



# Navigating through the Challenging German Employment Law Framework for Japanese Companies Doing Business in Germany

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# Program



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2. The Employee
3. Overview on German social security system
4. Dismissal of employees
5. Managerial authority
6. Modification of working conditions
7. German anti-discrimination law
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1. Employment law in  
Germany – General facts



## Employment law in Germany – General facts



- Complex area of law, expert knowledge required
- Constant modifications through Labor Court rulings
- Employer may have to deal with unions and works councils
- Labor law disputes are numerous and common
- 500,000 claims per year filed before German Labor Courts
- Employer's mistakes can be costly
- German law has influenced Japanese employment law

# Employment law in Germany – General facts (cont'd)



## **Most frequent employment disputes in Germany**

- Claims for unlawful dismissal (approx. 250,000/year)
- Bonus/payment claims
- Claims regarding reference letters
- Claims regarding holiday
- Disputes with the works councils

# Employment law in Germany – General facts (cont'd)



## Similarities between Japanese and German law

- Employees are protected against dismissal – no employment at will
- High social protection of employees (maternity leave, etc.)
- Employee representatives have important role
- Courts further develop employment law
- Law does not regulate severance amounts

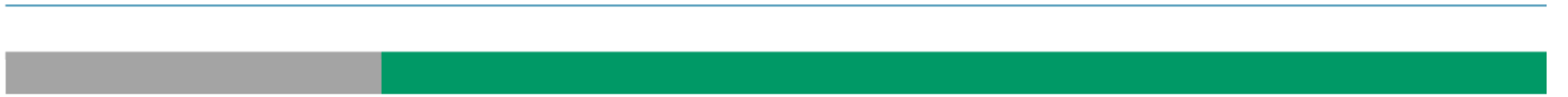
# Employment law in Germany – General facts (cont'd)



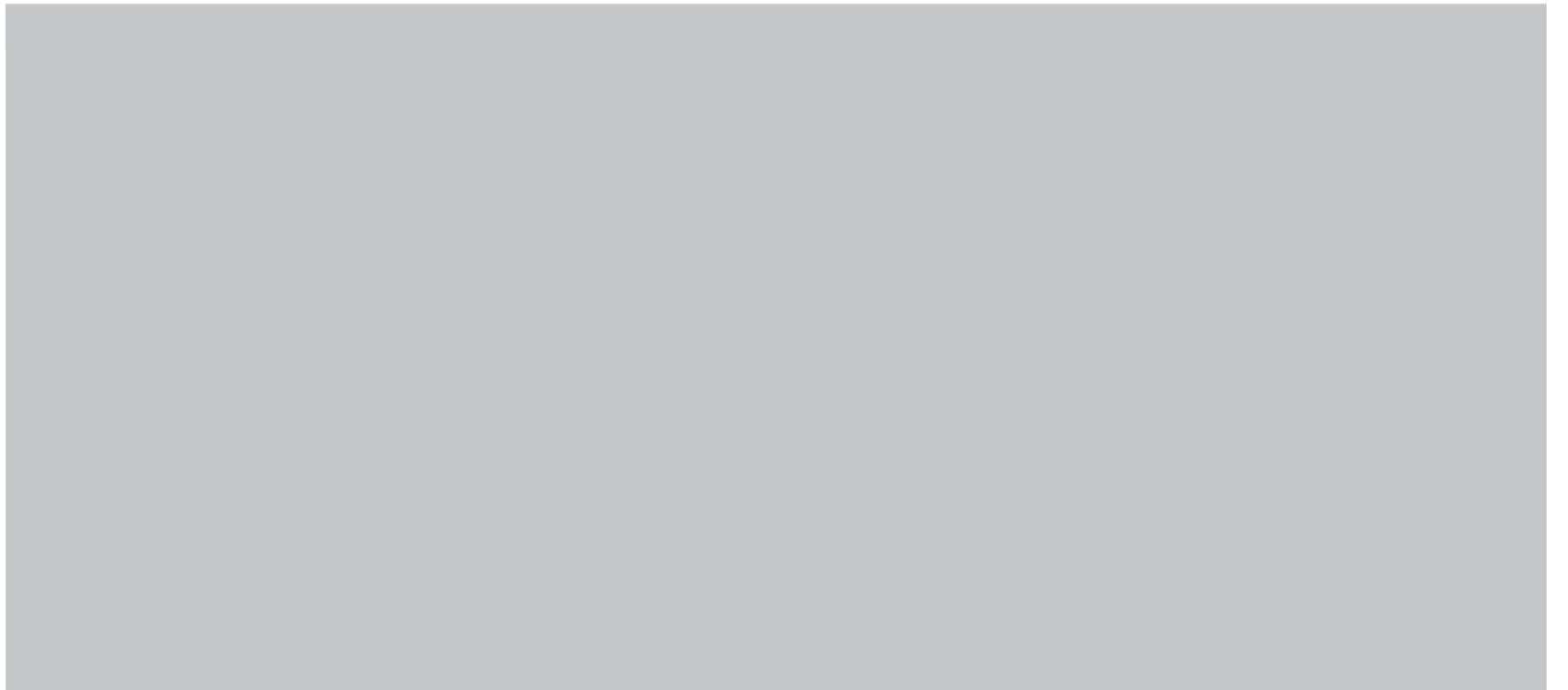
## Differences between Japanese and German law



<b>Japan</b>	<b>Germany</b>
-rather short employment contracts	-elaborated employment contracts
-dismissals are last resort, can damage company reputation	-dismissals are frequent and accepted as normal business
-no Labor Courts, number of cases at the labor tribunals of ordinary courts on a rise	-numerous claims before Labor Courts
-short notice periods	-rather long notice periods
-no works councils	-works councils
-company work rules are very important	-less importance of company work rules



## 2. The Employee





# The Employee



## Different types of employees

- Full-time employees
- Part-time employees
- Apprentices
- Leased employees

# The Employee (cont'd)



## Employment for a fixed term

- **Japan:**
  - » Maximum three years (in some cases five), Article 14, Labor Standards Act
- **Germany:**
- Maximum two years, only in rare cases more
- If employee is employed longer than two years:
  - » Employment is deemed as concluded for an unlimited time
  - » Mistakes are costly for employer!

# The Employee (cont'd)



## Executives

- Managing Directors/Board Members are not deemed employees!
  - » Similar to Japanese law
  - » Employee protection laws generally do not apply
  - » No protection against dismissal
- Executive employees (second line of management)
  - » Most employee protection laws apply
  - » Full Protection against dismissal

## The Employee (cont'd)



### German employment contracts – basic facts

- More elaborated than Japanese contracts due to lack of work rules
- German employees often negotiate terms and clauses
- Wording of clauses is very important
- Clauses are invalid if they are not “understandable and transparent”
- **Important:** periodic review of clauses highly recommended

## The Employee (cont'd)



### **German employment contracts – typical clauses**

- Definition of tasks, working place
- Clauses to unilaterally modify working conditions
- Most contracts determine specific notice periods (usually between one to six months)
- Clauses regarding additional benefits (company car, etc.)

# The Employee (cont'd)



## Working time

- Regulations of statutory law:
  - » Maximum daily working time: ten hours
  - » Meal breaks etc. are not working time
  - » Companies can establish flexible working schemes
- Can be additionally regulated by Shop Agreements with works council

# The Employee (cont'd)



## Salary-regulations

- Salary
  - » Works council (if existing) can have co-determination rights regarding yearly salary increase decisions of employer

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### 3. Overview on German social security system





# Overview on German social security system



## Social security contributions (2013)

Type of insurance	Full contribution rate	Employee's share	Employer's share
Health insurance	15.5 % (measurement limit: € 3937.50/month)	8.2 %	7.3 %
Nursing care insurance	2.05 % (measurement limit: € 3937.50/month)	1.025 %	1.025 %
Pension insurance	18.9 % (measurement limit: € 5.500/month)	9.45 %	9.45 %
Unemployment insurance	3 % (measurement limit: € 5.800/month)	1.5 %	1.5 %

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## 4. Dismissal of employees



# Dismissal of employees



## Hypothetical case:

- Employer's product A is made manually by two employees
- Employer acquires new machine which produces A
- Manual labor is no longer required to make A

**Question: can the employer make the 2 employees redundant?**

# Dismissal of employees (cont'd)



## Dismissal in Germany and Japan

- Considerable similarities between Japan and Germany
- Japanese and German law see dismissal as a last resort  
==> law protects the employee's right to employment

## Dismissal of employees (cont'd)



### **Not all German employees are protected against dismissal**

- No protection during the first six months of employment
- During probationary period, employees can generally be dismissed without reason
- No protection in small companies of 10 or less employees

# Dismissal of employees (cont'd)



## Special protection against dismissal

- Some employees have special protection against dismissal
  - » Pregnant women/mothers – no dismissal eight weeks before and six weeks after birth
  - » Employees on parental leave
  - » Disabled employees
  - » Data protection officer
  - » Emission control officer
- In case of special protection: dismissal only with permission granted by public authorities

# Dismissal of employees (cont'd)



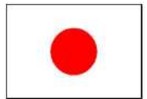
## Reasons for dismissal under German law

- Reasons of conduct (with notice period)
- Reasons related to the person (sickness, etc.)
- Operational reasons (position is made redundant)
- For good cause with immediate effect (e.g.: severe misconduct)

## Dismissal of employees (cont'd)



### When is a dismissal invalid?



- **Japan:** *“A dismissal is treated as an abuse of right and invalid if the dismissal lacks objectively reasonable grounds and is not considered to be appropriate in general social terms,”* Article 16, Japanese Labor Contract Act



- **Germany:** a dismissal is invalid if it is not *“socially justified”*, Section 1 Termination Protection Act
- Basic criteria for validity are similar in Japan and Germany



# Dismissal of employees (cont'd)



## Notice Periods in case of dismissal

- Notice periods must be observed, remuneration and benefits must be paid until end of notice period
- Only in cases of severe misconduct the dismissal is effective immediately
- Notice periods are longer than in Japan
- Length of notice period subject to agreement in employment contract and/or length of service
- No payment in lieu of notice admissible

# Dismissal of employees (cont'd)



## Minimum notice periods in Germany

<b>Service Time</b>	<b>Minimum notice period</b>
0 – 6 months	(optional) probationary period – notice period of 2 weeks
< 2 years	4 weeks to the 15 <sup>th</sup> or the end of a month
2 – 4 years	1 month to the end of a month
5 – 7 years	2 months to the end of a month
8 – 9 years	3 months to the end of a month
10 – 11 years	4 months to the end of a month
12 – 14 years	5 months to the end of a month
15 – 19 years	6 months to the end of a month
> 20 years	7 months to the end of a month

## Dismissal of employees (cont'd)



### Check-list – formal requirements for valid dismissal

- Work council consultation completed? (Before any dismissal, works council must be consulted)
- Did the competent person sign the termination notice? (Should be managing director)
- Employee must receive signed original of termination notice (No scan, copy, fax!)
- Can I prove that the employee received the termination notice? (Best practice: handing out before a witness)

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# Dismissal of employees

- a. Dismissal for reasons of conduct
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# Dismissal of employees (cont'd)



## Types of dismissal for reasons of conduct:

### 1. **Severe** misconduct

- » Criminal offences against company, etc.
- » Dismissal with immediate effect
- » No prior warning necessary

### 2. **Less severe** misconduct

- » Employee consistently violates superior's orders
- » Dismissal with applicable notice period
- » **Important:** usually prior warning required!

# Dismissal of employees (cont'd)



## 1. Dismissal for severe misconduct (immediate effect)



- **Japan:**

- » Official permission required, therefore companies usually opt for 30-day-notice-period



- **Germany:**

- » No official permission required; termination with immediate effect
- Under German law, no severance for employee
- Examples for severe misconduct:
  - » Sexual harassment
  - » Fraud or theft against company

## Dismissal of employees (cont'd)



### 2. Dismissal for misconduct (with notice period)

- **Example:** employee repeatedly violates company order not to sell a product without prior superior's consent.
- **First step:** employee receives **formal warning**
- **Second step:** in case of further **similar** misconduct, employee is dismissed (observing the notice period)

#### **Important:**

Warning must be prepared carefully! If warning is not in line with requirements established by the Labor Courts, dismissal can be invalid!

## Dismissal of employees (cont'd)



### How to act in case of misconduct? Possible sanctions?

- **Minor** misconduct – “Reminder”; no legal effect, however employee is reminded to respect rules
- **Moderate to severe** misconduct – “Warning”; employee is informed that further misconduct leads to dismissal
- **Very severe** misconduct – dismissal for important reason with immediate effect
- Unlike Japan, **reduction of salary** is not possible in Germany



## Dismissal of employees (cont'd)



### How to act in case of misconduct? Best practice:

- **Severe** misconduct requires sanction, especially in case of flagrant breach of security rules
- **Important: one-time (moderate)** misconduct by **key employee** should not be sanctioned with warning; warning can damage relationship with employee who might leave company
- Legal expert knowledge required, therefore, consult **HR department** before issuing sanctions

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# Dismissal of employees

- b. Dismissal for reasons in the person of the employee
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## Dismissal of employees (cont'd)



### Dismissal for reasons in the person of the employee

- **Typical case:** dismissal for long-term sickness (including alcoholism)
- Requires careful preparation
- **Important:** dismissal for other reason (e.g. operational reason) during sickness is possible!

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# Dismissal of employees

c. Dismissal for operational reasons



## Dismissal of employees (cont'd)



### Dismissal for operational reasons – basic principles:

- **Most dismissals** in Germany are based on **operational reasons**
- In Germany, even a very healthy and successful company can carry out restructuring measures and dismiss employees in order to maintain its good standing.
- Usually **no loss of company reputation** through dismissal for operational reasons

## Dismissal of employees (cont'd)



### When can a company dismiss for operational reasons?

- Company has **decided** to restructure ✓
- Restructuring makes function of employee **redundant** ✓
- “**Social Selection**”, employer must terminate employee in least need of social protection ✓
- Company has **no vacant positions** suitable for employee ✓

## Dismissal of employees (cont'd)



### How to carry out a dismissal?

- If reasons for termination are **not very strong**:
  - » Employer should first **negotiate settlement agreement** with employee
  - » Settlement agreement **preferable over termination**
- In case of a **termination without strong reasons** for dismissal:
  - » Employee will file claim for unlawful dismissal and **put company under pressure** before Labor Court

## Dismissal of employees (cont'd)



### How to carry out a dismissal? Negotiating with employees

- If company decides to **negotiate** to avoid dismissal, **careful preparation** is required
- **Tailor-made** draft **termination agreement** should be prepared
- Employee should be **approached in personal meeting**
- Reasons for decision to separate must be explained comprehensively, however, **not** in written form



## Dismissal of employees (cont'd)



### How to carry out a dismissal? Negotiating with employees

- Company should underline **willingness to support** employee in transition period
- However, company must also make clear that it is **not possible to continue employment**
- Employee might want lawyer/works council member to be present during negotiations
  - » **No** obligation for employer to accept this
  - » To be decided on **case to case basis**

## Dismissal of employees (cont'd)



### How to carry out a dismissal? Negotiating with employees

- During meeting, superior should **hand out** and **explain** draft **termination agreement**
- **Important: tailor-made** termination agreement for every employee
- Company must analyze how to structure an **attractive** termination offer
- Important for German employees: avoidance of loss of **unemployment benefits**

# Dismissal of employees (cont'd)



## Important regulations of termination agreements

- **Reason for termination** – mostly “operational reasons”
- **Notice period** – **no shortening** of applicable notice period!  
Otherwise, employee will lose unemployment benefits
- **Severance payment** (see below)
- **Garden leave**; granting of **holiday**; **bonus payments**
- Very important for German employees:
  - » **Good reference letter**

## Dismissal of employees (cont'd)



### Negotiating a termination – how will the employee react?

- German employees **no longer** think that they will work their whole life for the same company
- However, usually they **develop strong ties to company**
- Due to current economic situation, **most employees find a new job quickly**
- However, especially **older employees fear long term unemployment**
- **Important:** many employees have **legal fees insurance** – in case of termination proceedings, they will be assisted by lawyer

## Dismissal of employees (cont'd)



### How to carry out a dismissal? Severance payments in Germany

- **German law does not regulate severance amount**
- Severance amount is **matter of negotiation**
- Severance amount depends on **negotiation skills of parties**
- “Rules of thumb”

## Dismissal of employees (cont'd)



### How to carry out a dismissal? Severance payments in Germany

- **Basic rule:** in case of a **valid termination:**
  - » **No** obligation to pay severance
- Therefore, in order to obtain severance:
  - » Employee **must prove that dismissal could be invalid**

## Dismissal of employees (cont'd)



### Accepted formulas for calculation of severance

- Termination is **likely to be valid**:
  - » “Basic severance” – **0.5 monthly salaries for every year of employment**
- Termination is **likely to be invalid**:
  - » **0.75 – 1 monthly salaries for every year of employment**
- Termination is **clearly invalid**
  - » **1 monthly salary for every year of employment or more**

## Dismissal of employees (cont'd)



### Claim for unlawful dismissal before the Labor Court

- **Statutory three-week-period**
  - » If employee fails to file termination protection claim within three weeks, dismissal is deemed valid by law
  - » Employee cannot claim severance payment



## Dismissal of employees (cont'd)



### Claim for unlawful dismissal before the Labor Court

- Approx. **250,000 claims** for unlawful dismissal **per year**
- Such claims are **normal and unavoidable for companies in Germany**
- **Important:** dismissal/claim for unlawful dismissal does **not** damage company's reputation

## Dismissal of employees (cont'd)



### Claim for unlawful dismissal before the Labor Court

- Proceeding consists of **2 hearings**
- **1<sup>st</sup> hearing** – “conciliation hearing”
  - » Informal, judge tries to settle case;
  - » Duration approx. 10 – 30 min.
  - » More than 50% of all cases are settled in the first hearing
- **2<sup>nd</sup> hearing** – formal hearing
  - » Witness statements
  - » Hearing regarding expert opinions, etc.

## Dismissal of employees (cont'd)



### Hypothetical case:

- Employer's product A is made manually by two employees
- Employer acquires new machine which produces A
- Manual labor is no longer required to make A

**Question: can the employer make the 2 employees redundant?**

## Dismissal of employees (cont'd)



### Outcome of hypothetical case:

- **Operational reasons** for dismissal **exist**
- Termination is valid if
  - » **Social selection** is carried out
  - » **No vacant** positions exist
- Employee **cannot** claim severance
- Company might consider offering **symbolic severance** to avoid time consuming lawsuits
- If negotiations fail: **notice of termination**

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## 5. Managerial Authority



# Managerial Authority



## Basic principles

- Employer is entitled to **determine how** employee has to carry out his tasks
- Managerial authority is **exercised by superior** of employee
- Employee **violates employment contract** if he rejects **legitimate** order

# Managerial Authority (cont'd)



## Typical managerial orders

- Sales agent is ordered to contact five customers per day
- Worker is ordered to assembly machine in specific way
- Superior orders employee not to grant customers discounts

## Managerial Authority (cont'd)



### Which modifications are possible?

- Scope of managerial authority **depends on employment contract**
- “**Direction clause**” may allow employer to unilaterally
  - » Transfer employee to other position
  - » Modify working place
  - » Transfer employee to other group company



# Managerial Authority (cont'd)



## Limits of managerial authority

- No salary reduction
- No transfer to lower positions
- **Important:**
  - » Direction clauses are invalid if they are too far reaching
  - » Employment contract's direction clause should be reviewed before issuing order

# Managerial Authority (cont'd)



## Limits of managerial authority

- **Employment contract**
  - » E.g.: contract stipulates that employee must contact only three customers/day
- **Co-determination rights of works council**
  - » E.g.: **general** behavioral rules require works council's consent
  - » For example: **general smoking ban** for the whole site

# Managerial Authority (cont'd)



## Limits of managerial authority

- **Constitutional rights of employee**
  - » E.g.: freedom of religion – ban to wear Islamic headscarf
- **Far-reaching permanent** modifications of working conditions

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## 6. Modification of working conditions



# Modification of working conditions



## Hypothetical case:

- Sales manager performs poorly
- Company has vacant position as HR assistant
- Superior considers transferring employee to HR assistant position

**Question: how can superior achieve the transfer?**

# Modification of working conditions (cont'd)



## Two ways to achieve modification

1. **Managerial authority** – superior orders modification of working condition
2. **Partial dismissal** – company dismisses employee and offers new position with modified conditions

**Which option is adequate to transfer the employee to HR?**

## Modification of working conditions (cont'd)



### Managerial authority or partial dismissal?

- In many cases, modification cannot be achieved using managerial authority. For example:
  - » Employment contract has no direction clause
  - » Direction clause does not provide for desired transfer to other company site
    - Partial dismissal required

## Modification of working conditions (cont'd)



### Partial dismissal – how does it work?

- Company **dismisses** employee
- At the **same time**: offer to continue to work under different conditions
- **Important**: different conditions apply after end of notice period!
- Therefore, **no immediate** modification of working conditions



# Modification of working conditions (cont'd)



## Partial dismissal – limits

- Reduction of benefits is nearly impossible
- Operational reasons required
  - » Modification must be inevitable
  - » Social selection required
- Employee can ask Labor Court to review validity of dismissal

## Modification of working conditions (cont'd)



### Hypothetical case:

- Sales manager performs poorly
- Company has vacant position as HR assistant
- Superior considers transferring employee to HR assistant position

**Question: how can superior achieve the transfer?**

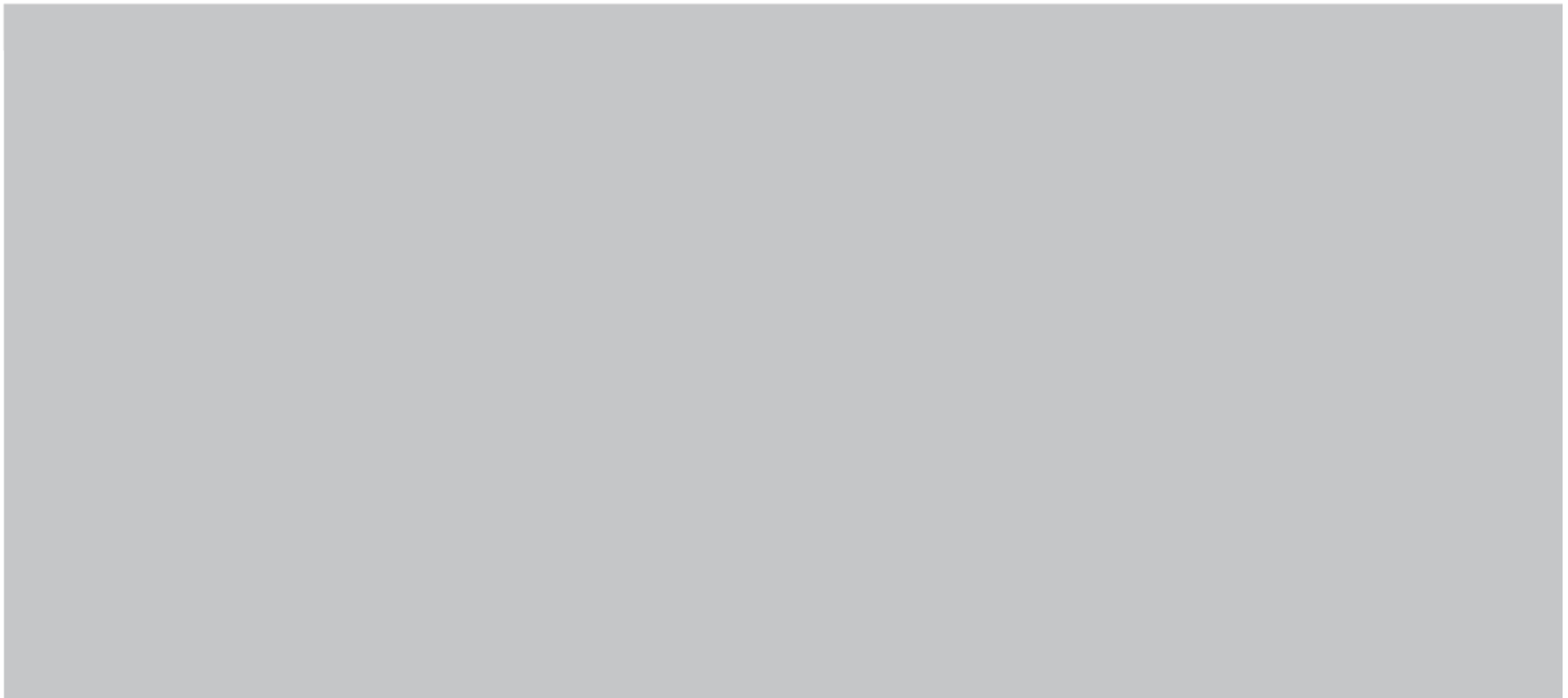
## Hypothetical case – best practice

1. Review of employment contract – managerial authority sufficient?
2. If not, partial dismissal required
  - » Sales position must be made redundant
  - » Recommendable: negotiation with employee
3. Issuance of partial dismissal

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## 7. German anti-discrimination law



# German anti-discrimination law



## Basic rules

- **“German Equal Treatment Act”**, in effect since 2006
- Discrimination = Less favorable treatment of employee due to:
  - » Race;
  - » Ethnic origin;
  - » Gender;
  - » Religion or belief;
  - » Disability;
  - » Age; or
  - » Sexual orientation

## German anti-discrimination law (cont'd)



### Basic rules – consequences of discrimination

- Compensation of damages
- Employee who discriminates violates his duties
- Superior who does not avoid known discrimination also violates his duties
- Discrimination cases damage company reputation

## German anti-discrimination law (cont'd)



### Typical cases:

- Job advertisement aimed only at women or men
  - » Rejected applicant of other gender can claim compensation in the amount of three monthly salaries
- Employee is not promoted due to gender, race, pregnancy, etc.
  - » Employee can claim compensation for damages

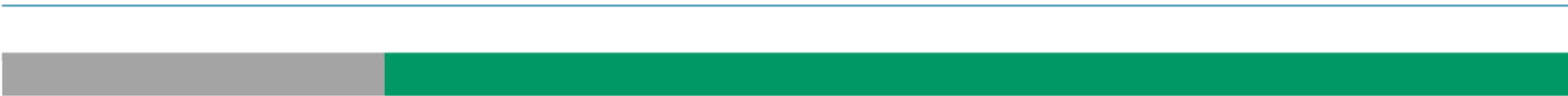
## German anti-discrimination law (cont'd)



### Best practice:

- Carefully review promotion decisions – can employee claim discrimination?
- Motivate employees to comply with anti discrimination law
- Act immediately if employees report discriminatory acts of other employees
- Training for employees!





## 8. Trade secrets



# Trade secrets



## Definition of trade secrets

- Information related to the company business +
  - not publicly known +
  - Company has interest in maintaining confidentiality
- = Trade secret

# Trade secrets (cont'd)



## Examples for trade secrets

- Construction plans
- Client lists and price lists
- Recipes
- Formulas
- Strategic plans

# Trade secrets (cont'd)



## Secrecy obligations

- Every employee has obligation not to disclose trade secrets
- Secrecy obligations continues after end of employment
- **Recommendable:** secrecy clauses in employment contracts and termination agreements

## Trade secrets (cont'd)



### **Legal steps in case of trade secret disclosure**

- Cease and desist order against employee
- Initiation of criminal proceedings against employee
- Legal claims against new employer who uses disclosed trade secrets

## Trade secrets (cont'd)



### Protection of trade secrets - best practice

- Secrecy clauses in employment contracts
- Important - in case of termination of key employees.
  - » Termination agreement must contain specific secrecy clauses
  - » Post contractual non-competition agreement?
- In case of disclosure: employer must act quickly and with determination

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## 9. Non-competition obligations



# Non-competition obligations



## During employment:

- Employee must not compete with employer
- No work for competitors
- No own competing company
- Violation of non competition obligation can be reason for dismissal



## Non-competition obligations (cont'd)



### After the end of employment

- Former employee can compete with company
- Former employee can approach ex-customers immediately after end of employment
- Former employee can solicit employees of ex-company
  - » Key employees leaving the company can cause considerable damage!
  - » Protection only through post contractual non compete agreement

## Non-competition obligations (cont'd)



### Post contractual non-competition undertaking

- Employee must refrain from competition for up to two years
- **Important:** only valid if company pays compensation!
- For every year of non-competition 50% of former remuneration
- Therefore, only recommendable in case of high risk key employees!

## Non-competition obligations (cont'd)



### Best practice

- Verify that leaving employee do not take client lists etc. with them
- In case of high risk key employees – consider conclusion of non-compete agreement
- If no non-compete agreement exists: review if competition of employee is unlawful
  - » E.g. former employee uses client lists or tries to solicit whole management

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# 10. Works councils – Basic facts



## Works councils – Basic facts



- In companies with at least five employees, employees can establish works councils (no obligation to do so!)
- Many companies in Germany have a works council
- German system of co-determination has helped economy to prosper
- Works council has considerable co-determination rights
  - » Must be consulted before hire, dismissal, transfer of employee
  - » General rules for business site require consent of works council
    - e.g. Smoking ban, holiday plans, overtime regulations
- Works council does not represent executives

## Works councils – Basic facts (cont'd)



- Work council can be useful for employer
- Agreements between works council and employer are binding for all employees
  - » E.g.: overtime rules, instead of negotiating with 200 employees, employer can conclude binding agreement with works council
- HR-department is very experienced in dealing with works council
- Consult HR-department for all question regarding works council

## Works councils – Basic facts (cont'd)



### Co-determination rights of works council

- In Germany, works council has considerable co-determination rights
- In areas of co-determination, consent of Works Council is necessary to legally implement measure
- As a result, before the employer adopts decision, works council must be consulted and often negotiations are required in order to get approval
- If the employer violated co-determination rights, the respective measure is void

# Works councils – Basic facts (cont'd)



## Co-determination rights of works council

- Areas of co-determination:
  - » Working time
  - » Overtime work
  - » Holiday regulations
  - » Implementation of new working methods
  - » Mass dismissal
  - » (Partial) closing of business
  - » General regulations regarding remuneration (bonus plans, distribution of extra payments, etc.)



## Works councils – Basic facts (cont'd)



### Co-determination rights of works council

#### Specific areas of co-determination – hiring of employees

- Before hiring an employee, works council must give consent
- Works council may deny consent in specific cases, e.g.:
  - » Hiring violates company agreement or law
  - » Other employees could be dismissed due to hiring
  - » Vacancy was not notified to the existing employees before
- Same rules apply if employee shall be transferred to other position

# Any questions or comments?



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