1. **General**

1. **Brief Introduction**

German labour and employment law is divided into two areas: individual employment law and collective labour law. Individual employment law concerns the relations between the individual employee and the employer whereas collective labour law regulates the collective representation and organization of employees as well as the rights and obligations of employees’ representatives.

2. **Legal Framework**

German labour and employment law is not consolidated into a single labour code. The main sources of German labour and employment law are Federal legislation, collective bargaining agreements, work 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.

3. **New or Expected Developments**

During the economic crisis in 2008 and 2009, short time work (Kurzarbeit) aided by substantial governmental subsidies were considered crucial in maintaining jobs. In 2009, over 60,000 companies applied for short time work for 1.14 million employees. While this instrument was not undisputed politically, its application can be expected in similar scenarios in the future.

In certain industries, the regulation of working conditions is shifting from collective bargaining agreements to state regulations. While specialized unions for certain key employees have become and are becoming more important, the large unions are losing influence. As a result, state regulations of wages and other minimum working conditions have become increasingly significant. The government has recently renewed the requirements under which such conditions may be laid down by state authorities in the Act on Minimum Working Conditions (Mindestarbeitsbedingungsgesetz – MiArbG).

4. **Recent Amendments to the Law**

Employee data protection is being addressed in more detail as a result of several prominent cases of data privacy invasions. In 2009, amendments were made to the Federal Data Protection Act (Bundesdatenschutzgesetz – BDSG) in order to better reflect employment issues. A draft act on employee data protection is currently under review.

In order to increase employee stock ownership in companies, which is low as compared to such ownership in other European countries, tax relief measures for employees were introduced in 2009. However, due to the complicated nature of the provisions, the new regulations have not yet had the anticipated effect.
2. 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 the employment. The terms and conditions of the 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: 1) name and address of the employer and the employee; 2) information on the starting date; 3) the anticipated duration (only in case of fixed term contracts); 4) the place of work; 5) the nature of the activity involved; 6) the composition and amount of the remuneration; 7) the working hours; 8) the length of annual leave; and 9) the notice period. To avoid future disputes, a version of the employment contract should be drafted in German.

2. Fixed/Unlimited Time Contracts

As a 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 being necessary 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, 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. The German Act on Protection Against Unfair Dismissal does not apply within the first six months of employment.

4. Notice Period

The German Civil Code (Bürgerliches Gesetzbuch – BGB) sets forth the statutory notice periods. Their length depends on the employee’s length of service with the employer with notice periods 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 contact, the extended statutory notice periods are only applicable to terminations by the employer. Collective agreements may specify longer or shorter notice periods, whereas individual contracts of employment may only specify longer notice periods.
3. **Authorizations for Foreign Employees**

1. **Requirements 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 pursuant to Art. 116 GG (Basic Law – Grundgesetz); 2) a EU national (with the exception of nationals from Central and Eastern Europe EU enlargement states, Cyprus and Malta until April 30, 2011; as of January 1, 2014 all restrictions will, be lifted within the 27 EU member states); or 3) a national of a European Economic Area (EEA) member state (Iceland, Liechtenstein, Norway) or Switzerland.

Residence title and work permit are granted together as a “residence title for the purpose of employment” (Aufenthaltstitel zum Zwecke der Beschäftigung). Such title is generally only granted if: 1) the employment office agrees or such consent is not required due to statutory regulations; 2) the examination of the employment market by the employment office shows that a job offer may not be filled by the German employment market including EU and EEA nationals (“job market test”); and 3) there is a concrete job offer with usual working conditions (draft of employment contract should be attached).

Several types of employees are exempted from the consent and the job market test of the employment office, including: 1) highly qualified persons (e.g. scientists with specific professional knowledge); 2) executives (e.g. board members, managing directors); and 3) employees on a short-term deployment of up to three months within a one-year-period. In such cases, a residence title for the purpose of employment can be received within two or three weeks as opposed to up to three months in cases where the employment office must be involved.

Foreign nationals who already have an unrestricted residence permit (Niederlassungsverlaubnis) for Germany and who would like to start working are not subject to any restrictions.

4. **Working Conditions**

1. **Minimum Working Conditions**

The terms and conditions of employment (such as maximum working hours, minimum paid holiday 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 labour law. However, to ensure fair competition and to protect the interests of employees, the German Posted Workers Act (Arbeitnehmerentsandegesetz – AEEntG) 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. They include: 1) maximum work periods and minimum
2. Salary

There is no overall statutory minimum wage in Germany. There are, however, special regulations and collective bargaining agreements within certain sectors, i.e. the construction sector. 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. 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.

3. Maximum Working Time

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.

4. Overtime

Overtime pay is not expressively regulated by law but is subject to the employment agreement, collective bargaining agreements or works council agreements. For board members and managing directors, any overtime worked is generally deemed to be already remunerated by their normal salary.

5. Holidays

By statute, German employment law grants employees who work on a five day work week, 20 working days of paid leave per calendar year. However, it is more typical for an employee to receive between 25 and 30 days of holiday per calendar year, depending on seniority and the type of business.

5. Rights of Employees in Case of a Transfer of Undertaking

1. Employees’ Rights

The transfer of an undertaking, business or part of a business to a new owner by way of agreement is subject to Section 613a of the German Civil Code (Bürgerliches Gesetzbuch – BGB). By reference in the Transformation Act (Umwandlungsgesetz – UmwG), Section 613a BGB also applies in the...
case of mergers, splits and asset transfers. Section 613a BGB 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 Section 613a BGB, 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 the employment without giving reasons for his/her objection. 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 Transferee Party

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 by the transferee after the transfer is invalid according to Section 613a (4) if the dismissal is based on the transfer.

6. Termination of Employment Contracts

1. Grounds for Termination

Under German law, the employment 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 German Act on Protection Against Unfair Dismissal (Kündigungsschutzgesetz – KSchG). The act 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. If the KSchG applies, a notice is only legally effective if it is “socially justified”. Pursuant to Section 1 KSchG, a termination is justified only if it is based on reasons related to: 1) the person; 2) the conduct of the employee; or 3) compelling operational requirements which preclude the continued employment of the employee in the establishment.
Person-related reasons include, in particular physical or mental impairments, extensive absenteeism due to illness and reduced working capacity. Conduct-related reasons include on wilful or severely negligent breach of contract. A dismissal based on the employee’s conduct usually requires that an advance warning (Abmahnung) 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 reorganization. These measures must result in the loss of the position and there may not be any alternative position available that the employee could occupy. Furthermore, dismissals due to business reorganization are only socially justified if the correct “social” criteria have been applied. 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 several criteria including; age, length of service, support obligations for dependants and severe disability. Employees whose further employment is crucial for the functioning of the establishment (Funktionsträger) may be excluded from this selection process.

In case of severe breach of obligation, 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 German KSchG. In addition, specific rules apply if the dismissals form part of a collective dismissal; e.g. prior notice must be given to the competent employment agency. In case of a so-called operational change of business such as the closure of business, collective dismissals additionally require the negotiation of a social plan (Sozialplan) and the attempt to negotiate a reconciliation of interests (Interessenausgleich) with the works council if the undertaking employs more than 20 employees. Certain alleviations exist during the first four years of a company’s existence.

3. Termination Agreement

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 termination 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 termination agreement without requiring permission of the authorities. The employer will generally offer a severance payment to induce employee to accept the termination by agreement.

4. Severance Payment

Severance payments are paid at the end of employment in the following cases: 1) the employment agreement provides for a contractual severance payment; 2) the parties agree upon a severance payment (in or out of court); 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 mass dismissal provides for severance payments. Before labour courts as well as in severance agreements and social plans, the following (non-binding) formula is often used to calculate a 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.

5. Options for Employee

The employee has the option to object to a dismissal. In such case, he/she must file a complaint with the labour court within 3 weeks of receipt of the termination notice. 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 with the employer, and in practice it is often difficult to establish the social justification for dismissal. If the termination is deemed invalid, the employee returns to his position. In practice, most employment protection proceedings are settled in exchange for a severance payment.

6. Unfair Dismissal (Consequences)

If the German Act on Protection Against Unfair Dismissal applies, a termination lacking social justification will be deemed null and void. However, the termination itself will be deemed effective and binding if the employee does not object by filing an action with the Labour Court within three weeks of receiving notice of termination.

7. Void Dismissal

Notice must be given in writing and signed by the employer in order to be legally effective. All other forms of notice (i.e., those given orally or by email or fax) are void. Terminations without information/hearing of the works council (if in place) are also void. If the dismissal is void, the employee is entitled to reinstatement and continued remuneration by the employer. In practice, most cases addressing a void termination are settled, in or out of court in exchange for a severance payment.

7. Trade Unions and Employers Associations

1. Brief Description of Employees and Employers Organizations

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 organized 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. About 38 percent of all German businesses belong to an employers’ association.
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 which 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: 1) 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 himself; 2) the Federal Ministry of Labour and Social Affairs has declared the collective bargaining agreement to be generally binding; or 3) the employment contract provides for the contractual application of a particular collective bargaining agreement. Although the unionization rate in Germany is low with about one third of the employees organized, the collective bargaining coverage usually is around 64 percent.

8. Employee Representation

1. Types of Representations

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 (Betriebsrat) can – by election – be constituted by the employees. There may also be other representative bodies, such as a company works council, a group works council, a works council executive committee, an economic committee, a representative body for executive staff, one for disabled employees and one for young employees and trainees.

2. Number of Representatives

The size of the works council depends on the regular number of employees in the undertaking 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. If a company has more than 100 employees and a works council exists, an economic committee to the works council must be formed. If there are generally more than 10 executives in a company, a representative body for executive staff can be established. The number of their representatives varies between 1 and 7 representatives.

3. Nomination of Representatives

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, except for executive employees, and has initiative, participation and codetermination rights in personnel matters (recruitment, transfers, dismissal). Furthermore, the works council can conclude works council agreements with the employer on certain matters, such as working conditions and remuneration schemes. Works council agreements have immediate and binding effect on the individual employment in the same manner as statutory law.

5. **Employee 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 Codetermination Act (Mitbestimmungsgesetz – MitbestG) 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 chairman must be a representative of the employees.

9. **Social Security**

1. **Legal Framework**

In Germany, employees belong to the national social security system by force of law. The statutory social security system is regulated in the Social Security Code (Sozialgesetzbuch – SGB).

2. **Contributions**

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.

3. **Insurances**

The social security system covers the following principal areas: health insurance, unemployment insurance, nursing care insurance, pension or old-age benefits and accident insurance.

4. **Maternity Leave**

Female employees are entitled to paid maternity leave 6 weeks prior to the expected date of birth and 8 weeks after childbirth. Depending on specific circumstances (e.g. health reasons,
twins), such periods may be extended. Payments to the employee during this period are made partly by the statutory health insurance provider and partly by the employer. 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 (up to 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 his/her position.

5. Pension

The public retirement insurance system (gesetzliche Rentenversicherung – GRV), company pension plans (betriebliche Altersvorsorge – bAV) and private individual retirement investments are the three pillars of the German pension system. The public retirement insurance, in which currently about 85% of all employees are enrolled, 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 subsidized by the government. Retirement begins at age 65, though it is now gradually being increased to age 67.
Pusch Wahlig Legal | Germany

Pusch Wahlig Legal is a leading German employment and labor law firm, with 14 highly qualified labor and employment law specialists. The firm offers clear, concise, goal-oriented solutions in the highly regulated realm of German labor and employment law. Through close contact and a regular exchange of ideas with clients, Pusch Wahlig Legal 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 Legal was nominated as German Employment Law Firm of the Year by JUVE in 2008 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. Partners of the firm are regularly recognized as leading employment lawyers in Germany by Best Lawyers and Juve.

www.pwlegal.net

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
Stephan Swinkels,
Executive Director
stephan.swinkels@leglobal.org

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 on any particular feature you should seek advice from the L&E Global representative stated in this memorandum. This document is based on the law as at January 2011.