LEGAL Q&A | TERMINATION OF EMPLOYMENT

January 2020

In Germany, employees enjoy rather strong protection against termination of employment. Additionally, there are some form requirements employers must observe. This Q&A two pager gives a basic overview of the termination process in Germany.

1. Are there any form requirements?

Yes, notably, notice of termination must be given in written form, *i.e.*, wet ink signature is required. Notice of termination declared orally, by scan or e-mail is invalid. The same is true for any form of e-signing (*e.g.*, DocuSign).

It is crucial that the notice of termination clearly indicates the company, signatory and addressee and is signed by a person registered in the commercial register (*e.g.*, managing director, proxy holder) or whose authority to give notice is generally known within the company. If such person is not available for signature, an original of the signatory's power of attorney must be enclosed to the notice. Otherwise, the employee may reject the notice of termination due to lack of the signatory's authorization, rendering the dismissal invalid.

2. How does the notice of termination have to be delivered?

The original, signed notice has to be properly delivered to the employee in order to become effective. As the burden of proof regarding the delivery of notice to the employee is on the employer, it is recommendable to have the employee confirm receipt of the notice or, as employees sometimes refuse confirmation of receipt, to ask another person (other than managing directors or board members) to serve as witness of delivery. If a handover in person is not feasible, best practice is to use a courier service confirming date and time of delivery. Normal post or registered mail is not recommendable.

3. Is a certain content or wording required?

Generally, it is recommended to keep the notice as short and clear as possible. In particular, apart from a few exceptions, it is neither required nor recommendable to state the reasons for termination. The text should unmistakably state that the employment relationship shall be unilaterally terminated observing the applicable notice period, specifying the notice period. The wording should be clear and not be misunderstood as merely offering to conclude a separation agreement or as a proposal to negotiate an amicable separation or leave it unclear when employment will end. If the termination is with immediate effect, this also must be clearly stated. Although this has no impact on the termination's effectiveness, the notice must include a note on the requirement of registration as job-seeking with the local labor office.

4. How is the notice period determined?

Statutory law provides for a minimum notice period of two weeks during an agreed probationary period not exceeding six months. If no probationary period has been agreed and for the time thereafter, the statutory minimum notice period is four weeks to the 15th or the end of a calendar month, however, for a termination by the employer gradually increasing with the years of service from one month to the end of a calendar month to up to seven months after 20 years of service.

Employer and employee may freely agree on a longer notice period, however, the notice period to be observed by the employee may not exceed the one for termination by the employer.

5. Is termination with immediate effect possible?

A termination without notice for good cause ends the employment immediately and there is no notice period to be observed. However, the employer has to give notice within two weeks after becoming aware of the reasons justifying the termination with immediate effect.

The threshold for terminations without notice for good cause is very high. The employer has to prove a reason so significant it would be unreasonable for the employer to further work together with that employee until the end of the applicable notice period (*e.g.*, criminal offences, significant breach of contract).

6. What reasons can terminations be based on?

The Dismissal Protection Act (*Kündigungsschutzgesetz – KSchG*) grants general protection against dismissal to employees with a service period of more than six months in an operation regularly employing more than ten employees. A dismissal will only be effective if it is socially justified by either personal reasons (*e.g.*, long-term illness), conduct-related reasons (*e.g.*, breach of contract; will usually require prior formal warning) or operational

reasons (*e.g.*, redundancy, shutdown of business). Each of these reasons requires certain – rather strict – criteria to be met.

If statutory dismissal protection does not apply, a particular reason for termination is not required, however, dismissals must not be discriminatory or violate public policy. Furthermore, even in these cases a notice period must generally be observed.

7. Do certain employees enjoy special protection against dismissal?

Yes, certain groups of employees enjoy special protection against dismissal, including severely disabled employees, pregnant women during pregnancy and four months after giving birth and employees who applied for or are on parental leave or other protected leaves. These employees may only be dismissed with the prior consent of the competent authority. Works council members can only be dismissed for good cause and with the works council's or the labor court's prior approval.

8. Does German law recognize payment in lieu of notice?

No, German law does not provide for a unilateral option of the employer to pay in lieu of notice, *i.e.*, to make a one-time payment in exchange for shortening the notice period. This is only possible upon mutual agreement, however, the employee will normally be reluctant to agree since she/he will suffer disadvantages with regard to unemployment benefits in this case.

9. Can the employee be put on garden leave?

Garden leave is generally accepted under German law, however, a unilateral release of the employee is only feasible if the employer's interest in not having the employee show up for work outweighs the employee's interest in working throughout the notice period. In separation agreements, however, providing for garden leave is best practice.

10. What claims can employees bring in case of dismissals? Are employees entitled to a severance payment?

Employees may file an unfair dismissal claim with the local labor court within three weeks after receiving the notice of termination. The claim can be for reinstatement only since statutory law generally does not provide for a severance payment. Employees are only entitled to severance payments under a social plan concluded with the works council or under a collective bargaining agreement.

The labor court can only rule on whether the dismissal is valid or not. If the dismissal is valid, the employment relationship terminates after expiration of the notice period. If the dismissal is held void, the employment relationship will continue and any outstanding salary has to be paid.

However, in practice employers and employees often agree on termination of employment against a severance payment in or out of court.

11. Are separation agreements common? What would be a typical amount of severance payment?

Yes, separation agreements are quite common. In order to avoid lengthy lawsuits for unfair dismissal and the related costs and risks, employer and employee often come to a separation agreement or a court settlement, in many cases providing for a severance to be paid. The amount of a severance payment is usually calculated with 0.5 up to 1.5 monthly gross salaries per year of service in the company, depending on the strength of the case and other factors, *e.g.*, the employee's role and seniority, the employer's previous practice and the business sector.

12. Is there a requirement to involve the works council and/or a trade union prior to dismissal?

Where a works council has been elected, it must be notified about the employer's intention to dismiss the employee and the underlying reasons no later than one week prior to giving notice of termination (three days in case of termination for good cause). Trade unions are generally not involved.

13. Are there specific rules for collective redundancies/mass layoffs that need to be observed?

Yes. If terminations exceed a certain number (depending on the size of the business) within 30 days, the employer has to notify the labor office prior to giving notice or concluding separation agreements with any of the employees. Otherwise, the dismissal or separation agreement would be void.

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Version: January 2020