Employment Guide

A – Z for Germany (per August 2012)

1. Anti-discrimination regulations

Art. 3 sec. 1 of the German Constitution *(Grundgesetz)* establishes the principle of equality before the law. Art. 3 sec. 2 sets out that men and women should be treated equal. Art. 3 sect. 3 prohibits discrimination for reasons of gender, parentage, race, language, homeland, family background, beliefs, religious or political views; sec. 3 binds the powers of the state and its bodies and seeks to establish equal treatment under the law by prohibiting the use of arbitrary criteria. This general principle has been specified in a number of employment law rules.

On 18 August 2006 the General Equal Treatment Act *(Allgemeines Gleichbehandlungsgesetz,* AGG) came into force which represents the national implementation of the European Council Directive 2000/43/EC of 29 June 2000. The „AGG" aims to prevent and resolve unjustified discrimination for reason of race, ethnical origin, sex, religion, ideology, disability, age or sexual identity. The provisions concerning labour law (§§ 6 –18 of the General Equal Treatment Act) apply to employees and apprentices of the private sector, but also to job applicants. Agreements that infringe prohibitions of discrimination are not valid. Furthermore, employees are granted claims for damages, rights to refuse performance or a right of complaint. Notwithstanding the General Equal Treatment Act,

several further regulations exist in Germany against discrimination of employees, e.g. the law on the protection of expectant and nursing mothers (*Mutterschutzgesetz*) or the regulations concerning the protection of disabled persons (Sec. 71 f. Social Security Code IX.).

2. Business transfers

As a general rule, under sec. 613a of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*), a transfer of business (*Betriebsübergang*) or even of a part of the business does not affect the validity of employment agreements. The new owner assumes liability for existing employment agreements. Therefore, any dismissal "by reason of the transfer" either by the previous owner or the new owner of the business is prohibited.

Under sec. 613a Civil Code, a business (or part of a business) is an organisational unit of persons, rights and other resources (machines, real estate, natural resources etc.) that enables an enterprise to further its purpose. The labour jurisdiction considers and evaluates several factors, if – according to sec. 613a Civil Code - a transfer of business is given or not.

Under sec. 613a Civil Code, all working conditions including scope of work, working time, remuneration, location, holidays and notice periods remain unaffected by the transfer of business. Changes of the individual terms and conditions of the employment agreement require an agreement between the new owner of the business and the employee. Unilateral changes of conditions of the employment agreement are subject to the restrictions of the German Employment Protection Act (*Kündigungsschutzgesetz, KSchG).*

As a general rule, both the works council agreements (*Betriebsvereinbarungen)* and the collective bargaining agreements (*Kollektivverträge)* remain valid notwithstanding the business transfer. However, upon transfer of business, the works council agreements are no longer collectively binding, but instead become part of the individual employment contract. Any provision resulting from a collective or operational work agreement becomes part of the employment contract and may not be amended to the detriment of the employee until after one year after the transfer of the business.

The employees must be duly informed about the transfer of business and the impact of such change on their employment agreement. This written information must be detailed and complete. The employees are entitled to object to the transfer of their individual employment contracts within a period of one month after notice. The legal consequence of the objection is, that they remain employees of the previous owner of the business. However, the seller may subsequently dismiss the objecting employees on operational grounds ("*betriebsbedingte Kündigung"*).

3. Compromise agreement

The compromise agreement offers the opportunity to amicably cease an employment contract. Written form of the compromise agreement is required; otherwise it is governed by the freedom of contract. Typical clauses are: Termination of the employment contract, severance payment, exemption from the obligation of work, reference, confidentiality, return of documents, equipment and data, completion clause, escalator clause.

With such an agreement the employer has the opportunity to separate from an employee circumventing, for example, the period of notice, certain social criteria for redundancy or the duty to hear the workers' council. From the perspective of social security law, the compromise agreement may be disadvantageous for the employee because it is regarded as

notice of cancellation of the employment contract by the employee. This may lead to a blocking period for the receipt of unemployment benefits.

4. Employment contracts

The employment contract is regulated under sec. 611 German Civil Code *(Bürgerliches Gesetzbuch*) and many other statutes (including the Law of Proof of Substantial Conditions Applicable to the Employment Relationship *[Nachweisgesetz*]). The employment contract is characterised by the employee's personal dependence on the employer and the authority of the employer to issue directives regarding working time, working place, etc. In general, the contracting parties agree upon the basic duties, in particular salary, working hours or the definition of the field of activity. The employment contract may be for a fixed period and it may be concluded orally. The notice of termination of employment, however, has to be in writing. It exists different types of employment contracts: limited and unlimited, part- and full-time contracts.

It is important to be aware that not only legislation and the individual terms of employment but also collective labour law may influence the relationship between the employer and the employee. Under German law, it exists a lot of restriction regarding the rules of employment contracts in order to protect the interests of the employee.

5. Employee benefits

The employee's length of continuous employment determines his/her eligibility for certain statutory benefits, such as:

- Protection against dismissal (starting after six months of continuous employment).
- Full holiday entitlement.
- Sick pay (starting after four full weeks of employment, see item 8, "sickness regulations").
- Severance pay.
- Longer notice periods.
- More social protection.

6. Handbook for employees

The provisions in the employment contract may be complemented by work rules and company handbooks (in particular the code of conduct, which defines the business policies of a company).

Work rules and company handbooks are incorporated into the individual employment contract through a bridging provision, if they are not part of an agreement between management and the works council, in which case they apply directly. Alternatively company bargaining agreements and collective labour agreements may provide for said issues along with an exercise of the managerial authority according to sec. 106 of the German Industry Trade and Commerce Code (*Gewerbeordnung, GewO)*. Work rules and company handbooks often provide for the privacy policy, the utilisation of the internet at the workplace and for ethical principles in general (e.g. relating to constitutional rights of employees, conflicts of interest, gifts and bribes or the protection of the environment).

The rules are subject to co-determination of the works council.

7. Health and safety

In Germany, the sector health and safety at the workplace is a dual system, divided into the statutory system of health and accident insurance (see item 14, "*social security*") and the governmental supervision of health and safety at the workplace. Due to the German federal system, the regional trade supervisory centres (*Gewerbeaufsichtsämter*) and regional labour protection offices (*Arbeitsschutzämter*) exercise control functions as well as the German Federal Bureau for Occupational Safety and Workplace Medicine (*Bundesanstalt für Arbeitsschutz und Arbeitsmedizin*), which is subject to supervision of the German Federal Ministry for Labour and Economy (*Bundesministerium für Wirtschaft und Arbeit*). Said law enforcement agencies complement each other.

The public authorities ensure that the business management complies with the statutory rules of health and safety.

Different laws and regulations provide for the health and safety of the employees. Based on the Social Security Code (*Sozialgesetzbuch VII*) and the Labour Protection Law (*Arbeitsschutzgesetz*) the government enacted regulations of inter alia the Regulation on Occupational Safety, the Regulation on Workplace Protection.

The regulatory field "Health and Safety" includes rules on the employment of handicapped persons *(Social Security Code IX)* and the application of the Act on Pregnancy and Maternity (*Mutterschutzgesetz*).

8. Sickness regulations

In case of illness or an occupational accident employees receive full sick pay from the employer for six weeks according to the Continuation of Remuneration Act *(Entgeltfortzahlungsgesetz*) if:
- they have worked for at least four weeks.
- the illness or injury is not caused by their negligence.

If an employee has a continuing illness (e.g. chronic disease), this six-week period begins again with each onset of the illness, provided that either:
- six months have passed since the last sick leave based on that particular illness or
- one year has passed since the beginning of the first sick leave.

Employees have to inform the employer of their incapacity to work immediately and have to submit evidence by handing in a doctor's certificate, usually on the 4th day of sickness.

Once the six-week period expires, employees receive a sickness allowance due to the statutory health and accident insurance (see item 14, "social security").

9. Immigration and work permits

A. Residence permit and work permit

In principle, foreign employees require a residence permit and a work permit unless they are European Economic Area (EEA) nationals or have an unlimited permit to reside in Germany.

(i) Third-country nationals require a legal status *(Aufenthaltstitel)* for the entry and the residence in Germany. This can be either a visa (for a stay up to 3 months), a residence

permit or a settlement permit. Each legal status must indicate whether an employment has also been permitted (a work permit).

(ii) Until May 2011, nationals from the new EU member states that acceded in 2004 (such as Slovakia and the Czech Republic), except Cyprus and Malta, were subject to a temporary EC regulation which restricted their free movement of labour in the old EU member states. The temporary regulation sets out a "2-3-2" model, that is, an initial restriction of two years from May 2004, which member states can then extend by three years, and then another two-year period.

Since May 2011, these new EU member states have unlimited freedom of movement in Germany. Therefore these EU member states do not need a work permit any more. As EU member states they also do require a residence permit.

(iii) However, the restriction is still valid for the new EU member states Bulgaria and Romania who acceded in 2007. Foreign nationals from those EU member states do not need a residence permit but still require a work permit. Work permits are generally denied if there are any German nationals or nationals from the old EU member states who could do the job.

(iv) Under the Work Permit Decree *(Arbeitsgenehmigungsverordnung*), there are potential additional exceptions e.g. for executives and academic employees (such as university lecturers).

(v) The following provisions of the Immigration Act *(Aufenthaltsgesetz*) apply to foreign nationals who wish to work in Germany:

- Employers may recruit foreign nationals if they cannot find German nationals to fill their vacancies. In this case, the employer must take all necessary steps to obtain the work and residence permits required (sect. 18 of the Immigration Act);

- Highly-qualified persons (for example computer scientists or specialised scientists) may obtain a work permit if they finished a qualified job training, have been working in Germany for two years with a German university degree or have been working for three years in a profession that requires a qualified job training and if other, additional requirements have been met (sect. 18a of the Immigration Act);

- Highly-qualified persons may also obtain permanent residence permits immediately if certain conditions are met, e.g., a specific offer of employment. This permanent residence permit is unlimited and includes the permission to work (sect. 19 of the Immigration Act);

- Foreign nationals who intend to set up their own business or company may obtain a residence permit for three years, if it is justified by a strong economic interest (sect. 21 of the Immigration Act).

B. Authority

(ii) Residence permits:

Foreign nationals must apply for visas at the relevant consulate before entering the country (except for nationals from Australia, Canada, Israel, Japan, New Zealand, Republic of Korea and the United States who may apply at the immigration agency after entering Germany).

Employees or others who are already in Germany must apply for a residence permit at the immigration authority *(Ausländerbehörde*) or the regional office *(Kreisverwaltungsbehörde*) that has jurisdiction over the employee's intended place of work.

(i) Work permits:

Since May 2011, there have been significant changes to the approval procedure regarding work permits. The authority has been transferred from the Federal Employment Agency to the International Placement Services *("Zentrale Auslands- und Fachvermittlung, ZAV")*. The ZAV has six teams in four locations in Germany (Bonn, Duisburg, Frankfurt am Main, Munich) and all requests for approval must be sent to the ZAV by the foreigners' registration offices.

In case of a visa, the relevant consulate will contact the immigration authorities. The local immigration authorities will send the applications to one of the four locations of the ZAV, as well as in case of a residence permit or a settlement permit, who will then engage the Federal Employment Agency if necessary regarding the estimation of the regional employment market and regarding certain stages of the assessment.

Applications for work permits are not considered separately, but as part of the whole application procedure for a person's stay in Germany.

Citizens from the new EU member states Bulgaria and Romania who do not need a residence permit, need to apply directly at the ZAV.

C. Work and residence permits are valid for a maximum of five years, but employees or employers can apply for extensions. The whole process of obtaining a work and residence permit can last several weeks, depending on the size of the relevant authority.

For more detailed information the assistance of an immigration lawyer is recommended.

10. Industrial action (strike)

The right to participate in an industrial action is guaranteed by the German Constitution, *the Grundgesetz* ("*GG*"). Art. 9 sec. 3 of the German Constitution warrants the freedom of association, which includes the right of trade unions to start an industrial action. Whether the strike is legal or illegal depends on the provisions of the works council agreements and any applicable collective bargaining agreement.

In Germany the only legal purpose for commencing a strike is for leveraging the employees' position during negotiations over a collective bargaining agreement. In particular strikes for political ends are prohibited. The Federal Labour Court has established prerequisites for a legal strike. Under case law, a strike must respect the "peace obligation" (*Friedenspflicht*). That is, during the duration of the collective bargaining agreement employees, as a general rule, must not go on strike. After the peace obligation the strike has to be preceded by a secret ballot of union members. More than 75 % of the union members must agree to the strike. Before the start of the ballot there are often "warning strikes" *Warnstreiks*where employees lay down their work for a short period of time to exert pressure on the employer. "Wildcat strikes", i.e., any strike that was not authorised by trade unions are illegal. In

addition the strike must be proportionate and fair. Especially, the boycott of goods and services or a blockade of deliveries and replacement workforce is illegal. An industrial action can only be used as ultima ratio after exhaustion of other means such as the compulsory arbitration procedure, i.e., the principle of commensurability. During the strike, the employment contracts are suspended. For the duration of the strike, the employees are not entitled to wages. During the time of a strike the trade union often pays their members "strike money".

Though a strike is no reason for dismissal, the employer is entitled to declare a lockout (*Aussperrung*) or a factory shutdown *Betriebsstilllegung* and prevent all employees from working. The requirements and legal consequences of a lockout are generally the same as those of a legal strike (e.g. the principle of proportionality and the suspension of the employment relationship).

11. Non-competition clause / other restrictive stipulations

During the period of the employment contract the employee is not allowed to compete with the employer unless he approves. Former employees are generally free to compete with their past employer unless their employment contract contains a non-competition clause for a period following the termination of the contract. Such clause is valid only if it is set out in writing for a maximum duration of two years and if the employer undertakes to pay the employee for every month of the validity of the non-competition clause at least 50% of the remuneration he/she last received (sec. 74 of the Commercial Code - *Handelsgesetzbuch).*

12. Restructuring and redundancy

Restructuring and redundancy measures give rise to a large number of issues of employment law, such as with regard to laying off employees and changing the conditions of employment. Within this regard, the Employment Protection Act *(Kündigungsschutzgesetz*, see item 17, “termination of employment”) and the provisions on transfer of employment agreement in the event of transfer of business (see item 2 “business transfers“) play an important role. In addition, the works council has to be consulted before terminations of employment agreements or an operational change of business (*Betriebsänderung*).

As a general rule, the employment contracts as well as the collective bargaining agreements are binding (*Betriebsübergang*). There are only very limited possibilities to adversely change the agreed conditions, e.g. concerning the wage.

13. Secondment of employees and expatriates

Sending employees from Germany abroad gives rise to a whole host of issues under German employment law. Inter alia, the following situations regularly occur:

- **business trips** within the scope of the employment: The employment agreement stays unaffected. The law of posting of workers does not apply.

- **secondment of employees for a short or medium term (up to 1 year);** the employment contract remains unaffected, in addition, a contract of secondment is concluded (decisional authority is retained by the employer, the employee is entitled to his former salary from the employer), for any secondment longer then 1 month the employer has to give to the employee a document which proves that the regulations of the employment contract remain in force *(Nachweisgesetz),*

- **secondment of employees for longer periods** ; original employment is suspended, new contract of employment with the foreign company (decisional authority of the foreign company, foreign salary),

- **transfer**; cancellation of the contract of employment; new contract of employment with the foreign company.

Sending foreign employees from abroad to Germany also will give rise to issues of employment law. The wages and working conditions of posted workers in Germany are protected by the Posted Workers Act (*Arbeitnehmerentsendegesetz, AEntG*), which transposed the Posting of Workers Directive (Directive 96/71/EC) into national law. The Posted Workers Act is applicable to all posted workers in the construction industry, other construction-related services, as well as building cleaning industry. Under the Posted Workers Act, workers posted to Germany are entitled to minimum standards regarding e.g. working time, rest times, paid leave, health and safety, maternity entitlements as well as equal treatment. In addition, the act establishes that post workers should be granted the same minimum collectively agreed upon wages, overtime bonuses as well as the number of holidays and holiday bonuses that have been declared as generally binding by the German Ministry of Labour.

In the case of temporary employees provided by a third party provider, the permanent employment relationship between the agency and the worker is governed by the Act on Temporary Work *(Arbeitnehmerüberlassungsgesetz, AÜG*).

Beyond employment law, posting employees to Germany will give rise to issues of tax, social security and immigration law.

14. Social security

The social insurance system in Germany is financed by contributions to the respective (state-controlled) insurance carrier. Insurance carriers are not public authorities but public corporations with self-administration. This state social insurance is structured in different categories: the statutory pension insurance, the statutory health insurance, statutory accident insurance, compulsory long-term care insurance, as well as the unemployment insurance. The calculation for contributions is calculated based on the gross wages (limited by a contribution ceiling/cap). The social insurances are principally financed equally by employees and employers contributions. All employees are compulsory members of the state social security system. Legal foundation for the social insurance is the Social Security Code (*Sozialgesetzbu*ch).

15. Specifics of German employment law

German employment law is not consolidated in a single employment code. Instead, it is based on the provisions of the German Civil Code *(BGB - Bürgerliches Gesetzbuch)* governing service contracts along with a large number of individual statutes. Collective agreements bind the parties in the same way as statutory provisions. German employment law contains far-reaching rules in the interest of employees such as the *Kündigungsschutzgesetz* which sometimes can make it difficult to end an employment contract with an employee. This includes most prominently the unique German system of employee participation at various corporate levels and also participation via the works council (see item 19 “works council“).

In companies (e.g. the *GmbH* or the *Aktiengesellschaft)* with more than 500 employees one third of the members of the supervisory board are elected by the employees (sec. 1 of the One-Third Participation Act*, Drittbeteiligungsgesetz)*. In companies with more than 2000 employees, employees and shareholders are represented equally in the supervisory board of directors (sec. 1 of the Employees Participation Act – *Mitbestimmungsgesetz).* There are also special provisions for representation in the board of directors (i.e., for the *Geschäftsführung/Vorstand*). Yet another aspect is the workers' participation in companies of the coal, iron and steel industries (Act on Employees' Participation in Corporate Governance in Coal, Iron and Steel Industries, *Montan-Mitbestimmungsgesetz*).

16. Tax matters

Any person residing in Germany or having his/her customary abode there is subject to unlimited tax liability on the income accruing worldwide during the period of tax liability. The income tax rates range from 14% to 45% (for 2011).
Any person not residing in Germany or staying for less than 183 days per year in Germany is subject to limited income tax liability that only accrues on income from German sources. Accrual of employment income is considered to be where the employment is carried out. Where the salary comes from, does not matter. EU nationals who are non-residents may apply to be treated as residents under certain conditions (inter alia if a minimum of 90% of total income is from a German source).
Germany has entered into more than 90 double taxation agreements ("*Doppelbesteuerungsabkommen*") avoiding that the person has to pay taxes both under German and under foreign law.
The tax year is the same as the calendar year. The income is taxed in the year in which the payment or benefit is actually received. At the end of a calendar year, income tax is assessed on the revenues earned by the taxpayer during that year. The assessment procedure is generally prompted by the taxpayer submitting a statement of earnings (tax return) for the year concerned. If you are obliged to fill out tax returns the deadline for filing tax returns for the previous year is in the majority of cases the 31 of May. The deadline for optional tax returns is four years (Art. 169 sec. 2 General Fiscal Law – *Abgabenordnung*). The tax office issues its assessment in a tax notice.

Among others, the following items are taxable:

- income from agriculture and forestry,
- income from trade or business,
- income from independent personal services,
- income from employment,
- income from capital assets and
- rental income.

17. Termination of employment

The statutory or contractual period of notice must be observed in the case of ordinary dismissals, which must always be on permissible grounds (such as the employee's misconduct or redundancy). The statutory notice period is four weeks expiring on the fifteenth or at the end of a calendar month. For service periods of two years or more, this notice period is gradually extended according to the length of service.
(ii) An extraordinary dismissal (without observation of the notice period) requires a serious reason which makes further collaboration for both parties to the end of the regular term of notice impossible.

Any dismissal must be in writing. The employee can, within three weeks after receiving a dismissal notice, file a lawsuit with the labour court for a declaratory judgement, that the employment relationship has not been dissolved by the dismissal (because the dismissal has been unfair or unjustified). If the claim succeeds, the employee can continue employment on the same conditions as before.
There is no legal requirement of a severance payment in the case of justified dismissals. However, in practice, disputes about justification of dismissals are usually settled by severance payments.
(iii) For enterprises with more than ten employees respectively with more than five employees (if the employee began working for this employer before 1 January 2004), the Employment Protection Act *(Kündigungsschutzgesetz*) applies. Dismissals are only justified for:
- Individual circumstances (e.g. a long-term illness without foreseeable recovery)
- Misconduct
- Economic, technical or organisational (ETO) reasons that rule out, that the employee continues to work in the business (enforced redundancy – *betriebsbedingte Kündigung*).

The decision with regard to which employee is dismissed for ETO reasons, must take into account the following social criteria for redundancy *(Sozialauswahl*):
- Length of service

- Age
- Any obligation to support
- Any severe disability.

If an unfair dismissal is proved, employees may claim for reinstatement or they can demand severance pay if certain requirements are satisfied. In addition both the employee and the employer can apply to the Labour Court to dissolve the employment relationship.

The possibility to declare an extraordinary termination of the employment contract shall remain unaffected thereof.

In case of a fixed-term contract it expires automatically with the end of the agreed time. In general in this case the employer is not allowed to terminate the employment contract in an ordinary way.

18. Trade Unions

Trade unions play an important role. Although the number of members has decreased in recent years, still 15% of the German employees are a member of a trade union.

Trade unions are negotiation partners of the employers' association and conclude wage agreements about the general pay scale. Therefore they deal with wage conflicts, if necessary, with the help of strikes and boycotts.

Both parties, which are involved in the collective bargaining – trade unions as well as employers' associations –, enjoy the freedom of association by protection of constitutional law (Art. 9 para. 3 of the German Constitution).

19. Works Council

In companies with at least five permanent employees, who are entitled to vote, a works council may be established (sec. 1 of the Works Council Constitution Act, *Betriebs-verfassungsgesetz*). The employer must accept the works council, which has considerable rights to information, supervision, hearing and co-determination in relation to financial, personnel and social matters within the company.

The works council needs to be duly informed about human resource planning, technical and organisational changes or measures concerning single employees, for example in the hiring procedure or the termination of employment.

The works council may deny its approval concerning restructuring, hiring, grouping / classification of employees or relocation of employees. There is only a certain catalogue of reasons which can be brought forward by the works council in order to deny its approval. In such a case, the denial of the works council can only be overruled by a decision of the labour court.

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