Labour & Employment 2021

Contributing editors
Matthew Howse, K Lesli Ligorner, Walter Ahrens, Michael D Schlemmer and Sabine Smith-Vidal

LEXOLOGY®
Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

First published 2006
Sixteenth edition
ISBN 978-1-83862-680-8

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Labour & Employment 2021

Contributing editors

Matthew Howse, K Lesli Ligorner, Walter Ahrens, Michael D Schlemmer and Sabine Smith-Vidal
Morgan, Lewis & Bockius LLP

Lexology Getting The Deal Through is delighted to publish the sixteenth edition of *Labour & Employment*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria, Hong Kong, Hungary, Mauritius, Romania, Singapore and Taiwan.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Matthew Howse, K Lesli Ligorner, Walter Ahrens, Michael D Schlemmer and Sabine Smith-Vidal of Morgan, Lewis & Bockius LLP, for their continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

London
April 2021

Reproduced with permission from Law Business Research Ltd
This article was first published in May 2021
For further information please contact editorial@gettingthedealthrough.com

Contents

Germany

Walter Ahrens

Morgan, Lewis & Bockius LLP

LEGISLATION AND AGENCIES

Primary and secondary legislation

1 | What are the main statutes and regulations relating to employment?

The main statute on individual employment law is the Civil Code, which forms the basis of all individual employment contracts. Certain details of the employment relationship are governed by separate statutes, for example:

- the Part-Time and Fixed-Term Employment Act;
- the Remuneration Continuation Act (which deals with sick and holiday pay);
- the Federal Vacation Act;
- the Working Time Act;
- the Termination Protection Act; and
- the Company Pension Act.

The main non-discrimination statute is the General Equal Treatment Act. Relevant collective employment law statutes are the Collective Bargaining Agreement Act and the Works Constitution Act (regarding works councils and their rights), as well as the Co-Determination Act and the One-Third Representation Act, both of which deal with employee co-determination in corporate governance.

Protected employee categories

2 | Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The Federal Constitution provides that no one shall be discriminated against or privileged owing to gender, descent, race, language, homeland, origin, religion, or political opinion and that no one shall be discriminated against owing to disability. This provision applies directly or indirectly to all employment relationships. Discrimination in employment is specifically prohibited by the General Equal Treatment Act. The Act prohibits direct and indirect discrimination on the grounds of racial or ethnic origin, gender, religion, belief, disability, age or sexual orientation, as well as harassment in all forms.

Different treatment may be justified by genuine and determining occupational requirements. In the case of occupational activities within churches and similar organisations, a person's religion or belief constitutes a genuine and legitimate occupational requirement concerning the organisation's ethos. Age discrimination can be detrimental to older or younger employees and is not subject to an age threshold. Different treatment on the grounds of age shall not constitute discrimination if it is objectively and reasonably justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary. In particular, the Act allows the fixing of ages in company pension schemes.

Employees who have been discriminated against are entitled to compensation for financial and non-financial damage but do not acquire a right to employment. If an employee can establish a prima facie case for discrimination, the employer bears the burden of proof that no discrimination has occurred.

Separate non-discrimination provisions apply concerning an employee's genetic characteristics and in favour of part-time and fixed-term employees. Also, employers are generally prohibited from differentiating in any way whatsoever among different groups of employees without sufficient reason.

Enforcement agencies

3 | What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

Law enforcement by government agencies plays a role only in certain areas of employment law. The most important is occupational safety and health, where jurisdiction lies with state authorities. The Federal Employment Agency has some limited enforcement powers, namely concerning temporary workers under the Temporary Employment Act. The Federal Anti-Discrimination Agency and similar state agencies support individuals in enforcing their rights under the General Equal Treatment Act. Illegal employment, that is, employment without payment of income tax and social security contributions, is pursued by the customs administration, which is supported by the social security providers. Otherwise, employment statutes and regulations are typically enforced by individual employees, works councils or unions bringing actions in the labour courts.

WORKER REPRESENTATION

Legal basis

4 | Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

A works council may be established in any business that regularly employs at least five permanent employees who have reached the age of 18 years and at least three of whom have six months of service. Works council establishment is voluntary. A works council is only established if the employees, even a minority among them, initiate the statutory election process.

Powers of representatives

5 | What are their powers?

Works councils have a variety of statutory rights to enable them to perform their statutory tasks. For this purpose, employers need to inform them comprehensively and in due time and provide them upon request

at any time with all necessary documents. To the extent necessary, works councils may ask employers to make knowledgeable employees available to them for fact-finding and may use external experts, subject to an agreement with the employer. Additional statutory rights exist concerning personnel as well as social and economic matters, ranging from information and consultation to full co-determination. Where the statute provides for co-determination, the employer needs the works council's consent concerning these matters.

Regarding personnel matters, the works council is entitled to be informed of any hiring, pay scale grouping or regrouping, and transfer, and the employer must obtain the works council's consent. Within one week of being informed, the works council may withhold consent for certain reasons set out in the Works Constitution Act; namely, if such a measure would be in breach of the law, any collective bargaining agreement or agreement with the works council, or if there is factual reason to assume that the measure is likely to result in the dismissal of or other detriment to employees not justified by operational or personal reasons. If the works council withholds consent, the employer needs to apply to the labour court to permit such a measure. Further, the employer needs to inform and consult with the works council before giving any termination notice.

In social matters, the following issues are subject to works council consent:

- questions concerning maintaining order and the conduct of employees in the business;
- scheduling of the daily working hours in the business and their allocation to individual weekdays;
- temporary reduction or extension of the usual working hours in the business (including overtime and short-time work);
- time, location and form of remuneration payments;
- vacation policies and plans;
- introduction and application of technical equipment that may be used to monitor employees' performance or conduct (eg, information and communication systems);
- workplace health and safety rules;
- form, design, and administration of institutions administering employee benefits at business, company or group level (eg, a pension fund or a cafeteria);
- questions regarding the pay and benefits structure (excluding amounts);
- piecemeal pay (including amounts);
- principles regarding employee suggestion schemes; and
- principles regarding group work.

Typically, the employer and the works council enter into written agreements on such matters (works agreements). If the employer and the works council are unable to agree, each may call for a conciliation board to be formed with an equal number of representatives from both sides and a neutral chair to issue a ruling that will constitute a binding agreement between the employer and the works council.

Concerning economic matters, in a business that regularly employs more than 20 employees who are entitled to vote, the employer must inform the works council comprehensively and in due time and consult with it about 'operational changes' such as:

- closures or downsizings of businesses or material parts thereof;
- relocations of businesses or material parts thereof;
- mergers or demergers of businesses;
- fundamental changes to the organisation, purpose or facilities of businesses; or
- the introduction of fundamentally new work or production processes.

The employer and works council are required to negotiate an agreement on the implementation of such change that is intended to balance the interests of the employees and the employer (the implementation agreement). If the employer and the works council cannot reach an agreement, either party may initiate the aforementioned conflict resolution procedure. In this case, however, the conciliation board may only mediate and does not have the power to impose an agreement on the employer and the works council. The works council may also be entitled to demand a social plan.

BACKGROUND INFORMATION ON APPLICANTS

Background checks

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

As a rule, background checks are allowed to the extent that an employer is entitled to obtain the relevant information directly from the applicant. This is usually the case if the information sought is objectively and intrinsically linked to the specific position and relevant to the work to be performed. Within these limits, employers may, for example, check the background of an applicant by contacting his or her previous employers. Employers are not entitled to obtain an applicant's criminal or credit record directly from the relevant registers. Whether they may ask the applicant to obtain and submit such a record is questionable, since these records are standardised and may also contain information that is not relevant to the specific position. Security checks may be conducted if the position is security sensitive. Psychological, personality and graphological tests require the applicant's consent, whereas polygraph tests are unlawful. Background checks regarding union membership are not allowed, and checks regarding political or religious affiliation are lawful only if the employer is a political or religious institution. Hiring a third party to conduct background checks is subject to additional restrictions.

Medical examinations

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

An employer may request a medical examination only to the extent that the examination is relevant to the applicant's physical ability to perform the work, and only with the applicant's consent. The consent requirement, however, is of little help to the applicant, as refusal to consent may cause the employer to reject the application. HIV tests may be required only if the work bears an increased risk of infecting others. Genetic testing of applicants is prohibited.

Drug and alcohol testing

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

Alcohol and drug tests may be required if an applicant, by drug or alcohol-related misconduct, could endanger him or herself or others or cause substantial property damage. Such tests require the applicant's consent. Refusal to consent may cause the employer to reject the application.

HIRING OF EMPLOYEES

Preference and discrimination

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

An employee working part-time for an indefinite period who has informed the employer in writing that he or she wishes to increase his or her

working hours shall be given preference for a vacant position unless the vacant position does not correspond to the part-time employee's position, the part-time employee is less qualified than an applicant preferred by the employer or the employee's wish conflicts with similar wishes of other part-time employees or urgent operational requirements. Employers with at least 20 employees are required to employ severely disabled persons for at least 5 per cent of the positions in their businesses. However, non-compliance with this obligation does not give a severely disabled person a right to be hired; instead, such a person may be entitled to adequate compensation under non-discrimination law. The General Equal Treatment Act and the prohibition of discrimination concerning an employee's genetic characteristics also apply in a hiring context.

10 | Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

Statutory law requires only that employment contracts with temporary workers and those parts of employment contracts relating to fixed terms (including mandatory retirement clauses) and post-termination covenants not to compete be in writing. The written form requires the exchange of one or more hard copies with original handwritten wet signatures of the employer and the employee on the same hard copy. Regardless, written employment contracts for all employees are a best practice. Written employment contracts are also a way to comply with the Documentation Act, which requires employers to provide to employees written summaries of the essential terms of the employment relationship within one month of its commencement, including, at a minimum, the following:

- the names and addresses of the parties;
- the employment commencement date;
- for fixed-term contracts, the envisaged term of employment;
- the place of employment or, if an employee will be employed at more than one location, the information that the employee may be required to work at various locations;
- a brief characterisation or description of the work to be performed;
- the composition and the amount of remuneration, including all components as well as their due dates;
- the agreed working hours;
- the annual vacation;
- the notice periods; and
- a general reference to applicable collective bargaining and works agreements.

Similar requirements apply to internship contracts. In this case, the summary must be provided immediately following the signing, or, at the latest, before the commencement of the internship.

11 | To what extent are fixed-term employment contracts permissible?

Fixed-term employment contracts are permitted if the limitation in time is justified by reasonable cause. Reasonable cause exists in particular (without limitation) if the operational need for work is only temporary, if an employee replaces another employee (eg, in the case of illness) or if the limitation is for a probationary period. There is no specific maximum duration for such fixed-term contracts; however, the longer the duration, the more difficult it usually is to establish reasonable cause. The successive use of fixed-term employment contracts over many years may amount to an abuse of rights, rendering the limitation unenforceable.

Reasonable cause is not required for fixed-term employment:

- of new employees and employees whose last employment with the employer ended a very long time ago, was of an entirely different nature or was very short (such contract may be extended up to three times, subject to an overall maximum term of two years);
- by newly established businesses, unless they are established in connection with a reorganisation of existing businesses, within four years of establishment (such contract may be extended multiple times, subject to an overall maximum term of four years); and
- of employees who have reached the age of 52 years and have been unemployed for at least four months (such contract may be extended multiple times, subject to an overall maximum term of five years).

Specific statutes govern fixed-term employment of scientific and artistic university staff and medical practitioners in further education.

Probationary period

12 | What is the maximum probationary period permitted by law?

The statutory maximum probationary period is six months. Collective bargaining agreements may provide for a shorter or longer maximum period. An extension is only possible if a period shorter than the applicable maximum period has initially been agreed to, only up to the applicable maximum period and only by agreement with the employee. Unless agreed otherwise, during a probationary period of no more than six months, a notice period of two weeks applies. Agreements with apprentices and other training agreements must provide for a probationary period of at least one month but no longer than four months. During the probationary period, a notice of termination with immediate effect may be given.

Classification as contractor or employee

13 | What are the primary factors that distinguish an independent contractor from an employee?

An employee is defined as someone who, based on a contract under private law, is obliged to work according to instructions and heteronomously in someone else's service and personal dependence. The degree of personal dependence required may vary by the nature of the work to be performed. Contrary to an independent contractor, who is essentially free to determine how to organise his or her work and when and where to work, an employee is integrated into the employer's operational organisation and subject to the employer's instructions regarding the contents, performance, time and place of work. In determining whether someone is an employee, all circumstances of the individual case must be taken into account. The wording of the contract is disregarded where its practical implementation shows an employment relationship. Independent contractors who are economically dependent on the employer and, comparable to employees, in need of social protection are regarded as employee-like persons to whom some employment statutes apply.

Temporary agency staffing

14 | Is there any legislation governing temporary staffing through recruitment agencies?

Temporary staffing through recruitment agencies is governed by the Temporary Employment Act. Recruitment agencies are required to have a government permit to operate and are subject to detailed regulation. If a recruitment agency does not have a permit, its employees will automatically become employees of the businesses for which they work, unless they declare within one month from the agreed start date that they wish to stay employed with the recruitment agency. The maximum period that temporary staff may work for the same business is 18 months. In this context, periods during which an individual staffer previously worked for such business are fully taken into account unless they were followed by a break of more than three months. Shorter or longer

maximum periods may be set out in a collective bargaining agreement applicable to the business for which the temporary staff work. If the applicable maximum period is exceeded, temporary staff will automatically become employees of the businesses for which they work, unless they declare within one month from exceeding the maximum period that they wish to stay employed with the recruitment agency. A declaration that the temporary staffer wishes to stay with the recruitment agency is only valid if:

- the temporary staffer submits it in person to the Federal Employment Agency;
- the Federal Employment Agency adds a note including the date of submission and verification of each employee's identity; and
- it is submitted to the recruitment agency or the business within three days of its submission to the Federal Employment Agency.

Recruitment agencies must grant temporary staff essentially the same terms and conditions of employment, including pay, as the businesses for which the temporary staff work grant to comparable employees of their own (the equal treatment rule). Regarding pay, collective bargaining agreements (which apply to most recruitment agencies) may deviate from the equal treatment rule for the initial nine months of staffing (or, subject to certain conditions, for up to 15 months), except for temporary staffers who had been employees of the business (or affiliated entities) during the six-month period immediately preceding temporary staffing. Businesses using temporary staff must allow them access to their collective employee services, such as cafeterias, nurseries and transportation. Temporary staffers must not replace employees on strike.

FOREIGN WORKERS

Visas

15 | Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Short-term visas, that is, visas for periods of up to 90 days, are not subject to numerical limitations.

Regarding employees transferring from a foreign corporate entity to a related German entity, residence titles – for up to three years – are available for two groups of employees of an internationally active business or group meeting the following criteria:

- employees with university or similar education, provided that they transfer within the framework of a personnel exchange programme in such business or group; and
- employees whose qualifications are comparable to those of a German skilled worker and who have specific, especially company-specific, know-how, provided that:
  - these employees usually work abroad;
  - they are employed in the domestic part of such business or group;
  - their employment in Germany is absolutely necessary for the preparation of foreign projects; and
  - they will work abroad in connection with the implementation of such projects.

Special intra-corporate transfer permits are available to managers, specialists and trainee employees seconded to Germany for occupational or training purposes for a maximum term of three years (for managers and specialists) or one year (for trainee employees).

Employees from other EU or EEA countries or Switzerland do not require visas for employment in Germany.

Spouses

16 | Are spouses of authorised workers entitled to work?

Spouses of authorised foreign employees with certain residence titles are generally entitled to a residence permit if the employee has sufficient housing space, the spouse and the employee are at least 18 years old and the spouse can communicate at least in basic German. Such residence permit comprises permission to work to the extent that statutory law does not prohibit or restrict such work. Spouses of employees from other EU or EEA countries or Switzerland who are not citizens of one of these countries and live together with the employee automatically receive a residence certificate. This certificate confirms their right to work.

General rules

17 | What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

In Germany, employers may employ workers from other EU or EEA countries or Switzerland without the need for a specific residence or work permit. Workers from other foreign countries may be employed in Germany only if they have a residence title. Such residence title comprises permission to work to the extent that statutory law does not prohibit or restrict such work. The granting of residence titles is subject to detailed statutory requirements and, in principle, limited to certain occupations and categories of employees. Residence titles must usually be applied for at the relevant German embassy before entering Germany. The embassy will involve the local immigration office to the applicant's German address and, unless an exception applies, the Federal Employment Agency. Employers are obliged to verify that any such foreign worker has a residence title and that his or her employment is not subject to any applicable prohibition or restriction. They must keep a copy of the residence title in electronic or paper form for the duration of employment and must inform the local immigration office within four weeks of any early termination of employment. Employing a foreign worker who is not entitled to work in Germany constitutes an administrative offence. The maximum fine is €500,000 for the employer and €5,000 for the employee.

Resident labour market test

18 | Is a labour market test required as a precursor to a short or long-term visa?

Effective from 1 March 2020, Germany facilitated the immigration of skilled labour. As a result, certain residence titles no longer require prior approval by the Federal Employment Agency. Where such approval is still required it is granted for most occupations and categories of employees without a labour market test, provided that the terms and conditions of employment of the foreign employees are equivalent to the terms and conditions of comparable domestic employees. Where a labour market test is still required it is passed where German employees or non-German employees with comparable status are not available for the relevant position.

TERMS OF EMPLOYMENT

Working hours

19 | Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The maximum daily working time from Monday to Saturday is eight hours. It may be increased to 10 hours if an average of eight hours per

day, that is, 48 hours per week, is not exceeded within a period of six months or 24 weeks. Work on Sundays and public holidays, in principle, is prohibited, subject to limited exceptions. Employees are not entitled to opt out of these restrictions.

Overtime pay

20 | What categories of workers are entitled to overtime pay and how is it calculated?

Entitlement to and calculation of overtime pay are often governed by collective bargaining agreements, works agreements or individual employment contracts. Unless otherwise agreed, the employer is contractually required to provide overtime pay if it can objectively be expected based on the circumstances of the individual case. Such objective expectation applies to most employees; however, it does not apply where a commission is paid in addition to the base salary, nor does it apply to employees who provide certain qualified services (eg, lawyers) or whose annual remuneration exceeds the contribution assessment ceiling in the statutory pension insurance scheme (in 2021, €85,200 in western Germany). Statutory law does not require overtime pay to be higher than pay for the normal hour.

21 | Can employees contractually waive the right to overtime pay?

Overtime pay governed by a collective bargaining agreement or works agreement cannot be waived just by an agreement between the employer and the employee. Where overtime pay is governed by the individual employment contract it cannot be waived completely in advance. Provisions to that effect are unenforceable; however, the employer and the employee may agree that a certain number of overtime hours within a certain period will not be compensated separately.

Vacation and holidays

22 | Is there any legislation establishing the right to annual vacation and holidays?

Employees are entitled to a minimum paid vacation of 24 working days per year based on a six-day working week, which translates into 20 working days in the case of a five-day working week. During the first six months of the employment relationship, vacation accrues at a rate of one-twelfth of the annual vacation per completed month. After six months of service, employees are entitled to the full annual vacation. Severely disabled employees are entitled to five days' additional paid vacation per year (based on a five-day working week). Vacation is in addition to public holidays, the number of which varies from 10 to 13 days per year, depending on the state where the employee works. Public holidays are also paid.

Sick leave and sick pay

23 | Is there any legislation establishing the right to sick leave or sick pay?

Employees are not obliged to work if they are unable to do so owing to illness. They are obliged to submit a medical certificate for any inability to work that lasts more than three calendar days; however, an employer may ask for such a certificate to be submitted from the first day. Under the Remuneration Continuation Act, employees are entitled to sick pay from their employers for a period of up to six weeks for the same illness. Sick pay is available to all employees who have completed four weeks of service. The amount is essentially equal to the employee's usual remuneration but without overtime pay and certain expenses. If six weeks have expired and the employee continues to be sick, an employee who is a member of the statutory health insurance system is entitled to sick pay from his or her health insurance provider for a maximum period of 72 additional weeks. This sick pay amounts to 70 per cent of the employee's gross pay, but no more than 90 per cent of the employee's net pay, in each case up to the contribution assessment ceiling in the statutory health insurance system (in 2021, €58,050).

Leave of absence

24 | In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

There are several types of leaves of absence, the most important being maternity and parental leave.

Maternity leave commences six weeks before expected childbirth and ends eight weeks after childbirth (12 weeks in the case of multiple births, pre-term birth or if a disability of the child is determined within eight weeks of its birth). During maternity leave, the employee receives maternity pay from her statutory health insurance provider or the government, and the employer is required to make up the difference between maternity pay and the average net remuneration.

Parental leave may be taken if an employee lives with, cares for and educates his or her child. Parental leave can be taken until the child's third birthday. With the employer's consent, up to 24 months' parental leave may be taken after the child's third birthday but before his or her eighth birthday. Parental leave is unpaid by the employer; however, a government benefit of up to €1,800 per month is available to the parents for a maximum period of 12 months or, if each parent takes at least two months' parental leave, 14 months. Alternatively, parents may opt for parental pay at a reduced rate for twice the period, which makes particular sense for employees working part-time. Employees are entitled to work up to 30 hours per week during parental leave.

Nursing care leave may be taken by an employee who cares in a domestic environment for a close relative who needs care. The leave may be taken for up to six months and is unpaid. In businesses with more than 25 regular employees, the employees may take part-time family care leave with a minimum of 15 working hours per week. This leave may be taken for up to 24 months (including any nursing care leave).

A right to paid leave of absence exists where an employee is prevented from working for personal reasons through no fault of his or her own for a relatively short period. Examples include major family events such as weddings, medical consultations and home care for close relatives who are sick, in particular, for children up to 12 years old.

Mandatory employee benefits

25 | What employee benefits are prescribed by law?

Employees are regularly insured in the social security system, which comprises statutory pension, health, nursing care, unemployment and occupational accidents insurance. Employees whose pay exceeds a certain threshold (in 2021, €64,350 annually) may opt out of statutory health and nursing care insurance and enrol in private health and nursing care insurance instead. As a rule, contributions to the statutory schemes are borne in equal shares by the employer and the employee. However, childless employees over 23 years of age contribute slightly more to nursing care insurance, and contributions to occupational accidents insurance are borne solely by the employer. Typical social security benefits are retirement pensions, disability pensions, survivors' pensions, healthcare and nursing care, as well as unemployment and short-time work benefits. Other benefits prescribed by law include paid vacation and holidays, sick pay and maternity leave.

Part-time and fixed-term employees

26 | Are there any special rules relating to part-time or fixed-term employees?

The main statute in this area is the Part-Time and Fixed-Term Employment Act. Employees with more than six months of service may request a permanent reduction of their working time by giving three months' notice in writing. Employers who regularly employ more than 15 employees must accept such requests to the extent that operational reasons do not require otherwise. Such operational reasons exist, in particular (without limitation), if the reduction materially affects the organisation, the workflow or the safety of the employer's business, or if it results in unreasonably high costs.

Alternatively, employees with more than six months of service may request a temporary reduction of their working time for a period from one to five years by giving three months' notice in writing. Employers who regularly employ more than 45 employees must accept such requests to the extent that operational reasons do not require otherwise. A similar right exists for employees during parental leave, limited to between 15 and 30 working hours per week. Specific statutory provisions apply to work on demand and job sharing.

Pre-retirement part-time work is subject to specific requirements under a separate statute.

Public disclosures

27 | Must employers publish information on pay or other details about employees or the general workforce?

Under the Pay Transparency Act, an employer with more than 500 regular employees is required under the German Commercial Code to add a management report to its financial statements must publish a report on gender and pay equality. Such report must detail the employer's measures to advance the equality of women and men in general and the impact of such measures, as well as its measures to establish pay equality for men and women. Employers that do not take such measures must explain this in the report. Employers that are bound by, or have agreed with all of their employees that they will apply, a collective bargaining agreement on pay must publish the report every five years, covering the preceding five-year period, while other employers must do so every three years for the preceding three-year period. The report must include the average total number of employees and the average number of full-time and part-time employees, in each case broken down by gender, for the last year of the applicable five- or three-year period. Any subsequent report must show the changes in numbers versus the previous report.

Companies and partnerships without an individual as a general partner that are organised under German law are required to include in the annex to their annual financial statements information on:

- total pay for board members;
- supervisory board members, if any;
- advisory board members, if any;
- members of any similar body, if any; and
- former board members and their survivors.

If the company is listed on a stock exchange, the information must be provided for each board member individually, broken down by category (eg, fixed pay, performance-based pay and long-term incentives). In this case, the annex must also include information on pay and benefits that the board member is entitled to in the event of regular and premature termination.

POST-EMPLOYMENT RESTRICTIVE COVENANTS

Validity and enforceability

28 | To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Post-termination covenants not to compete are invalid if they have not been agreed to in writing. They are unenforceable if the employer has failed to hand over to the relevant employee a signed document with the covenant or has failed to agree to pay compensation of at least 50 per cent of the employee's most recent contractual remuneration for the term of the covenant, which must not exceed two years. A post-termination covenant not to compete is unenforceable to the extent that it is not justified by the employer's legitimate business interests or makes the employee's professional advancement unreasonably difficult. If the covenant is valid but unenforceable, the employee may elect to reject or accept the covenant.

Before the termination of employment, the employer may waive the covenant not to compete in writing. The effect of such waiver is that the employee becomes immediately free to compete upon termination and that the employer's obligation to pay compensation terminates 12 months from the waiver. Consequently, if the employer waives the non-compete covenant at least 12 months before termination, no compensation will be payable.

If the employer or the employee terminates employment extraordinarily, the covenant not to compete becomes unenforceable, and no compensation needs to be paid, if the party terminating employment declares in writing within one month of the termination that it will not be bound by the covenant. The employee may also declare that he or she will not be bound if the employer terminates employment ordinarily unless the termination is justified by reasons relating to the employee's person or conduct, or the employer, when giving notice, agrees to pay 100 per cent of the employee's most recent contractual remuneration for the term of the covenant.

Post-termination covenants not to solicit or not to deal with customers are subject to the same rules. The same applies to post-termination covenants not to solicit employees in favour of the employee bound by the covenant, whereas such covenants are not subject to the foregoing rules and enforceable if they prohibit solicitation only in favour of such employee's new employer. Whether the aforementioned rules apply to covenants not to solicit suppliers has not yet been decided by the labour courts.

Post-employment payments

29 | Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Yes. A post-employment covenant not to compete is unenforceable if the employer has failed to agree to pay compensation of at least 50 per cent of the employee's most recent contractual remuneration (base pay, variable pay and certain benefits) for the term of the covenant. If no compensation at all has been agreed upon, the restrictive covenant is invalid. If compensation has been agreed upon but does not reach the statutory minimum, the restrictive covenant is valid but cannot be enforced by the employer. Rather, the employee may elect to reject or accept it. If the employee accepts it, he or she will be entitled to the compensation that the employer has agreed to pay.

Other employment income that the employee earns or maliciously fails to earn during the term of the non-compete covenant will be taken into account to the extent that such employment income, together with the non-compete compensation, exceeds 110 per cent of the employee's most recent contractual remuneration (125 per cent if the non-compete covenant forced the employee to relocate). The employee

is obliged to inform the employer about such other employment income upon request.

LIABILITY FOR ACTS OF EMPLOYEES

Extent of liability

30 | In which circumstances may an employer be held liable for the acts or conduct of its employees?

Within the framework of a contractual relationship, an employer is liable for any negligent or wilful breach of contract caused to the other party of the contract by an employee whom it uses to perform its obligations under the contract, provided that an intrinsic factual link exists between the employee's act and the breach. The employer is not liable for any act the employee commits only on the occasion of the performance of the contract (eg, if the employee commits a criminal offence that is in no way linked to his or her duties). Regarding liability in tort concerning third parties, the employer may excuse itself by proving proper care and diligence in selecting the relevant employee. The effect, however, of such an excuse is limited owing to the employer's obligation to indemnify the employee from third-party claims. Such obligation depends on the degree of the employee's fault, namely:

- where there is a low degree of negligence, full indemnification;
- where there is ordinary negligence, partial indemnification; and
- where there is gross negligence or a wilful act, usually no indemnification.

Personal injury to employees caused by an occupational accident for which the employer or another employee is responsible is covered by occupational accident insurance. Employers are directly or indirectly liable for such damage only if they have acted wilfully or with gross negligence.

TAXATION OF EMPLOYEES

Applicable taxes

31 | What employment-related taxes are prescribed by law?

An employee's remuneration is subject to income tax, to the solidarity surcharge on such tax (to the extent still applicable) and, depending on the employee's religious affiliation, also to church tax. Income tax, the solidarity surcharge and church tax must be withheld and paid to the tax authority by the employer but are borne by the employee. The employer must also withhold the employee's share of the social security contributions and pay it, together with the employer's share, to the employee's health insurance provider, which acts as a clearing centre.

EMPLOYEE-CREATED IP

Ownership rights

32 | Is there any legislation addressing the parties' rights with respect to employee inventions?

The Employee Invention Act governs inventions that qualify for patent or utility patent protection as well as suggestions for technical improvements; that is, other technical innovations that do not qualify for such protection. The Act distinguishes between service inventions, which either result from an employee's work in the employer's business or significantly depend on the business's experience or work, and free inventions, which include all other employee inventions. Employees are obliged to notify the employer in text form without undue delay of any invention they have made during the employment (except free inventions that obviously cannot be used in the employer's business). Service inventions may be claimed by the employer with the effect that the employer acquires all proprietary rights to the invention. The employer is deemed to have claimed the invention if it does not waive the invention in text form within four months after proper notification. Free inventions must be offered to the employer first, at least on a non-exclusive basis, provided that the invention can be used in the employer's business. Employees are entitled to compensation for any service or free invention acquired by the employer and for any suggestion for technical improvement granting protection similar to an industrial property right. The compensation shall be agreed upon between the parties. In the absence of agreement, employees may apply for determination of the compensation by an arbitration board established at the German Patent and Trade Mark Office and, should arbitration fail, the civil court. The Employee Invention Act cannot be deviated from to the employee's detriment by mutual agreement; however, agreements on inventions and suggestions for technical improvement may be entered into following notification.

Trade secrets and confidential information

33 | Is there any legislation protecting trade secrets and other confidential business information?

The Trade Secrets Statute requires employees to treat confidentially the employer's trade secrets, namely information that:

- is not generally known or readily accessible to persons within the circles that usually deal with the kind of information in question and, thus, has commercial value;
- is subject to measures to maintain confidentiality by its lawful owner that are appropriate under the circumstances; and
- in the confidentiality of which there is a legitimate interest.

Examples of trade secrets include technical know-how, sources of goods, territories, lists of customers and prices, inventories and financial and credit matters. The Statute prohibits the acquisition of trade secrets by unauthorised access to, unauthorised appropriation of or unauthorised copying of any documents, objects, materials, substances or electronic files that are under the lawful control of the trade secret holder and that contain the trade secret or from which the trade secret can be deduced, or by any other conduct that, under the circumstances in the individual case, is not following the principles of good faith, taking into account honest market practices. The Statute also prohibits the use and disclosure of trade secrets by anyone who acquired the trade secret unlawfully or violates an obligation limiting the use of the trade secret or a non-disclosure obligation.

The Trade Secrets Statute does not pre-empt confidentiality provisions in employment agreements, works agreements and collective bargaining agreements, which remain unaffected. For example, employment agreements may provide for the non-disclosure of confidential information that does not meet the requirements of the statutory definition of trade secrets.

This statutory confidentiality obligation also applies following the termination of the employment relationship to the extent that it does not unreasonably restrict the employee in his or her professional activities. This post-employment confidentiality obligation is to be distinguished from a post-termination covenant not to compete, which has different content and consequences.

In the event of a suspected breach of confidentiality, the employer may demand information concerning whether and to whom the employee has disclosed trade secrets. If the employee has violated the confidentiality obligation, the employer may claim damages. Additionally, the employer may obtain an injunction against the employee enjoining future disclosures. Disclosure of trade secrets may also be punishable as a criminal offence. The maximum punishment is three years'

imprisonment or a fine. If the employee acts for gain or at the time of the disclosure knows that the secret will be exploited abroad the maximum punishment is five years' imprisonment.

DATA PROTECTION

Rules and obligations

34 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The processing of employee personal data in Germany is governed by:
- Regulation (EU) No. 2016/679 (the General Data Protection Regulation);
- the Federal Constitution; and
- the revised Federal Data Protection Act.

The Constitution guarantees the right to privacy and the right to determine who is to receive personal data. Under the Federal Data Protection Act, the employer may process personal data (ie, facts relating to a specific or at least identifiable individual) for the purposes of the employment relationship if it is necessary for the decision on whether to establish an employment relationship, for the performance or termination of the employment relationship, or compliance with information duties regarding employee representatives under statutory law, a collective bargaining agreement or a works agreement. Employee personal data may be processed to investigate criminal offences only if:
- facts (which need to be documented) raise the suspicion that the employee committed a criminal offence in the course of the employment relationship;
- the collection, processing or use is necessary for the investigation; and
- the employee's legitimate interests in the omission of such collection, processing or use do not prevail, in particular (without limitation) if the form and extent of such measures are not disproportionate concerning the cause.

Where the processing of personal data is based on the employee's consent, the assessment as to whether the consent was voluntarily provided must take into account the employee's dependency in the context of the employment relationship as well as the circumstances under which the consent was provided. Consent may be voluntary where it is legally or commercially beneficial to the employee or where the employer and the employee pursue the same interests. Consent must be provided in writing unless a different form is appropriate given the circumstances. The employer must inform the employee in text form about the purpose of the processing and the right to withdraw consent. Employee personal data may also be processed based on a collective bargaining agreement or works agreement. The processing of special categories of personal data, such as health data, is subject to additional protection.

35 Do employers need to provide privacy notices or similar information notices to employees and candidates?

Employers are required to provide privacy notices to employees and candidates regarding the processing of their personal data. The key contents of such privacy notices are summarised below:
- the employer's identity and contact details;
- the contact details of the employer's data protection officer, if any;
- the categories of personal data concerned;
- the purposes of the processing and its legal basis;
- the recipients or categories of recipients of the personal data, if any;
- where applicable, the fact that the controller intends to transfer the personal data to a country outside the European Economic Area and applicable safeguards;
- the period for which the personal data will be stored or, if that is not possible, the criteria used to determine that period;
- the employees' rights concerning the processing of their personal data;
- where the processing is based on consent, the existence of the right to withdraw consent at any time;
- the right to lodge a complaint with a supervisory authority; and
- whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into an employment contract, as well as whether the employee or candidate is obliged to provide the personal data and of the possible consequences of failure to provide such data.

The data privacy notice must be provided at the time of the collection of the personal data from the employee or candidate or, if it was collected via a third party, within a reasonable period of being collected, at the latest within one month.

36 What data privacy rights can employees exercise against employers?

Employees have the right to obtain from the employer confirmation as to whether or not personal data concerning them is being processed, and, where that is the case, access to the personal data as well as certain key information about the processing, namely:
- the purpose of processing;
- the categories of personal data concerned;
- the recipients or categories of recipients of the personal data;
- the envisaged period for which the personal data will be stored or, if not possible, the criteria used to determine that period; and
- where personal data is not collected from the employee, any available information regarding its source.

Employees may also obtain from the employer without charge a copy of their personal data processed.

Employees may require the employer to rectify without undue delay any inaccurate personal data concerning them. In certain circumstances, they may demand from the employer restriction of the processing of their personal data, namely where the accuracy of the personal data is contested by the employee. Employees may also be entitled to have their personal data deleted without undue delay; for example:
- if the personal data is no longer necessary for the purposes for which it was processed;
- if the processing is based on the employee's consent and the employee withdraws consent; or
- where the personal data has been unlawfully processed.

Employees have the right to data portability (ie, to receive the personal data that they provided to the employer in a structured, commonly used and machine-readable format) and to transmit those data to a third party, provided that the processing is carried out by automated means.

BUSINESS TRANSFERS

Employee protections

37 Is there any legislation to protect employees in the event of a business transfer?

There is no legislation to directly protect employees in the event of a share deal, as share deals affect only the ownership in the employing

company and do not interfere with the employment relationships between the company and its employees. However, asset deals and similar scenarios, such as outsourcing, are subject to the transfer of undertaking legislation, which applies to undertakings and businesses or parts thereof that qualify as a stable economic entity (ie, an organised grouping of persons and assets facilitating the exercise of an economic activity that pursues a specific objective). To determine whether the conditions for the transfer of such organised economic entity are met, the courts consider all facts characterising the transaction in question, in particular (without limitation):

- the type of undertaking or business concerned;
- whether its tangible assets, such as buildings and movable property, are transferred;
- the value of its intangible assets at the time of the transfer;
- whether the majority of its employees are taken over by the new employer;
- whether its customers are transferred;
- the degree of similarity between the activities carried on before and after the transfer; and
- the period, if any, for which those activities were suspended.

If the conditions for such transfer are met, the employment relationships between the employees employed in the relevant undertaking or business or part thereof and the transferor (old employer) pass to the transferee (new employer) with all rights and obligations (including pension liabilities, also for past service). Rights and obligations from collective bargaining agreements or works agreements continue to apply between the employees and the new employer and, as a rule, must not be modified to the employees' detriment for one year following the transfer.

Before the transfer, the old or new employer should notify the employees affected by the transfer in writing of:

- the date or proposed date of the transfer;
- the reasons for the transfer;
- the legal, economic and social implications of the transfer for the employees; and
- any measures envisaged concerning the employees

Each employee is entitled to object to the transfer of his or her employment relationship to the new employer within one month of receipt of the notification and, if the notification is incomplete or incorrect, also at a later point in time. The transfer does not in itself constitute grounds for the termination of the employment relationship by the old or new employer; terminations for other reasons, however, shall remain unaffected.

TERMINATION OF EMPLOYMENT

Grounds for termination

38 | May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

If an employer employs more than 10 employees (including temporary workers) regularly in a business in Germany, and if the relevant employee has more than six months of service, the employer may ordinarily give notice to terminate only if the termination is justified by reasons relating to the employee's person or conduct or by urgent operational requirements. A typical reason relating to the employee's person is illness (eg, long-term illness or repeated short-term illnesses causing business disruption or unreasonably high sick-pay costs), provided that a medical expert confirms that future illness or illnesses are to be expected. Termination for reasons relating to the employee's conduct usually requires a breach of contract despite a prior warning relating to a similar breach. Urgent operational requirements exist where:

- based on a workload analysis, the employer's actual headcount exceeds the required headcount;
- the employee cannot be further employed in another vacant position, even after reasonable training or under modified terms and conditions; and
- the employer, in selecting the employee from among comparable employees, has sufficiently taken into account the employee's length of service, age, number of dependants and any severe disability. Employees whose continued employment is required by legitimate operational interests (eg, owing to their knowledge, abilities and performance or to ensure a well-balanced personnel structure) are excluded from this social selection.

What these statutory requirements mean in detail has been interpreted by the labour courts in countless judgments.

Notice

39 | Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Written notice to terminate must be given before dismissal. This requires delivery to the employee of a hard copy with an original handwritten (wet) signature of the employer or its properly authorised representative. The standard statutory notice period is four weeks, expiring on the 15th or the last day of a calendar month. The notice period for the employer increases to one month, expiring at the end of a calendar month, after two years of service, and by one additional month each after five, eight, 10, 12, 15 and 20 years of service, up to a maximum of seven months, expiring at the end of a calendar month. Collective bargaining agreements may provide for longer or shorter notice periods, and individual employment contracts for longer notice periods; however, the notice period for the employee may not be longer than for the employer. Pay in lieu of notice is only possible by agreement with the employee. Such agreement, however, is usually not advisable for the employee as social security benefits are thereby negatively affected.

40 | In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

An employer may dismiss an employee extraordinarily with immediate effect for an important reason. This requires facts based on which the employer, taking into account all circumstances of the individual case and balancing the interests of the parties, cannot reasonably be expected to continue the employment relationship until the expiry of the notice period or the agreed-upon termination date, respectively. Written notice to terminate must be given within two weeks of the employer's becoming aware of the circumstances justifying immediate termination. These statutory requirements have been further developed by the labour courts over time. Examples of reasons for extraordinary terminations include:

- taking a vacation without approval;
- simulated sickness;
- serious insult or assault against the employer or fellow employees;
- sexual harassment; and
- criminal offences in employment, in particular, to the employer's detriment.

Severance pay

41 | Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

A statutory right to severance exists only in particular cases. An employer that has given notice to terminate for urgent operational requirements may offer the employee severance in the notice contingent upon the employee's not bringing an action in court within the statutory limitation period of three weeks. Upon expiry of the notice period, the employee is then entitled to severance equal to half the monthly remuneration per year of service. Such an offer, however, is usually not advisable for the employer.

Another case may arise in labour court proceedings. If the notice is invalid, but the employee cannot be reasonably expected to continue employment, he or she may apply for dissolution of the employment relationship by the labour court against payment of severance. The employer may file such an application if facts exist based on which continued employment cannot be expected to be beneficial for the employer's business. Such severance may amount to up to 12 times the monthly remuneration (or up to 15 times for employees aged 50 years or older with at least 15 years of service, or up to 18 times for employees aged 55 years or older with at least 20 years of service). Monthly remuneration is defined as monetary and non-monetary earnings in the month in which the employment relationship ends, based on the employee's regular working hours.

A right to severance also exists where a social plan so provides. Social plans usually include detailed provisions on how severance is to be calculated. It is also very common for employers and employees to settle termination protection claims that have been filed with the labour court in return for payment of negotiated severance. Negotiated severance is usually between half and one-and-a-half times the employee's monthly remuneration per year of service, but may also be higher depending on the circumstances of the individual case.

Procedure

42 | Are there any procedural requirements for dismissing an employee?

The works council, if any, must be informed and consulted before the employer gives notice. It has seven days to raise concerns (three days in cases of extraordinary termination). A notice to terminate that is given without prior information of and consultation with the works council is invalid. Information that is available but not given to the works council at this stage cannot be used by the employer to justify the termination in any labour court proceedings that may follow. If the employee is severely disabled or has been granted equivalent status, the representation of severely disabled employees must also be informed and consulted before giving notice. Any notice given without such information or consultation is invalid.

Employee protections

43 | In what circumstances are employees protected from dismissal?

Severely disabled employees and employees with equivalent status may be dismissed only after prior approval by the Integration Office, which is a state agency.

The dismissal of a female employee is prohibited during pregnancy and the four-month period after childbirth if the employer, when giving notice, was aware of the pregnancy or childbirth, or if it is informed thereof within two weeks of receipt of the notice by the employee. The competent state agency may approve a termination for reasons unrelated to pregnancy or childbirth in exceptional cases. Similar protection exists for employees on parental leave, nursing care leave or family care leave.

Works council members must not be given notice during their terms of office unless reasons for extraordinary termination exist and the works council or, in lieu of it, the labour court, has approved such termination. This protection continues for one year following the termination of office, except that no works council approval is required in this case. Employees initiating works council elections, election committee members and candidates for works council elections enjoy similar protection during the election process and for a period of six months thereafter (three months in the case of initiating employees). Exceptions apply if the business is closed down, or if a department thereof is closed down and the works council member, initiating employee, election committee member or candidate working in such department cannot be employed in another department.

Employed data protection commissioners whose appointment is required by statutory law, during their terms of office and for one year thereafter may only be dismissed extraordinarily, with immediate effect for an important reason. Ordinarily, termination of their employment is prohibited.

Mass terminations and collective dismissals

44 | Are there special rules for mass terminations or collective dismissals?

Collective dismissals regularly constitute 'operational changes', which the employer may implement only after attempting to achieve an agreement with the works council. If the works council refuses to enter into an agreement (the implementation agreement), the employer needs to apply to a conciliation board and postpone the implementation of the dismissal until the board has met, to avoid employee claims for damages resulting from any premature implementation (premature implementation may be prevented by an interim injunction obtained by the works council). The process of trying to achieve an agreement may take up to six months, and in exceptional cases even longer. In the case of an operational change, the works council is usually also entitled to demand a social plan, providing in particular for severance to be paid to the employees to be dismissed. Failing an agreement between the employer and the works council, the conciliation board may determine the financial volume and the details of the social plan.

Before implementing a collective dismissal, the employer is obliged to inform and consult with the works council and to notify the Federal Employment Agency before it gives notice to terminate within 30 calendar days to:

- more than five employees in businesses regularly employing more than 20 but fewer than 60 employees;
- at least 10 per cent of the employees or more than 25 employees in businesses regularly employing at least 60 but fewer than 500 employees; or
- at least 30 employees in businesses regularly employing at least 500 employees.

Termination notices that are to take effect before the expiry of one month from the notification to the Federal Employment Agency may do so only subject to the Agency's approval. The Federal Employment Agency may (but rarely does) extend this period to two months in individual cases.

Class and collective actions

45 | Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

German law does not permit class or collective actions to be brought by employees. Employees may only assert labour and employment claims on an individual basis. Although employees could jointly file individual claims in the labour courts, this is rarely done in practice.

Mandatory retirement age

46 | Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Employers are not allowed to impose, but may agree on, mandatory retirement in a collective bargaining agreement, works agreement or individual agreement. Such agreement may provide for mandatory retirement once an employee has reached the regular retirement age (traditionally 65 years, now gradually increasing to 67 years). Agreements providing for mandatory retirement at a point in time when the employee may claim a retirement pension before having reached the regular retirement age are deemed to mean the regular retirement age unless the agreement was entered into or confirmed by the employee no more than three years before such point in time. Mandatory retirement ages that are lower than the regular retirement age require specific justification under the General Equal Treatment Act; for example, the mandatory retirement age of 60 years for pilots and cabin crew members has been held unenforceable.

DISPUTE RESOLUTION

Arbitration

47 | May the parties agree to private arbitration of employment disputes?

An employer and an employee cannot submit a dispute to private arbitration.

Employee waiver of rights

48 | May an employee agree to waive statutory and contractual rights to potential employment claims?

An employee cannot, in advance, waive statutory rights or rights under collective bargaining agreements or works agreements. Even if a specific right (eg, to sick pay or vacation) has arisen under a statute, the employee is usually not entitled to waive it. However, the employee may waive statutory minimum wage claims in a court settlement and, following the termination of employment, statutory claims to compensation for untaken vacation. Rights resulting from a collective bargaining agreement (eg, remuneration claims) may be waived only in a settlement approved by the parties to the collective bargaining agreement, and rights resulting from a works agreement may be waived only with the works council's consent. Rights under an individual employment contract may be waived.

Overtime pay governed by a collective bargaining agreement or works agreement cannot be waived just by an agreement between the employer and the employee. Where overtime pay is governed by the individual employment contract it cannot be waived completely in advance. Provisions to that effect are unenforceable; however, the employer and the employee may agree that a certain number of overtime hours within a certain period will not be compensated separately.

Limitation period

49 | What are the limitation periods for bringing employment claims?

The standard limitation period for employment claims is three years and commences upon the end of the year in which a claim arises and the creditor becomes aware, or should become aware without gross negligence, of the circumstances justifying the claim and the identity of the debtor. However, a variety of other limitation periods apply to specific claims, notably to actions in court challenging a notice to terminate or the validity of a fixed term. The limitation period for such actions is three weeks from receipt of the notice or expiry of the fixed term. Claims for compensation of financial or non-financial damage under the General Equal Treatment Act must be filed with the employer in writing within two months of the employee becoming aware of the different treatment unless otherwise provided for in a collective bargaining agreement.

UPDATE AND TRENDS

Key developments of the past year

50 | Are there any emerging trends or hot topics in labour and employment regulation in your jurisdiction? Are there current proposals to change the legislation?

On 1 December 2020, the Federal Labour Court issued a judgment on the status of crowdworkers. It held that they may be regarded as employees, subject to the actual performance of the contractual relationship. The case was about merchandisers visiting shops and petrol stations to monitor the presentation of branded consumer goods. Participating users could accept orders (without being obliged to do so) via an online platform. For each order fulfilled, users received experience points that allowed them to reach a higher level and accept several orders at the same time. The plaintiff accepted and fulfilled 2,978 orders within 11 months. The Federal Labour Court held that it speaks for an employment relationship if the principal manages the contractual relationship via its online platform in a way that the user, as a result, cannot determine the location, the time and the contents of his activities. The court held that the online platform in question was designed in a way that incentivised users to continuously accept, and personally perform, bundles of simple micro-jobs to be carried out step by step following contractual guidelines. Only a higher level enabled the users to accept several orders at the same time so that they could perform them on the same route and thereby achieve higher earnings per hour. Since this incentive by design caused the plaintiff to continuously perform store checks in his region, the court held that he was an employee. The court noted that actual performance prevails over contract wording.

Coronavirus

51 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The covid-19 pandemic has resulted in several legislative changes affecting employers and employees, some of which have already expired. The most important remaining ones are set out below.

Health and safety

On 21 January 2021, the Federal Minister of Labour and Social Affairs issued a specific coronavirus health and safety regulation. It requires employers to reduce personal contacts in their businesses, inter alia,

by offering employees that perform office work to work from home unless urgent operational reasons require otherwise. If necessary, employers must provide employees with mouth and nose coverings that employees are required to wear. On 22 February 2021, the Federal Ministry of Labour and Social Affairs issued updated common occupational health and safety standards to protect employees against covid-19 infection. Details are set out in the health and safety rules developed by the Ministry's health and safety committees that apply in an updated version of 22 February 2021. The occupational accident insurance carriers issued additional industry specific health and safety guidelines. Employers should follow these rules, regulations and guidelines meticulously.

Extended short-time work benefits

Short-time work is an established instrument to avoid dismissals. Where employers, in response to a lack of work that is temporary, unavoidable and owing to economic reasons or force majeure, agree with their works council or, in their absence, their employees to reduce working hours to less than 90 per cent of the normal hours for at least one-third of the employees in the business or a business department, the Federal Employment Agency provides short-time work pay to the affected employees. Short-time work pay amounts to 60 or, if the employee lives with a child, 67 per cent of the loss in net pay resulting from the reduction in working hours, subject to a cap on underlying gross pay of €7,100 per month.

A government regulation of 25 March 2020 that has been extended until 31 December 2021 modifies the terms and conditions for short-time work pay in four respects:

- the one-third threshold was reduced to 10 per cent of the employees;
- employees will not be required to accrue negative hours to avoid short-time work;
- while employers must continue to pay all social security contributions, including the employee share, on 80 per cent of the loss in gross pay, the Federal Employment Agency will reimburse them for all of these contributions until 30 June 2021 and for half of them from 1 July through 31 December 2021; and
- the scheme is also available to recruitment agencies and their staff.

Short-time work pay for employees that reduce their working hours by at least 50 per cent and whose claim arises until 31 March 2021 has been increased until 31 December 2021. The percentages for such employees increased to 70 per cent from month four and to 80 per cent from month seven. For employees who live with a child, the percentages increased to 77 per cent from month four and to 87 per cent from month seven.

Government benefit for employees with childcare responsibilities

Effective from 30 March 2020, a special government benefit was introduced for employees with schoolchildren or nursery children affected by the temporary school or nursery closures ordered by local government authorities to prevent the covid-19 infection from spreading. The benefit is available to employees with a child younger than 12 years or with a disabled child requiring care who, in the absence of any reasonable alternative childcare option, take care of their child on their own, cannot work as a result, and thus suffer a loss in pay.

Reasonable alternative childcare options include childcare by the other parent, relatives, friends, home-office work – where reasonably possible – and the use of accrued paid time off. The benefit is not available during school or nursery closure periods owing to school holidays. It is paid for a maximum period of 10 weeks per working parent (20 weeks for single parents) and amounts to 67 per cent of the loss in net pay, subject to a cap of €2,016 per month. Employers are required to pay this benefit to eligible employees and to apply to the competent government agency for reimbursement. The benefit is available until 31 March 2021. Employers indirectly benefit too, as they might otherwise have been required to continue paying affected employees, at least for an initial period of up to five days.

Tax-free bonuses

Additional bonuses of up to €1,500 that employers pay to their employees between 1 March 2020 and 30 June 2021 are free from tax and social security contributions. This is to recognise employees' special efforts during the covid-19 pandemic.

Morgan Lewis

Walter Ahrens
walter.ahrens@morganlewis.com

OpernTurm
Bockenheimer Landstrasse 4
60306 Frankfurt am Main
Germany
Tel: +49 69 714 00 777
Fax: +49 69 714 00 710
www.morganlewis.com

Other titles available in this series

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Business & Human Rights
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
Drone Regulation
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
Healthcare M&A
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
Luxury & Fashion
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Partnerships
Patents
Pensions & Retirement Plans
Pharma & Medical Device Regulation
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

lexology.com/gtdt

an LBR business

ISBN 978-1-83862-680-8