Germany

Introduction

The labor law of the Federal Republic of Germany covers all legal rules concerning the relationship between employers and employees and their respective organizations. Traditionally, the labor law in Germany is divided into two parts: individual and collective labor law. Individual labor law covers rights and obligations of employers and employees as provided for by law or by contract. Collective labor law deals with the representation and organization of employees through trade unions and works councils, and with co-determination of employees on company boards.

Yet, the rights and duties regarding the employment relationship including its termination are in particular determined by:

- The content of the employment agreement;
- Agreements between the works council and the employer;
- Collective bargaining agreements;
- Labor laws; and
- The constitution as well as European law.

For resolving conflicts in individual and collective labor disputes in Germany, labor courts play a dominant role. The German labor court system is comprised of three levels: (i) labor courts of the first instance; (ii) appellate labor courts; and (iii) the Federal Labor Court.

Labor courts in Germany become involved in disputes mainly on the initiative of employees or their representatives. Settlement of disputes in the labor courts is the normal course. The procedure in labor courts is divided into two steps. The first step is the conciliatory hearing during which the presiding judge hears the case alone. The purpose of this step is to reach an amicable settlement, if possible, at an early stage. If no agreement is reached at this stage, one or more further hearings involving also non-professional judges (one chosen by employer federations and another chosen by the unions) will be held, and the court will finally issue a judgment.

The German liability system focuses primarily on monetary damages. However, in cases of injury of body, health, freedom or sexual self-determination, Section 253 (2) of the German Civil Code provides for compensation for non-material losses, such as pain and suffering. Furthermore, according to the German Equal Treatment Act, in certain cases of discrimination and sexual harassment victims are entitled to demand compensation for material and non-material losses.

Termination

The employment relationship may be terminated by mutual consent such as by separation agreement or by expiration of an employment agreement limited in time. However, the most common way to terminate an employment is by notice of termination. An employer has to consider several restrictions in order to give notice validly.

Form And Content Of Notice Of Termination

The notice of termination, to be valid, must be in *writing* and *signed* by the competent person, usually the Managing Director or HR Director. If notice is given by other representatives of the employer whose authority to represent the employer is not commonly known to the employee, the original power of attorney must be attached to the notice of termination. The original signed notice of termination must be given directly to the employee, e.g., termination via fax or e-mail is null and void. Due to the serious consequences, the termination must be declared clearly and unambiguously. Thus, the notice of termination must clearly express the intention to terminate and whether termination is intended to be an ordinary,(i.e., with a regular notice period) or an extraordinary (i.e., without notice period due to significant misconduct) termination.

Notice Provisions/Consequences Of A Failure To Provide The Required Notice

If a collective bargaining agreement is applicable, the notice periods follow the provisions contained in it. If no collective bargaining agreement is applicable, the notice periods follow the individual employment agreement or the applicable statute, where the statutory notice periods is more favorable to the employee.

The statutory notice periods are as follows:

- The basic notice period is four weeks as per the 15th or the end of a calendar month; however, the following notice periods apply for a termination by the employer beyond two years of service:
- After two years of service: one month to the end of a calendar month;
- After five years of service: two months to the end of a calendar month;
- After eight years of service: three months to the end of a calendar month;
- After 10 years of service: four months to the end of a calendar month;
- After 12 years of service: five months to the end of a calendar month;
- After 15 years of service: six months to the end of a calendar month;
- After 20 years of service: seven months to the end of a calendar month.

During the probationary period, which may be concluded for up to six months, the statutory notice period is only two weeks.

If the notice of termination does not refer to the correct termination date, the termination may be effective to the next permissible date, provided the content of the notice provides for such interpretation.

Involvement Of Works Council

If a Works Council exists, it must be given the opportunity to comment on the intended termination of an employee prior to serving the notice of termination. Therefore, the employer has to inform the Works Council properly, i.e., the employer must first communicate the relevant social criteria of the employee (age, years of service and number of dependants). The employer must also inform the Works Council about the reason for the termination. If the termination is based on compelling business requirements, the employer must in addition give its views on the necessity of the redundancy. It finally has to state why it picked the employee according to the criteria it applied. A termination without such information is void. The same applies if the Works Council is informed improperly. However, the Works Council cannot prevent the employer from dismissing the employee. The Works Council may take up to one week to give its statement in cases of terminations with notice and up to three days in case of a termination for cause with immediate effect.

General Termination Protection Under The Termination Protection Act

Employees are protected against unilateral termination of their employment by the Termination Protection Act, which, since January 1, 2004, applies to all business units with more than 10 employees. Before January 1, 2004, however, this termination protection applied to business units with more than five employees. Employees whose employment relationship started in a business unit with more than five but less than 10 employees prior to January 1, 2004, keep their protection even if the number of employees does not reach 10. However, in this case, employees hired after January 1, 2004, do not obtain termination protection. Furthermore, the Termination Protection Act applies only to employees who have been employed for at least six months by the same employer.

If these prerequisites are met, an employee can be dismissed with ordinary notice only if the termination is "socially justified." This means that the employment may be terminated for reasons based only on urgent business requirements, the employee's conduct, or the employee's person. There is no "at will" employment rule in Germany.

Urgent Business Requirements

If the termination is based on urgent business requirements, the following preconditions must be met: (i) the employee's specific job is cancelled; (ii) there is no possibility to employ the employee in another comparable or suitable position within the company; and (iii) the so-called "social selection" was properly made. In this context, "social selection" means to select for redundancy the employee who would be the least severely affected by the termination. The employee's years of service in the company, age, maintenance obligations and a disability of the employee must all be taken into consideration. In practice, this analysis often leads to the dismissal of the last person hired (i.e., the practice of "last in, first out"). The employer may be able to exclude from the "social selection" some employees if this is justified due to legitimate operating reasons, such as knowledge, skills and performance of a certain employee, or the maintenance of a balanced staff structure.

Employee's Conduct

A termination for reasons based on the employee's conduct is justified if the termination can be considered as an appropriate reaction to a breach of contractual duties by the employee. In this context, the interests of the employee and the employer must

be balanced. A single breach of contractual duties will normally not be sufficient to allow a unilateral termination. The labor courts normally require that the employee has been warned not to repeat the breach of contract. Therefore, it is necessary for the employer to give a formal warning to the employee. However, there are cases where terminations without prior warning have been accepted by the courts, e.g., in case of theft of employer's property. For reasons of evidence, the formal warning should be in writing.

Employee's Person

The most common case for a termination based on the employee's person is a termination due to lengthy or frequent illness.

A termination for lengthy illness is justified if the employee has been ill for a significant period of time and the recovery is not expected in a foreseeable period of time. Furthermore, the process of work must be disrupted considerably by the absence of the employee.

A termination for frequent illness is justified if the employee has been frequently ill in the past and similar illness periods are to be expected in the future. Again, the process of work must be disrupted considerably by the employee's absence. It is difficult to specify general rules as to how long and how frequent an illness has to be in order to justify a termination.

Special Termination Protection

Several protection laws provide for an additional termination protection for certain groups of employees.

Under the Maternity Protection Act, an employer may not terminate the employment with an employee during her pregnancy and until four months after giving birth. Only exceptionally, upon request of the employer, the competent authority may allow the termination of a protected woman if the employer can prove that the termination is indispensable and is not caused by any circumstance by her pregnancy. However, in practice, the authorities are rather reluctant to permit terminations.

Also, during their parental leave employees enjoy similar termination protection. Either parent is entitled to a parental leave that may extend up to 36 months until the child has reached the age of three. It may be taken in several periods by

either parent or combined by both parents. Upon prior consent of the employer, a maximum amount of 12 months can be taken as parental leave until the child has reached the age of eight.

Furthermore, disabled employees enjoy termination protection, provided they have been employed for at least six months.

Last but not least, an employer has to comply with termination protection rules for Works Council members and members of similar representative bodies. They may only be dismissed for important reasons.

Mass Dismissals

Terminations are considered to be a mass dismissal if they shall be served to the employees within a period of 30 days and include:

- More than five employees in a business (*Betrieb*) with more than 20 and less than 60 employees; or
- 10% of all, or more than 25 employees, in a business (*Betrieb*) with at least 60 and less than 500 employees; or
- At least 30 employees in a business (*Betrieb*) with at least 500 employees. (Section 17 Termination Protection Act).

Any such notice requires the prior information of the local employment office in order to become valid. As a rule, the termination cannot become effective earlier than one month after the information is filed with the local employment office; the regional employment office may extend this period to two months.

If there is a Works Council in the business, it has to be informed, at least within two weeks before the employer informs the local employment office. If the Works Council gives a statement within this period, the employer has to send it to the employment office together with its information of the envisaged mass dismissal. If either the Works Council or the employment office is informed improperly, the employer runs the risk that the terminations will be declared invalid by the labor courts.

If dismissals qualify as a "mass dismissal," the employer, furthermore, would have to consult with the Works Council beforehand and negotiate a so-called "equalization of interests-agreement" and a "social plan," which provides for severance payments

to the dismissed employees. This applies only to companies with more than 20 employees. It is essential to carry out these consultations and negotiations with the Works Council prior to giving the notices of termination. Otherwise, the Works Council might obtain a temporary injunction against the employer. Additionally, the employer has to inform and consult the economic committee timely, if it has business sites with more than 100 employees.

Termination For Cause

No notice period will need to be applied if there are sufficient grounds for a termination for cause. Such termination may take immediate effect (Section 626 of the German Civil Code). Facts must exist in which the terminating party cannot reasonably be expected to continue the employment until the regular termination date. All the circumstances of the individual case and the interest of both parties have to be taken into consideration. Usually, it is not easy to establish the requirement for an extraordinary termination with immediate effect.

Some examples may illustrate the concept behind it:

- An employee who accepts bribes can normally be terminated for cause.
- Deliberate incorrect calculations of his own expense claim generally justifies the termination of the employee for cause.
- Criminal acts on the part of the employee directed against or to the detriment of the employer (e.g., fraud, falsification of documents) will normally justify a termination with immediate effect.
- Competitive work during the time of employment may allow a termination without notice.
- Shutting down a business unit usually does *not* provide a reason for an extraordinary termination.

Often, however, it is difficult for the employer to prove a criminal act. Therefore, the labor courts usually allow an extraordinary termination if there is a strong suspicion that the employee committed the act.

A termination for cause with immediate effect can be based only on facts that have been discovered within a period of two weeks. In practice, this tight rule often leads to difficulties. Therefore, employers are well advised to initiate investigations at an early stage if there are grounds to suppose that criminal acts may have been committed.

Litigation Considerations

If the employer is able to prove the above preconditions for a termination in a legal dispute before the labor court (in which the employer has the full burden of proof), the termination would be considered valid and no severance would have to be paid. If, by contrast, the employer cannot establish these conditions, the termination would be regarded as invalid. Consequently, the employment would continue, and the employee could claim retroactive salary and reinstatement.

Terminations constitute the major type of claims litigated in German labor courts. The latest available statistics show that more than approximately 80% of all labor disputes are related to dismissals. In comparison to other countries, German labor law on terminations is quite strict. It is estimated that more than 75% of all employees who are served notice for termination end up going to court, and those do generally receive a higher compensation payment than offered by employers at the time notice is served.

To avoid the ever-increasing number of lawsuits regarding terminations, German legislators have implemented Section 1a of the Termination Protection Act as of January 1, 2004. If the employer terminates the employment relationship for compelling business reason, it may notify the employee and offer a severance payment of half a monthly salary per year of service if the employee does not file a claim for termination protection with the labor court. If the employee refrains from legal proceedings against the employer, the severance payment falls due on termination date. This precondition must be explained in the notice of termination. However, there is no obligation to combine notice of termination with the offer of a severance payment.

Settlement Agreements

Even if the prospect of winning the termination lawsuit appear to be good, the employer might wish to come to an amicable separation. Such an agreement is not subject to the restrictions that have to be considered in the case of a unilateral

termination by the employer. By a settlement agreement, the parties agree upon an end to the employment relationship. Simultaneously, the employer commits itself to pay a certain amount as a redundancy compensation for the loss of the job.

As far as the financial side is concerned, the following aspects have to be noted:

- First, the employee is entitled to continue work and to receive his or her salary until the end of his or her notice period. Also, if an amicable settlement is concluded, the employees normally claim to be paid until that date. For tax reasons, it is not possible to simply convert the salary to be paid during the notice period into a severance payment.
- In addition, it is customary to pay a severance. This is particularly true if the employer's prospects to win a possible termination lawsuit are not good. There are no fixed rules for the calculation of such severance payment in German law. As a "rule of thumb," employees older than 50 years receive a full monthly salary per year of employment, and younger persons a half monthly salary per year of employment. These figures, however, are subject to negotiations.
- Severance payments as compensation for the loss of the job may be tax-preferenced only to a limited extent. In this case, the so-called "one-fifth-method" (*Fünftelungsmethode*) may be applied. Accordingly, the severance payment may be spread over the next five years in order to mitigate the effects of tax progression, under Secs. 24 and 34 of the Tax Income Act (*Einkommenssteuergesetz*).
- According to case law, a settlement agreement may, in general, cause the employee not to receive unemployment benefits for a period of 12 weeks. Furthermore, the period in which the employee normally can claim unemployment benefits may be reduced to ¾. However, according to a recent directive by the Federal Employment Office, the employee may not face such reductions if he or she is not responsible for his or her unemployment, which shall be presumed if the following conditions are met:
  - The settlement agreement is concluded in order to prevent the employee's termination based on urgent business reasons;
  - The notice period is complied with;

– The severance payment amounts between 0.25 and 0.5 of the monthly gross salary per year of service; and

– The employee is not subject to special termination protection prohibiting an ordinary termination.

Employment Discrimination And Sexual Harassment

In the past, there was no specific anti-discrimination legislation in Germany. Because of the high degree of termination protection, apparently the legislators did not see the need to pass anti-discrimination laws. Furthermore, the employer has been obliged not to discriminate against employees without justifying reasons based on a general non-discrimination principle under case law. The employer's obligation to non-discrimination has also been based on other specific laws, e.g., the employer must treat part-time employees and employees employed for a limited period of time equal to full-time employees and employees employed for an indefinite period of time, unless there is a justifying reason for a different treatment.

In compliance with the obligation to transpose the EC Directives N° 2000/43, N° 2000/78 and N° 2002/73 into German law, German legislators implemented the principle of equal treatment in form of the Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz / AGG*), which took effect on August 18, 2006.

Discrimination Grounds

According to Sec. 1 of the Equal Treatment Act, the employer may not discriminate on the following grounds:

- Racial or ethnic origin;
- Sex or sexual orientation;
- Religion or secular belief;
- Disability; or
- Age.

The non-discrimination obligation refers to employees, apprentices, and persons who may be considered as persons similar to employees due to their economic dependency (*arbeitnehmerähnliche Personen*), including persons working from a home office.

In particular, the Equal Treatment Act prohibits discriminations in relation to recruitment, promotion, salary and redundancy. It allows only for limited exceptions to the principle of equal treatment due to "justifying reasons." The Act covers direct and indirect adverse treatment. Direct discrimination occurs when a person falling within the protected category is treated less favorably than another person in a comparable situation. Indirect discrimination occurs when an apparently neutral provision, criterion or practice would put one person having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons without these particular characteristics. For example, the criterion of "professional experience" may indicate an indirect discrimination due to age. Discrimination may only be justified, if the employer may refer to one of the enumerative justifying reasons of the Equal Treatment Act, e.g., the respective characteristic is indispensable to the work to be performed.

According to the Equal Treatment Act, harassment, including sexual harassment, is regarded as discrimination. The law defines harassment as behavior injuring the dignity of employees at the place of work. Sexual harassment is defined as (i) unwanted sexual behavior including unwanted sexual actions and invitations for this purpose, (ii) sexual-related physical contact, comments of a sexual nature, or a showing or visibly displaying of pornographic presentations, which are clearly disapproved by the person affected. Sexual harassment includes conduct caused at a work site by colleagues, superiors, subordinates, third parties or the employer. There are no justifications for any such conduct.

Rights Of Employees

In case of discrimination, the affected employee may file a complaint with management. The management then has to investigate the complaint and to inform the employee about the result.

Additionally, the employee may claim compensation for material or non-material losses from the employer or directly from the person who caused the damage. The employer therefore has to take measures to avoid that its employees are subject to discrimination in the working environment.

The amount of damages employees can claim has to be assessed by the labor courts. It is rather unlikely that the German labor courts will follow the concept of punitive damages. But the European Court of Justice has stated on several occasions that the amount of damages has to deter the employer from further discrimination. This will probably result in employers having to make substantial payments.

Employer's Obligations

The employer is obligated to protect the employees against discriminations and to take pre-emptive actions. According to the Act, the employer will be required to give special training to the employees in order to raise the awareness in its company that discrimination must be avoided. To this end, the text of the Act and special regulations concerning the procedure of a discrimination claim before the labor courts, as well as the competent person in the operation to deal with discrimination complaints, must be announced within each business unit. This information may be provided through the intranet.

Burden Of Proof

The burden of proof is shared between the employee and the employer. This means that in the labor court the employee has to establish facts from which it can be presumed that there has been discrimination. It is then up to the employer to give proof that there has been no harassment or breach of the equal treatment principle, which might be in practice rather difficult.

Anti-Discrimination Authority

Eventually, a Federal Anti-Discrimination Authority will be established to safeguard the enforcement of the Anti-Discrimination Act. This authority will promote equal treatment and provide independent assistance to victims of discrimination. However, it cannot fine an employer for not observing the rights and obligations under the Equal Treatment Act.