contractual remuneration of the employee needs to be paid. The employer is, however, entitled to offset any outstanding vacation against the release. Generally, during the time of release the employee may not perform any competing activities as the employment relationship is still ongoing, and the statutory non-compete still applies. However, in case of an irrevocable release, the employer should explicitly state that the non-compete shall continue to exist. In theory, employees can challenge garden leave through an interim injunction, but in practice this rarely occurs.

X. TRANSFER OF UNDERTAKINGS

1. EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

The transfer of an undertaking, business or part of a business to a new owner by way of agreement is subject to Sec. 613a of the Civil Code. By reference in the Transformation Act, Sec. 613a BGB also applies in the case of mergers, splits and asset transfers. Sec. 613a adopts the amended EU “acquired rights” or “transfer of undertakings” directive (EU Directive 2001/23/EC). An undertaking, a business or a part of a business is defined for this purpose by the European Court of Justice and the German Federal Labour Court as an economic entity, which retains its identity irrespective of the transfer.

Pursuant to Sec. 613a, all of the transferor’s employees automatically transfer to the transferee, with the terms and conditions of their employment contracts and their seniority remaining intact. Prior to the transfer, each affected employee must be informed in writing about the transfer, its reasons, the background, the social and legal consequences and any further measures planned by the transferee.

The employee is entitled to object to the transfer of employment within one month from receiving a correct and complete information letter, without giving reasons for their objection. If the information letter is not in line with legal requirements, the right to object may only be forfeit years after the transfer. In case of an objection, the employment will continue with the transferor. If the transferor is no longer in the position to offer a job to the employee, a dismissal for operational reasons may be socially justified.

2. REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

The transferee is bound by all rights and obligations resulting from the employment contracts in existence at the time of the transfer, and is also liable for pension commitments made by the transferor to the employees affected. However, the transferee is not obliged to treat the employees transferred and its other employees equally. A dismissal is invalid if the dismissal is based on the transfer.

XI. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

1. BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

In general, the main function of trade unions is to conclude collective bargaining agreements. Trade union representatives also support employees or the works council (e.g. by giving legal advice and representing employees before the court), but do not have participation rights within a company. Employers' associations are mostly organised by industrial sectors as well as by region, with national and state boards; they are generally the counterpart of trade unions when negotiating and concluding collective bargaining agreements.

2. RIGHTS AND IMPORTANCE OF TRADE UNIONS

The formation, function and the internal democratic structures of trade unions are protected by constitutional law. Trade unions can conclude collective bargaining agreements with either a single employer or an employers' association. Collective bargaining agreements are contracts that have immediate and binding effect on the individual employment relationship in the same manner as statutory law, if one of the following requirements is met:

- the employee is a member of the relevant trade union and the employer is a member of the relevant employers' association/concluded the collective bargaining agreement itself;

- the Federal Ministry of Labour and Social Affairs has declared the collective bargaining agreement to be generally binding; or
- the employment contract provides for the contractual application of a particular collective bargaining agreement.

Although the unionisation rate in Germany is low, with about 20 percent of the employees organised, the collective bargaining coverage is usually around 80 percent. In the event that several collective bargaining agreements apply in one establishment, the agreement concluded with the union that has the highest number of members among the employees in the establishment shall prevail. Smaller unions also represented in the establishment are only entitled to assume this same agreement for their members, so that only one collective bargaining agreement will be in place in an establishment. The Federal Constitutional Court held that these legal principles are only "largely" in line with the German constitution.

Therefore, the German legislator implemented a regulation in 2018, according to which the agreement concluded with the smaller union shall also apply, if the interests of the respective union were not taken into account, seriously and effectively, at the time the agreement was reached with the union that has the highest number of members among the establishment's employees. However, this new regulation has been criticised by organised labour as insufficient to protect smaller unions.

3. TYPES OF REPRESENTATION

The main representation of employees in Germany is guaranteed by the works council. A works council

however, is only established upon the initiative of the employees or a union, which is represented in the company. If a company has more than 100 employees and a works council exists, an economic committee for the works council must be formed. Generally, if there are more than 10 executives in a company, a representative body for executive staff can be established.

A. NUMBER OF REPRESENTATIVES

The size of the works council depends on the regular number of employees in the business site and ranges from one up to 35 works council members for companies with over 7,000 regular employees and may be even larger in companies with over 9,000 regular employees.

B. APPOINTMENT OF REPRESENTATIVES

In any company, generally employing at least 5 employees entitled to vote for a works council (i.e., all employees over 18 years of age, including temporary workers if they have been with the company for more than 3 months) and at least 3 employees eligible for election to a works council (i.e. employees with the entitlement to vote and a seniority of at least 6 months), a works council can – by election – be established by the employees.

The works council election is initiated and carried out by an electoral board. Where no works council exists, a union represented within the company or three employees eligible to vote have the right to call an employees' meeting at which an electoral board is elected.

4. TASKS AND OBLIGATIONS OF REPRESENTATIVES

The works council represents all employees of a business site, except executive employees, and has initiative, participation and co-determination rights in personnel matters (recruitment, transfers, dismissal), social matters (working time, remuneration schemes, use of IT systems) and economic matters (operational changes).

Furthermore, the works council can conclude works council agreements with the employer on matters such as, e.g. working conditions and remuneration schemes. Works council agreements have an immediate and binding effect on the individual employment in the same manner as statutory law.

5. EMPLOYEES' REPRESENTATION IN MANAGEMENT

In stock corporations, partnerships limited by shares and limited liability companies with more than 500 employees, one third of the members of the supervisory board must consist of employee representatives who are directly elected by the employees. If such companies employ more than 2,000 employees, the Co-determination Act applies. With very few exceptions, these companies must install a supervisory board consisting of an equal number of representatives of employees and shareholders and the deputy chairperson must be a representative of the employees.

6. OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

If a business site has at least five employees, who are below the age of 18 or are trainees below 25 years of age, a representation body for young employees and trainees can be established.

Similarly, in companies with more than 100 employees, an economic committee will be established, if a works council exists. The economic committee will discuss economic issues with the employer and inform the works council.

In companies with more than 10 executives, an executive committee can be established; an executive committee is comparable to a works council, but with limited rights and possibilities.

In any company with more than five disabled persons or disabled persons with equivalent status on a long-term basis, a representation body for disabled employees can be established. The function of

this body is to support the integration of severely disabled persons, to represent their interests as well as to advise and help them. Moreover, the representation body for disabled persons has the right to information and consultation in matters with impact on disabled persons. This especially applies to a termination of a severely disabled person. Without appropriate participation of the representative body for severely disabled persons, if one exists at the company, the termination is null and void.



XII. EMPLOYEE BENEFITS

1. SOCIAL SECURITY

In Germany, employees belong to the national social security system by law. The statutory social security system is regulated in the Social Security Codes. It covers the following principal areas: health insurance, unemployment insurance, nursing care insurance, pension and accident insurance.

All salary payments are subject to tax and social security contributions (pension, unemployment, health and nursing care insurance). These must be withheld from an employee's salary by the employer and paid to the respective institutions. In general, the employer and the employee each pay half of the social security contributions, and employers must pay their share in addition to the salary, based on the employee's gross salary with certain maximum amounts applying. Contributions to the employee accident insurance are made solely by employers.

2. HEALTHCARE AND INSURANCES

The employee can choose between different statutory health insurances. Only employees with an income exceeding the annual remuneration thresholds (62,550 EUR in 2020 and expected to be 64,350 EUR for 2021) are exempt. They can become members of private health insurances. In both cases, the contributions are shared equally by the employer and the employee.

3. REQUIRED LEAVE

A. HOLIDAYS AND ANNUAL LEAVE

The number of public holidays vary from one federal state to another across Germany; although the minimum is 10 (e.g. Berlin, Lower Saxony) there may be as many as 12 public holidays (Bavaria, Saarland).

Every employee is entitled to annual leave of 20 days, based on a 5-day-week pursuant to the Federal Vacation Act. This means that an employee can claim an annual leave of four weeks in a calendar year. However, most employers grant a longer annual leave; depending on the industrial sector, between 25 days and 30 days.

B. MATERNITY AND PATERNITY LEAVE

Female employees are entitled to paid maternity leave, which is the time period 6 weeks before and 8 weeks after giving birth. The maternity leave after the birth has been extended to 12 weeks in case of multiple births, premature births and disabled children. Payments to the employee during this period are made partly by the statutory health insurance provider and partly by the employer.

After the birth of a child, both male and female employees are entitled to a maximum of three years' parental leave per child. During this period, the employer is not obliged to make any payments to the employee. Employees, however, have a statutory right to work part-time (between 15 and 30 hours per week) during parental leave, unless urgent business reasons prevent such part-time work. After expiry of the parental leave, the employee returns to their previous position.

Under the Maternity Protection Act, pregnant employees as well as apprentices, interns and students undertaking a mandatory internship, enjoy special protection against dismissal during pregnancy and for four months after birth. Women suffering a miscarriage after the 12th week of pregnancy are also protected against termination for the next four months. Terminating an employee during the time of special protection against dismissal will only be possible in exceptional cases. Prior permission has to be obtained from the competent state authority.

The employer is obligated to carry out a risk assessment not only for work performed by pregnant employees, but for all work conducted within the company. Necessary measures to protect pregnant employees must be implemented immediately after the employer was made aware of a pregnancy, and the employee must be offered an opportunity to discuss (further) adjustments to her working conditions.

C. SICKNESS LEAVE

After four weeks of employment, the employee is entitled to continued payment by the employer in case of sickness, for a duration of six weeks, pursuant to the Act on Continued Remuneration. The regular payment, which the employee would have earned without sick leave, needs to be paid by the employer.

If an employee is sick several times during a calendar year, they may be entitled to continued payment (for each occurrence) even beyond the overall duration of six weeks. This entitlement is limited only if the employee is sick for the same reason for longer than six weeks. This, however, does not apply if the employee was not out sick for the same reason for more than six months or if a period of twelve months, after the first sickness for this reason, has expired.

In small companies with less than 30 employees, the employer may participate in an apportionment procedure, which allows for a repayment of sick pay.

After expiry of continued payment by the employer, the employee is entitled to sickness allowances paid by the statutory health insurance. Generally, the statutory sickness allowances are paid in the amount of 70 % of the regular remuneration for a period of 78 weeks.

D. DISABILITY LEAVE

After six months of employment, a severely disabled employee may claim additional vacation in the amount of five working days, based on a 5-day-week.

E. ANY OTHER REQUIRED OR TYPICALLY PROVIDED LEAVE(S)

Any leave, other than the abovementioned statutory leaves (e.g. compassionate leaves, leave when moving) is subject to individual negotiations or is typically part of collective bargaining agreements/works council agreements.

4. PENSIONS: MANDATORY AND TYPICALLY PROVIDED

The public retirement insurance system, company pension plans and private individual retirement investments are the three pillars of the German pension system. The public retirement insurance has always been “pay-as-you-go“, with the current pensions of the retired paid from the current premiums of the not yet retired. In view of demographic changes, pension payment levels are becoming difficult to maintain. Company pension plans have traditionally been designed to supplement statutory retirement insurance. Though company pension plans are not compulsory, they cover about three-fifths of the working population. The third pillar, individual retirement investments, is becoming more important and is subsidised by the government. Retirement used to begin at age 65, but is now gradually being increased to age 67.

5. ANY OTHER REQUIRED OR TYPICALLY PROVIDED BENEFITS

Different types of bonus payments and other benefits exist, all of which have to be negotiated individually or are typically part of collective bargaining agreements/works council agreements, such as a company car, car allowances, gym memberships, group accident insurances, “job ticket“, child care arrangements or allowances, or additional allowance for sick pay.

Tobias Pusch
Partner, **Pusch Wahlig Workplace Law**
pusch@pwwl.de
+49 30 206 295 30



Verena Braeckeler-Kogel
Partner, **Pusch Wahlig Workplace Law**
braeckeler@pwwl.de
+49 211 528 745 0



PUSCH WAHLIG WORKPLACE LAW

GERMANY

Pusch Wahlig Workplace Law is a leading German employment and labour law firm, with more than 40 highly qualified labour and employment law specialists working in offices in Berlin, Düsseldorf, Frankfurt am Main, Munich, Hamburg and Cologne. The firm offers clear, concise, goal-oriented solutions in the highly regulated realm of German labour and employment law. Through close contact and a regular exchange of ideas with clients, Pusch Wahlig Workplace Law develops proactive strategies to help employers create optimal working relationships. The firm has particular experience in dealing with complex works council issues, restructurings, ex-pat arrangements and the implementation of global policies.

Pusch Wahlig Workplace Law was nominated as Employment Law Firm of the Year in Germany by JUVE in 2008 and 2011 and in 2009 for the newly created “Gründerzeit-Award”. The award is directed at law firms that managed a market breakthrough in a short time and developed in a particularly dynamic way. In 2017, Pusch Wahlig Workplace Law won the JUVE award as Employment Law Firm of the Year in Germany. The firm also won the Azur Award in the category “Diversity” in 2017. Partners of the firm are regularly recognised as leading employment lawyers in Germany by Chambers, Best Lawyers, Who’s Who Legal, The Legal 500 and JUVE.

This memorandum has been provided by:

Pusch Wahlig Workplace Law

Labour Law Attorneys

Friedrich Carré

Dorotheenstrasse 54

D-10117 Berlin

P: + 49 30 206 295 30

www.pwwl.de

CONTACT US

For more information about L&E Global, or an initial consultation, please contact one of our member firms or our corporate office. We look forward to speaking with you.

L&E Global
Avenue Louise 221
B-1050, Brussels
Belgium
+32 2 64 32 633
www.leglobal.org





L&E GLOBAL

an alliance of employers' counsel worldwide

This publication may not deal with every topic within its scope nor cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice with regard to any specific case. Nothing stated in this document should be treated as an authoritative statement of the law on any particular aspect or in any specific case. Action should not be taken on this document alone. For specific advice, please contact a specialist at one of our member firms or the firm that authored this publication.

L&E Global CVBA is a civil company under Belgian law that coordinates an alliance of independent member firms. L&E Global does not provide client services of any kind. Such services are solely provided by the member firms in their respective jurisdictions. In certain circumstances, L&E Global is used as a brand or business name in relation to and by some or all of the member firms. L&E Global CVBA and its member firms are legally distinct and separate entities. They do not have, and nothing contained herein, shall be construed to place these entities in the relationship of parents, subsidiaries, agents, partners or joint ventures. No member firm, nor the firm which authored this publication, has any authority (actual, apparent, implied or otherwise) to bind L&E Global CVBA or any member firm, in any manner whatsoever.

