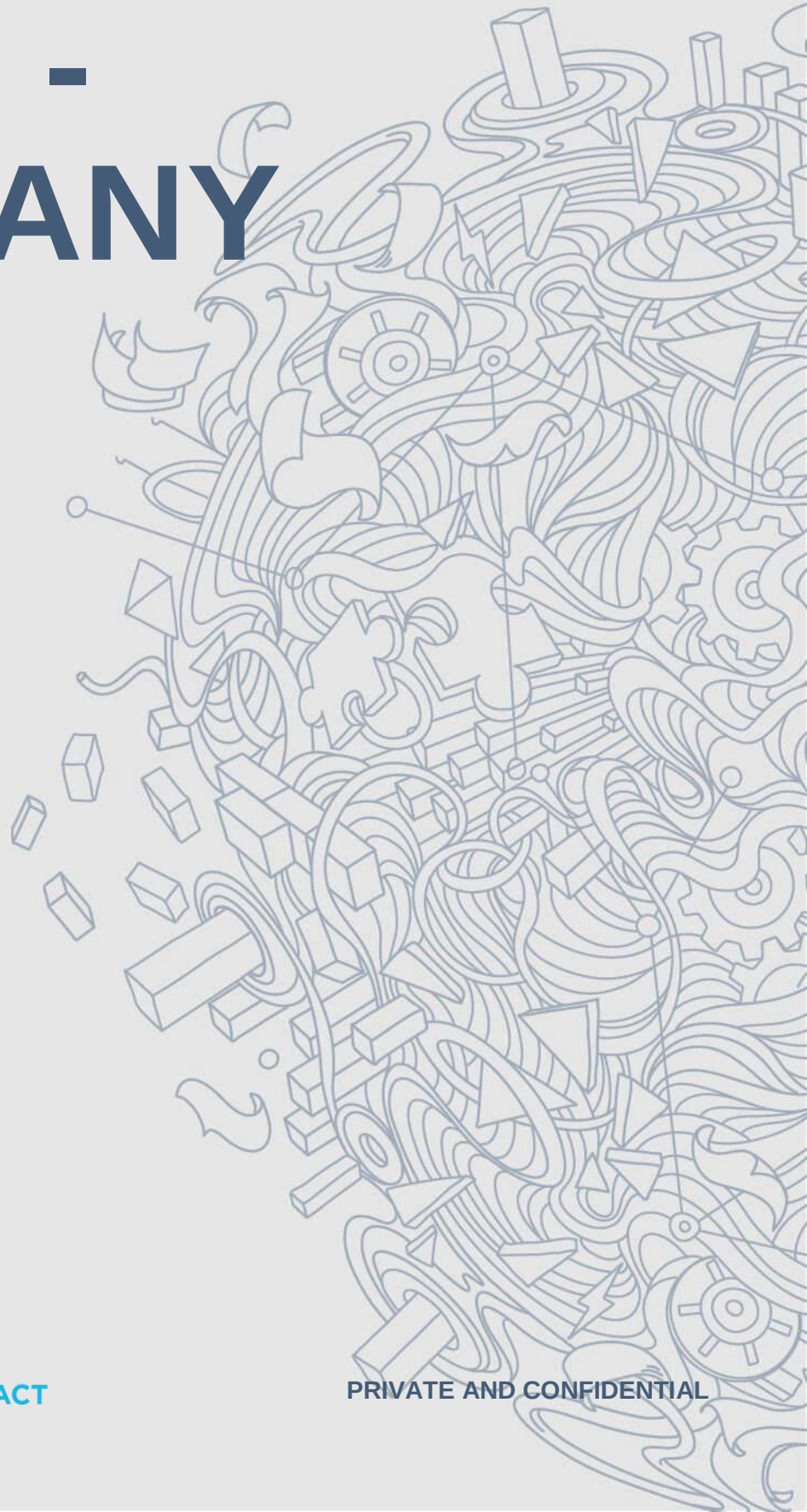
LABOUR AND EMPLOYMENT GUIDE - GERMANY

November 2022



ADDLESHAW GODDARD

MORE IMAGINATION MORE IMPACT

PRIVATE AND CONFIDENTIAL

LEGAL LANDSCAPE OF LABOUR & EMPLOYMENT LAW IN GERMANY

Labour and employment law is not regulated by a single labour code but rather originates from different sources. In addition to comprehensive federal legislation, German labour law is also shaped by case law, collective bargaining agreements (*Tarifverträge*) and/or works agreements (*Betriebsvereinbarungen*), each where applicable, as well as by individual employment contracts and the employer's right to give instructions (*Direktionsrecht*). Furthermore, court rulings and directives on European level have had and will carry on having considerable impact on German labour and employment law.

This overview is designed to line out the cornerstones of German labour and employment law and the challenges to face when employing personnel in Germany.

B. CONTRACTING EMPLOYEES

I. HIRING PROCESS

At all times of employment but already starting when advertising job vacancies and conducting job interviews, employers must observe certain prerequisites of the German Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*). This means that promoting a job offer needs to be done with no discrimination based on, for example, sex, age or ethnic origin and must clearly be linked to objective hiring criteria to avoid any legal actions for damage claims by rejected candidates at a later point in time.

Furthermore, employers must take caution when interviewing candidates since the limits to questions to be asked of the employee are fairly narrow. In essence, the employer may only obtain information directly linked to the employee's future tasks and responsibilities. For example, the employer may ask about relevant qualifications and experience. On the other hand, questions relating to pregnancy, age, ethnic origin, sexual identity, religion, trade union affiliation or disability are basically not allowed during a job interview.

Only permissible in exceptional cases (e.g. where required by statutory law) are the requests for the employee to provide criminal record certificates or certificates of health.

II. EMPLOYMENT CONTRACT ESSENTIALS

Offer letters as commonly used in other jurisdictions are not market practice and generally not recommended in Germany as such offer letters might already establish an employment relationship.

According to statutory law, employers must provide employees with their respective employment's essential working conditions in writing (i.e. signed in original wet-ink). Employers must make sure to provide employees with written evidence of certain working conditions already on day one of the employment (name and address of the contracting parties, remuneration elements and working time). Within seven days from the beginning of the employment, employers need to provide written evidence of further working conditions (e.g. commencement date of employment, place of work, job title, duration of agreed probationary period). Even further evidence is to be provided at latest within one month from the beginning of the employment (e.g. annual leave entitlement, information on procedure in case of termination). However, in practice, this is typically complied with all at once by entering into written employment contracts containing the respectively necessary information with employees. Employees who were in employment relationships already prior to 1 August 2022 are entitled to demand such written evidence of their working conditions within a short timeframe of seven days. Non-compliance with the aforementioned obligations can result in administrative fines of up to EUR 2,000 – for every breach and every employee.

Written employment contracts allow for deviations from (employee friendly) employment law to a certain extent. The concept of policies unilaterally set by employers is rather unknown in Germany, hence employment contracts in practice also include the employee's main statutory duties. Where clauses in employment contracts deviate from statutory law, special care needs to be taken as to drafting the details of the clause since clauses are deemed invalid if not compliant with general terms and conditions (*Allgemeine Geschäftsbedingungen*) provisions as detailed by case law.

As far as the employer wants to agree on a fixed-term employment or use a retirement clause ending the employment relationship upon the individual statutory retirement age of the employee, this employment contract and especially the clause regulating the respective topic need to be signed in original (wet-ink signature) by both parties prior to the start of the term and the employee actually taking up work to be concluded as a valid fixed-term employment. Fixed-term employment contracts may be entered into either if an objective reason is given (e.g. substitution of a member of staff taking parental leave) or, often used in practice because no such reason exists, for hires for a maximum of, as a rule, two years but only if the respective employee has not been previously employed by the contracting employer.

1 Remuneration

Generally, remuneration can be negotiated freely, as long as no collective bargaining agreement (some of them are generally binding for all employers of a specific branch (*Allgemeinverbindlichkeit*)) stipulates otherwise. However, the employer must ensure compliance with the German Act on Minimum Wage (*Mindestlohngesetz*) which obligates every employer of every sector to pay its employees an hourly wage in the amount of at least EUR 12.00 from October 2022 (subject to further increases in future). There are statutory exceptions, e.g. for trainees under specific circumstances. For certain branches of business, minimum wage is often increased through collective bargaining agreements, such as manufacturing, construction or nursing business. Further, the German Transparency in Wage Structures Act (*Entgelttransparenzgesetz*) sets up a legal basis to avoid an unequal payment of male and female employees for equal or comparable work.

2 Working time

The statutory maximum working time is 8 hours per day from Monday to Saturday. Working on Sundays and public holidays is generally forbidden, unless explicitly permitted by law. The statutory maximum weekly working time is 48 hours even if 40 or, if a collective bargaining agreement applies, the lower number stipulated therein are understood to be “full time work” as employees mostly have a five-day working week. The regular daily working time may be extended to up to 10 hours, provided that on average 8 hours per working day are not exceeded within a reference period of 6 months or 24 weeks. An uninterrupted rest period of 11 hours after daily work must be guaranteed. There are no opting-out provisions under the applicable German Working Time Act (*Arbeitszeitgesetz*). These limitations do not apply for board members, managing directors (*Geschäftsführer*) and executive employees (*leitende Angestellte*).

Overtime pay and overtime surcharges are not expressly regulated by law but are subject to individual employment contracts, collective bargaining or works agreements. It needs to be observed that as of 1 August 2022, employers are obligated to provide evidence on the employee’s remuneration which includes also the amount and calculation modalities of overtime-payment. For regular employees, it is only permissible in narrow limits to deem overtime compensated by their fixed remuneration, e.g. it is possible to contractually agree that overtime of 10-20 % of the regular working time shall be deemed compensated by the regular remuneration. For employees with an earning higher than the current contribution assessment ceiling in the statutory pension insurance (*Beitragsbemessungsgrenze in der gesetzlichen Rentenversicherung*) it can be agreed that overtime is paid with the fixed salary. Overtime of board members and managing directors is viewed as to generally be incorporated into their contractually agreed remuneration.

3 Holidays

Employees are entitled to a minimum paid vacation of 20 working days in case of a five-day working week, as long as no collective bargaining agreement provides differently. Severely disabled employees are entitled to additional five days' paid vacation per year (on the basis of a five-day working week). This statutory minimum vacation entitlement has to be understood as in addition to public holidays, the number of which varies from nine to 13 days per year, depending on the federal state where the employee works. Public holidays are paid as well. It is market practice to contractually grant an additional vacation entitlement of up to 10 days. Given the detailed case law on this topic, employers often make use of the permitted deviations from statutory vacation law in their favour in view of the additional vacation entitlements contractually granted.

4 Other time off (sickness, maternity and parental leave)

In the event of inability to work due to sickness, pursuant to the German Continued Remuneration Act (*Entgeltfortzahlungsgesetz*) employees are entitled to continuous remuneration for a period of six weeks to be paid by the employer. All employers with no more than 30 employees (not headcount but rather number of full-time employees relevant) can claim reimbursement of up to 80 % of such costs from the respective employee’s statutory health insurance due to a mandatory insurance, so-called U1 system (*Umlageverfahren 1*) to which these employers have to contribute. Employees are obliged to submit a medical certificate for any inability to work which lasts more than three calendar days. However, an employer may ask for such certificate to be submitted from the first day of the employee’s absence from work. Sick pay is payable only to employees who have completed at least four weeks of service with their employer. 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 unable to work due to sickness, employees who are member of the statutory health insurance are entitled to sick pay (*Krankengeld*) from their health insurance provider for a maximum period of 72 additional weeks (deviations for employees who opted for private health insurance may apply). This sick pay amounts to 70 % of the employee's gross remuneration, but not more than 90 % of the employee's net pay, in each case limited to the respectively applicable contribution assessment ceiling in the statutory health insurance (EUR 58,050.00 (annual gross) in 2022).

Maternity leave commences six weeks prior to expected childbirth and ends eight weeks after childbirth (12 weeks in the case of multiple births or pre-term 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. However, all employers can claim for full reimbursement of such costs from the statutory health insurance due to a mandatory insurance, so-called U2 system (*Umlageverfahren 2*) to which the employer has to contribute.

Parental leave may be taken if employees care for their child. Parental leave can in principle 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 prior to his or her eighth birthday. Parental leave is unpaid by the employer; however, a government benefit up to EUR 1,800 is available to employees for a maximum period of 12 or 14 months (if both parents take parental leave or for single parents) or at a reduced rate for twice the applicable maximum period. Also, employees are entitled to work a monthly average of up to 32 hours per week during parental leave. If the child to be cared for was born before 1 September 2021, the entitlement to work during parental leave is limited to a monthly average of 30 hours per week. Further, employers have to make the employee's position available for the employee upon her or his return to work or to allow the employee to return to a comparable new position suitable for the skills of the employee concerned.

5 Social security and income tax

The majority of employees in Germany is subject to the statutory social insurance system (i.e. protection against income-decreasing disability and insurance for old-age pension, unemployment, sickness and nursing). The employer is required to register its employees with the employees' respective statutory health insurance provider (deviations in case the employee is privately health insured) upon the employee taking up work. Conversely, the employer has to deregister its employees when they cease employment. The employer and the employee pay contributions to the social insurance system equally, each determined depending on the respective employees' gross remuneration limited by the division-specific contribution assessment threshold. The social insurance contributions are paid out by the employer to the health insurance scheme for both parties.

	CONTRIBUTION ASSESSMENT THRESHOLD (*BEITRAGSBEMESSUNGSGRENZE*)	EMPLOYER'S CONTRIBUTION	EMPLOYEE'S CONTRIBUTION
Pension Insurance 18.6 % shared equally	EUR 7,050 (West) EUR 6,750 (East)	Up to EUR 655.65 (West) Up to EUR 627.75 (East)	Up to EUR 655.65 (West) Up to EUR 627.75 (East)
Unemployment Insurance 2.4 % shared equally	EUR 7,050 (West) EUR 6,750 (East)	Up to EUR 84.60 (West) Up to EUR 81.00 (East)	Up to EUR 84.60 (West) Up to EUR 81.00 (East)
Health Insurance 14,6 % plus individual additional contribution depending on health insurance provider (current average 1.3 %), both shared equally	EUR 4,837.50 (West & East)	Up to EUR 353.14 plus equal share of individual additional contribution	Up to EUR 353.14 plus equal share of individual additional contribution
Long-term care 3.05 % shared equally (exception for Saxony, where the employer only pays 1.025 %)	EUR 4,837.50 (West & East)	Up to EUR 73.77	Up to EUR 73.77 + 0.35 % if older than 23 and childless

(All data in this table refers to the status as of 1 January 2022.)

Please note that employees have a claim against their employer to implement and administrate an occupational pension scheme in which they may accrue pension entitlements through deferred compensation (*Entgeltumwandlung*) which in turn is tax-free up to 4 % of the current contribution assessment threshold in the statutory pension insurance. Since 2019, employers have to contribute a lump-sum of 15 % of the deferred amount as an employer subsidy to the employee's pension contribution if social contribution payments are saved.

Income tax is calculated upon and deducted from the employee's gross salary and paid by the employer to the tax authorities on behalf of the employee. However, the employee remains the legal debtor of the respective income tax payments.

6 Occupational Health and Safety

German labour law provides for detailed regulations on health and safety standards at the workplace which public as well as private employers must comply with. These regulations are predominantly set out by the German Occupational Health and Safety Act (*Arbeitsschutzgesetz*). According to these regulations, employers must ensure appropriate measures to protect their employees from any hazardous employment conditions and maintain continuous supervision and analysis of possible health hazards within the workplace. The competent authority (e.g. trade supervisory authorities, offices for occupational health and safety or the district governments, each depending on the federal state the respective establishment is located in) is responsible for monitoring employers' compliance with statutory occupational health and safety provisions. The respective public authority has the right to enter and inspect establishments, demand access to information and documentation regarding occupational health and safety measures as well as examine those measures in place.

Where a works council is established, it may assert certain co-determination, information and inspection rights within the scope of occupational health and safety. Further, in establishments with more than 20 regular employees, a so-called health and safety committee (*Arbeitsschutzausschuss*) must be set up, which must meet at least every three months to discuss health and safety matters. Depending on the branch and site of the business, employers may be obliged to appoint a safety specialist (*Fachkraft für Arbeitssicherheit*).

Furthermore, the employer must provide occupational accident insurance (*Unfallversicherung*) as part of the mandatory social insurance scheme for e.g. accidents involving employees in the workplace, occupational diseases as well as accidents on the ways from and to work. Contributions to the occupational accident insurance are to be borne solely by the employer and depend on several criteria such as previous expenses for damages in the past or the level of risk in the respective industry.

7 (Post-contractual) non-compete restrictions

Employees are generally subject to a statutory duty not to compete during the course of the employment relationship.

Any post-contractual non-compete restrictions must be agreed upon in writing and must provide for certain minimum payments to be made (essentially 50 % of the overall remuneration formerly received) throughout the period of the restriction. The limitations as to scoping require diligent drafting of respective clauses as they are only valid and enforceable if their geographic and content scope are deemed reasonable (therefore usually not valid globally) and period does not exceed two years. Employers may waive the post-contractual non-compete restrictions by written declaration before the termination of the employment relationship with the effect that he shall be released from the obligation to pay the compensation upon the expiry of one year from the declaration only. Due to the associated costs and strict prerequisites for post-contractual restrictive covenants, they are not market standard in all employee groups but are rather only agreed with specific groups of employees, e.g. key sales employees whose departure poses a risk of damage to the employer's business.

Non-solicitation clauses either with respect to clients, customers or employees of the former employer may be agreed upon within slightly wider limits.

III. SHORT-TIME WORK

For times during which companies experience a temporary loss of workload and want to reduce the working time of their employees, German labour law provides for the instrument of so-called short-time work (*Kurzarbeit*). In this instance and based on either collective bargaining agreements, works agreements or individual contracts with the employees, employers, under certain conditions, may reduce the contractual working time even until zero. Correspondingly, the employer may apply to the Federal Labour Agency (*Bundesagentur für Arbeit*) for the payment of short-time work allowance (*Kurzarbeitergeld*) to cover the employees' loss of remuneration due to the decreased working hours. The short-time work allowance regularly amounts to 60 % (67 % in case of dependent children) of the difference amount between the contractually agreed upon net remuneration versus the actual net remuneration. To comply with the statutory requirements for applying for short-time work allowance, the loss of workload has to be due to economic reasons or based on force majeure, be of only temporary and unavoidable nature and affect at least one third of the employer's work force. Short-time work allowances are regularly paid for a maximum period of 12 consecutive months.

However, in the event of economic crises (e.g. the COVID-19 pandemic), the legislator will adjust the aforementioned conditions, such as the amount and duration of short-time work allowance or prerequisites for becoming eligible to apply for short-time allowances, at short notice.

IV. ENDING EMPLOYMENT RELATIONSHIPS / SEVERANCE PAYMENTS

In contrast to other jurisdictions, German labour and employment law provides for a considerable protection of employment through statutory law as well as through regulations within e.g. collective bargaining agreements. To terminate employment relationships in a legally effective way, employers need to observe a variety of provisions.

Employment contracts need to be ended through a written notice (wet-ink signature required) of termination signed by a duly authorised representative of the employer (e.g. managing director with sole power of representation or duly authorised head of HR). The employer must ensure to obtain proof of receipt by the employee.

Further, statutory or contractually agreed notice periods must be observed when issuing a notice of termination. If statutory rules apply, notice periods vary between four weeks to the 15th or end of the month up to seven months to the end of the month, each depending on the affected employee's length of service.

The German Protection against Unfair Dismissal Act (*Kündigungsschutzgesetz*) is in general applicable to all establishments of a company with more than ten regular full time employees and to the individual employee after six months of employment. If the aforementioned statute is applicable, an employment relationship can only be terminated if there is either (i) gross misconduct (e.g. theft) in which case the employer can terminate the employee even without notice (*fristlose Kündigung aus wichtigem Grund*), provided the termination notice is issued to the employee within two weeks following the employer's first knowledge of the facts justifying the termination or (ii) one of the following reasons such as repeated misconduct (subject to a previous final warning (*Abmahnung*)), personal reasons (e.g. drug addiction) or operational reasons (e.g. restructuring of positions) exist in which case the employee can be terminated but only while adhering to the individual notice period for such termination.

Even if there is no statutory provision commanding a severance payment in case of a termination, it is common practice in Germany (due to the considerable legal hurdles of such dismissals) that employers either offer their employees termination agreements to end the respective employment relationships against payment of severance to be negotiated therein or conclude court settlements compromising on severance payments following a notice of termination and a subsequent unfair dismissal claim by the employee concerned. The individual severance is not regulated by law but rather subject to negotiation between the parties concerned. However, the German market practice is to negotiate a factor of monthly salaries multiplied with the company seniority which can be taken as a guideline for employers when calculating severance payments. Nevertheless, the factor/the final amount of severance payment will finally depend on the various aspects of the individual case at hand (age and company seniority of the employee, chances on the job market) and in particular the chances of success of the unfair dismissal claim in court.

Under certain circumstances, employees may also be entitled to special protection against dismissal. For example, severely disabled employees may be dismissed only after prior approval by the integration office. The dismissal of a female employee is prohibited during pregnancy and a 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 from receipt of the notice by the employee. Similar protection exists for employees on parental leave, nursing care leave, or family care leave as such terminations require prior consent of the competent public authority. Works council members or candidates in the course of an election to the works council are protected from dismissal as well as throughout their period of membership or candidacy, and for one year thereafter. Special protection also applies to the company´s data protection officer.

V. MASS-LAYOFFS

In cases where larger numbers of employees have to be given notice due to redundancy, employers have to meet special prerequisites to be able to effectively terminate the respective employment relationships.

Where a certain percentage of the entire regular staff is being terminated (either by being given notice, entering into a termination agreement or otherwise initiated by the employer), the employer has to file a so-called mass dismissal notice (*Massenentlassungsanzeige*) with the competent labour office prior to terminating the employment relationships. In establishments with works councils, this mass dismissal notice must be discussed with the works council two weeks prior to filing the application with the labour office within the consultation procedure (*Konsultationsverfahren*). The works council may, in this instance, give its opinion on the intended mass dismissal within the aforementioned two-week period. However, if the works council does not give an opinion or objects to the mass dismissal, this will not result in the inadmissibility of the mass dismissal application which the employer may file irrespective of the works council's reply. Non-compliance or incorrect application of the mass dismissal notice make all related terminations legally invalid.

Further, employers with an established works council and more than 20 regular employees may be required to consult with it on a change of the operations (*Betriebsänderung*), if the structural change (e.g. shut-down of the business) might trigger significant (potential) disadvantages for the workforce of the affected establishment. In this instance, the employer and the works council have to enter into negotiations and have to try and agree on a reconciliation of interests (*Interessenausgleich*) governing the

steps to be taken within the intended change of operations. Furthermore, the parties need to agree on a social plan (*Sozialplan*) compensating the affected employees for their disadvantages due to the change of operations (e.g. by providing for severance payments). Even if the works council is essentially not able to hinder the measures intended by the employer, the works council is in a position to delay the process and to significantly increase the employment costs of such a measure.

VI. TRANSACTIONS / TRANSFERS OF UNDERTAKING ("GERMAN TUPE")

Where establishments (*Betriebe*) or separable parts of such establishments (*Betriebsteile*) are being transferred by means of selling all or the essential tangible and/or intangible assets, this regularly constitutes a so-called transfer of undertaking (*Betriebsübergang*). In course of such transfer of undertaking, all existing employment relationships are being automatically transferred to the new owner of the assets. However, this generally does not apply to contracts with company representatives such as managing directors or board members.

Within such transfer of undertaking, in principle, collective bargaining agreements and works agreements remain in place (on an individual or collective level) but can also be amended or replaced by existing collective agreements at the new employer, each depending on the individual case at hand. Moreover, the transfer of undertaking may also impact the works council up to it being exchanged with a works council in place at the new employer. However, the precise consequences for works councils are diverse and will depend on the individual scenario.

Furthermore, the transfer of undertaking arises the (joint) duty of the old and the new employer to duly inform the employees affected in writing and before the transfer of undertaking takes place about certain details of the intended transfer, such as the planned date of the transfer, its reason, the legal, economic and social implications arising for the employees as well as any measures intended alongside this transfer of business (e.g. restructuring measures leading to dismissals by the new employer). This so-called information letter (*Unterrichtungsschreiben*) must be written in a comprehensible and correct manner and inform the employees on their right to object to the transfer of their employment to the new employer within one month from receipt of the information letter. If the employees object to this transfer, their employment contract will stay in place with their old employer. In case the information letter is incorrect, the aforementioned objection period is not set in motion, hence making it possible for employees to object to the transfer of their employment even months or years after the transfer of undertaking, e.g. in situations in which the new employer wants to terminate the employment contract the employee may object to the transfer simultaneously claiming employment with his former employer. Therefore, complying with the prerequisites of a formally correct information letter is a key element when conducting any measures triggering transfers of undertaking.

Generally, such transfers of undertaking do not comprise any obligations for the employer vis-à-vis the works council in terms of information or co-determination. However, if established, an economic committee in place would have to be informed of the intended asset deal. Further, in case a change of operations is triggered due to the transfer of undertaking, mandatory negotiations on a reconciliation of interests as well as the agreement on a social plan become generally mandatory.

Conversely, sole share deals typically do not trigger such transfers of business nor do they generate any informational duties for the employer towards its employees or make negotiations on reconciliations of interests or the agreement on a social plan with an existing works council necessary. However, an existing economic committee or, if not established, the works council must be informed of the details concerning the intended direct share deal if at least 30 % of the company's voting shares are acquired, e.g. name of potential purchaser, its intentions regarding the future business activities and their consequences for the employees.

C. THIRD-PARTY CONTRACTORS

Other than engaging employees in the aforementioned sense, companies may also deploy independent contractors/freelancers (*freie Mitarbeiter*) or temporary workers (*Leiharbeitnehmer*) in order to save personnel costs and to be more flexible, e.g. to handle peaks in production.

In contrast to employees, freelancers work independently on the basis of service agreements and do not enjoy the same level of economic and social protection as regular employees do. Freelancers are typically distinguished from employees by certain criteria, e.g. freelancers are not integrated into the employer's operational organisation, they do not receive work instructions prior to taking up their work and solely bear the risk of their entrepreneurial undertaking. However, according to comprehensive case law, freelancers are often misclassified and turn out to really be (dependent) employees for whom, in such a scenario, not only social insurance contributions would have to be paid retroactively, but also special employment protection laws (such as dismissal protection) apply. As per this backdrop, contracting freelancers often exposes companies to significant (financial) risks which is why it is recommended to not hire any freelancers without detailed legal assessment of its feasibility.

Within fairly strict limitations, employers may also engage temporary workers by means of labour lease (*Arbeitnehmerüberlassung*); even further restrictions apply for the construction business. Temporary workers may be leased to the lessee (*Entleiher*) only by an officially recognised lessor (*Verleiher*) who must obtain a lease permit from the Federal Labour

Agency prior to leasing employees to the lessee. Further, temporary workers may only be engaged for a maximum time limit of 18 months by the same lessee and, in general, shall receive equal pay and equal treatment as compared to the permanent staff of the lessee. However, collective bargaining agreements may provide for certain regulations deviating from the aforementioned statutory rules, e.g. they may stipulate a prolongation of the maximum term of the engagement of temporary workers. During the term of the lease, agency workers are represented by the lessee's works council and, in principle, count as its employees when determining meeting respective thresholds for works council rights or co-determination on a corporate level.

D. EMPLOYEE REPRESENTATIVES

I. TRADE UNIONS / INDUSTRIAL ACTIONS

Less than one fifth of German employees are members of trade unions (*Gewerkschaften*). They are generally established for different branches of businesses, e.g. manufacturing, construction, public transport or the public sector. Trade unions typically deal with employers' associations (*Arbeitgeberverbände*) as well as individual employers and enter into collective bargaining agreements (*Tarifverträge*). The right to forming or being member of such collective labour organisations is constitutionally guaranteed, as is the right to refrain from doing so.

Collective bargaining agreements generally regulate the key terms and conditions for employment relationships within their respective branches of businesses, especially remuneration models. The regulations therein apply only if either both the employer and the employee are tariff-bound (*tarifgebunden*, e.g. due to membership in the respective trade union and employers' association) or if the employment contract provides for so-called reference clauses (*Bezugnahmeklauseln*) incorporating the respective collective bargaining agreement's provisions into the employment contract. The latter is fairly common within the aforementioned branches of businesses thereby significantly increasing the number of employees whose working conditions are regulated by collective bargaining agreements.

For the trade unions to be able to effectively negotiate such key working conditions and enter into respective collective bargaining agreements, the main tool to put pressure on the employers' side is the employees' constitutional right to take industrial action (*Arbeitskampf*). An industrial action is subject to certain requirements to be legally permissible. For example, during the periods of collective bargaining agreements, there is a general peace obligation preventing the involved trade unions from taking industrial action. However, the employer does not have to accept the consequences of an industrial action-related business disruption directed against him and can, in turn, try to limit the consequences of the industrial action-related stoppage by taking countermeasures. The classic means of employer action is suing the trade union for injunctive relief by arguing that the industrial action is unlawful (e.g. during periods of peace obligations). Also, employers may decide on a so-called lockout (*Aussperrung*). This is understood to mean the planned lockout of several employees by one or more employers, refusing to continue to pay wages in order to achieve a specific goal, which regularly involves shortening an industrial action by increasing the economic burden on the employees' side.

II. WORKS COUNCILS

In establishments with more than five regular employees, a works council (*Betriebsrat*) can be elected at the free discretion of the workforce. Works councils have extensive rights to information, consultation and/or mandatory co-determination in respect of most organisational matters. In companies with more than 20 employees in Germany, works councils also have the right to be consulted on decisions regarding individual personnel matters (such as the recruitment or transfer or an employee, dismissal and redundancies). In addition, and irrespective of the size of the establishment, the works council has to consent on some general personnel matters (such as selection criteria or evaluation principles) and must be consulted prior to any dismissal. The works council regularly meets with the employer.

Actions taken by the employer violating the works council's rights may be legally invalid and can be punished by imposing fines on the employer for each incident of violation. Where the works council and the employer are in dispute on a matter on which the works council has a right of co-determination and if they fail to reach an agreement, both parties may call for a conciliation committee (*Einigungsstelle*) to be established in order to resolve the issue. The conciliation committee is empowered by law to render a final and binding decision.

Furthermore, in companies with more than 100 regular employees, an economic committee (*Wirtschaftsausschuss*) is to be established through election among the works council. Its function comprises regular consultations of economic matters with the employer.

Where establishments employ more than 5 disabled persons or disabled persons with equivalent status not only on a short-term basis, a representation body for disabled employees (*Schwerbehindertenvertretung*) may be constituted. This body has to be informed of all measures affecting disabled employees prior to their respective implementation. A dismissal of a disabled employee without hearing the representation body for disabled employees first is ineffective.

III. SUPERVISORY BOARDS AND EMPLOYEE PARTICIPATION

Within companies with regularly more than 500 employees, supervisory boards with one-third members elected by and from the workforce may need to be established according to the German One-Third Participation Act (*Drittelbeteiligungsgesetz*). Moreover, in companies with more than 2,000 regularly employed staff, supervisory boards are to be established and shall comprise half of their members elected by and from the workforce according to the German Co-Determination Act (*Mitbestimmungsgesetz*). As required by law, the chairman of these supervisory boards is nominated from the employer's side and has the casting vote, so final control is placed on the employer's side.

E. EMPLOYING FOREIGN NATIONALS

As far as non-German nationals shall be employed, employers need to observe that certain immigration steps and criteria are met before the employee actually takes up work in Germany.

As a rule, all non-EU/EEA-nationals who want to enter and work in Germany need to apply for a respective visa before entering Germany for the first time. If necessary to enter Germany, such visas will be issued by German embassies abroad. However, there are exceptions to this rule, inter alia for UK, US, Canadian, Australian, Israeli, Japanese or Swiss nationals who may enter German territory without firstly having to obtain a respective visa; the maximum duration for such visa-free visits amounts to 90 days within a 180-day period.

If not already obtained abroad at the German embassy, once in Germany, non-EU/EEA-nationals subject to visa requirements will have to apply for a residency permit (*Aufenthaltstitel*) with the local public office for foreigners (*Ausländerbehörde*). After obtaining approval of their applications, the respective visa will be transformed into a residency permit which, if granted, simultaneously authorises the individual to take up work in Germany through the incorporated work permit therein. If all documentation is gathered and in order, the application process for such residency permits will take up to 4-8 weeks.

Even though all non-EU/EEA-nationals generally require such a residency and work permit to perform gainful employment in Germany, there is a limited catalogue of activities which are permitted to be carried out in Germany without such residency and work permit, e.g. activities of managing directors of a company, attending business meetings or performing certain installation works. The assessment of whether such exceptions apply will always need to be carried out on a case-by-case basis.

Should no such exception apply, non-EU/EEA-nationals will need to fulfil certain criteria in order to be eligible for a residency and work permit. Individuals will generally be able to apply for such a residency permit if (i) they are highly qualified or have a non-vocational qualification if there is a shortage of skilled workers in the profession to be practised in Germany, (ii) there is a specific job offer on the table and (iii) the education is recognised as equal to a German degree.

Highly educated non-EU/EEA nationals with university degrees (or a comparable degree) and professional experience also have the option to apply for a so-called EU Blue Card allowing them to stay and work in Germany for up to 4 years (prolongation optional). To fulfil the requirements, these individuals need to not only present their respective university degree, but also need to provide documentation on a specified job offer or contract with an annual gross salary of at least EUR 56,400 (in 2022). This threshold is lowered to EUR 43,992 (in 2022) if the applicant's profession lies within the fields of mathematics, engineering, natural sciences, technics or medicine.

Moreover, through implementing the European ICT Directive through federal law, intra-corporate transfers were made easier beginning 1 August 2019. According to this legislation, non-EU nationals become eligible to apply for a new residency permit called ICT Card which provides the permission to work for a German group entity for up to three years if posted from a group entity outside EU territory.

CONTACTS

DR. MARTIN LÜDERITZ

Partner
M: +49 (0) 151 544 13 160
D: +49 (0)40 87 4060 25
Martin.Luederitz@aglaw.com

Martin is the head of the German labour & employment team and advises national and international companies on all aspects of individual and collective labour law.

He is a specialised attorney for Labour Law and has been advising clients in employment law for more than 15 years.

JENS PETERS LL.M. (STELLENBOSCH UNIVERSITY)

Counsel
M: +49 (0) 160 294 9919
D: +49 (0)40 87 4060 20
Jens.Peters@aglaw.com

Jens is an employment law specialist and advises medium sized and large national and international companies on all issues relating to individual and collective labour law and occupational pension schemes.

He works across all sectors, but has a particular experience in the automotive, pharmaceutical and food industry. His experience includes several years working for Magic Circle law firm where he advised national and international listed clients.

DR. ELISABETH SECHTEM

Managing Associate
M: +49 (0) 162 137 9781
D: +49 (0)40 87 4060 29
elisabeth.sechtem@aglaw.com

Elisabeth is a lawyer specialised in German labour and employment law. She is experienced in advising national and international clients in all matters of individual and collective labour law issues as well as occupational pension schemes.

Elisabeth’s main fields of expertise lie within legal advice on employment and pension related questions in context with M&A processes as well as restructurings.

OUR TEAM

Our employment team in Germany has a nationally and internationally recognised reputation for all aspects of labour and employment law. We are deeply rooted in the German market, combining local market knowledge with international expertise for clients with business across the globe. They have long-time specialist experience in handling complex and sensitive matters, which are of high value or have the potential to affect reputation of clients. Working closely together with our other lawyers in Germany, in particular with Corporate and Commercial, M&A, Data Protection, IP and Competition, we can provide a one-stop offering for any labour and employment related query.

We are not only international in terms of the clients we work with, but also have excellent teams in the UK, continental Europe, Asia and GCC to call upon to provide co-ordinated local market knowledge and maintain high quality cross-border. Where we do not have offices, we engage with leading employment lawyers from across our global preferred firm network with whom we have cultivated long-lasting relationships.

We are able to support clients across a wide range of sectors including Automotive, Digital, Financial Services, Health, Industrials, IT, Real Estate, Retail & Consumer and Transport.

OUR APPROACH

We are known for offering a compelling combination of value and expertise. Our approach is to develop an insight into client organisations, what they value and their strategic and cultural approach to people issues in order to serve our clients best. We never sit on the fence and always give a view on what we believe to be the right approach for your business. We give high quality practical advice, suitable for the business needs of each individual client.

OUR EXPERTISE

Our strength is in the breadth of our experience and coverage while maintaining high quality advice, which spans:

- Service agreements with board of directors and/or managing directors including post contractual non-competition clauses and complex incentive schemes, employment contracts with key employees and other white and blue collar employees
- Restructurings including mass redundancies
- Employment Litigation, in particular in response to unfair dismissal claims
- Pre and post transactional labour and employment issues in the M&A context
- Transfer of undertakings ("TUPE")
- Employee Incentives
- Negotiation with works councils on reconciliation of interests, social plans and tariff agreements
- Co-ordination of cross-border employment projects
- Business immigration questions and social security implications
- Pension schemes, incentive plans and Employee Stock Option Plans (ESOP)

We also offer an extensive range of value-add services, including but not limited to legal training for in-house legal and HR teams and line managers and tailor made employment updates.

MORE IMAGINATION **MORE IMPACT**

addleshawgoddard.com