Orrick Germany China Desk

Employment Law in Germany

Practical Guidelines for Chinese Businesses and Investors

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奥睿德国分所中国业务组

德国劳动法

针对中国企业和投资人的实务指南

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Every Chinese Investor not only needs to be aware of cultural differences when considering investing in Germany, but also has to have a basic understanding of legal issues. German employment law provides for a good level of employee protection, for example in case of termination of employment. Being familiar with some basic principles of German employment law can help Chinese Investors avoid pitfalls that may lead to severe sanctions by authorities as well as financial obligations towards employees.

每个中国投资人在对投资德国进行评估时，不仅应考虑中德两国的文化差异，也应该初步了解德国的法律框架。德国劳动法为雇员提供了比较完善的保护，例如在劳动关系终止方面。中国投资人如果可以了解德国劳动法的基本原则，将有助于避免那些可能导致监管机构严重处罚和向雇员进行经济赔偿的错误行为。

Dr. André Zimmermann, LL.M.
Partner, Employment Law
合伙人，劳动法
Düsseldorf | 杜塞尔多夫
Tel | 电话: +49 211 3678 7265
azimmermann@orrick.com

Dr. Wilhelm Nolting-Hauff
Partner, M&A / China Desk
合伙人，并购业务/中国业务组
Düsseldorf | 杜塞尔多夫
Tel | 电话: +49 211 3678 7142
wnolting-hauff@orrick.com

Dr. Hang Xu | 徐杭 博士
Foreign Counsel, M&A / China Desk
外国法顾问，并购业务/中国业务组
Düsseldorf | 杜塞尔多夫
Tel | 电话: +49 211 3678 7232
hxu@orrick.com

This memorandum sets out a summary of key issues of German employment law which will generally apply to most employees who are working in Germany and whose employment relationship is concluded based on German Law, irrespective of their nationality or the nationality of their employer. This note is intended to be a summary of key issues only and is not intended to be exhaustive, nor does it deal with the application of employment law in any situation, where specific legal advice may be required.

本手册将向您简要介绍德国劳动法的重要规定。对于大多数雇员而言，无论其自身或其雇主的国籍是否为德国，只要该雇员的工作地在德国而且其劳动关系是依照德国法律成立，通常将适用德国劳动法。本手册旨在进行概要性介绍，并不构成法律意见，因此无法全面涵盖劳动法在任何情况下的具体运用。劳动法在个案中的具体运用可能需要专门的法律咨询。

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1. Formation of the Employment Contract

1.1 The Basics

The formation of the employment contract is generally subject to the same requirements as any other contract. There must be an offer and an acceptance (either oral or in writing), an intention to enter into legal relations and some benefit to both parties.

For the purposes of contract law it is irrelevant whether the contract is in writing. So to the lawyer a contract of employment is the agreement between the parties, not a written document.

1.2 The Obligation to Provide Certain Information in Writing to Employees

In Germany, the employer has a legal obligation to provide a basic statement of the main terms of employment to an employee within one month after he/she joins. These main terms include:

- names and addresses of the respective parties;
- the date the employee's employment commenced;
- in case of a fixed-term contract: the respective term;
- the rate of pay or how it is calculated, and when it is paid;
- any terms relating to hours of work;
- any terms relating to holidays;
- the notice required to terminate the employment;
- the job title or a brief summary of duties;
- the place of work; and
- details of any collective agreement and company agreement that applies or where these can be found.

1. 劳动合同的成立

1.1 基础

一般而言，劳动合同的成立与其他合同一样，需有（口头或书面的）要约和承诺、双方建立法律关系的意向以及各自的获益。

从合同法的角度看，合同是否以书面形式订立并不会影响其效力。因此对于律师而言，劳动合同是指双方之间的协议，而非书面文件。

1.2 向雇员书面提供特定信息的义务

在德国，雇主有法定义务在雇员开始工作后一个月内向雇员书面说明主要劳动条款。

主要劳动条款包括：

- 当事人的姓名和地址；
- 雇员开始工作的日期；
- 如签订的是固定期限合同，则须注明相关期限；
- 薪酬标准或薪酬计算方式以及支付时间；
- 与工作时间有关的条款；
- 与假期有关的条款；
- 解除劳动关系所需要的通知；
- 职务名称或工作职责的简短概括；
- 工作地点；以及
- 可适用的集体劳动合同和企业协定的细节或者何处可获得此类细节的说明。

The required details can be given to employees by way of a simple statement of terms and conditions, giving no more information than the minimum that the legislation requires, but can also be included in a more detailed written contract.

以上所要求的主要条款既可以通过一份简单的条款陈述告知雇员，其所提供信息仅需达到法律要求的下限，当然也可以被包含在一份更为详尽的书面合同中。

If the employer does not comply with this obligation, it does not affect the validity of the contract, but rather will lead to troubles regarding the burden of proof in case of an issue.

如果雇主不履行上述说明义务，并不影响合同的效力，但在发生争议时会造成举证责任上的麻烦。

There are at least two good reasons for issuing a more detailed written contract:

至少有以下两个充分的理由可以说明，雇主应该准备一份详尽具体的书面合同：

- it is an opportunity for the employer to impose certain obligations on the employee to which he/she would not otherwise be subject; and
- 对雇主而言，可以借此为雇员规定一些上述主要条款没有涉及的额外义务；而且

- it allows the employer to clarify uncertainties, for instance whether bonuses are at the employer's discretion.
- 允许雇主明确某些尚不确定的事宜，比如奖金发放是否可由雇主单方决定。

It is therefore recommended to conclude a written contract, clearly setting out the terms of employment.

因此，我们建议订立一份书面合同并且清楚地就雇佣条件做出规定。

In some cases, there is a written form requirement for employment contracts. This applies in particular to fixed-term employment contracts; if the fixed-term is not agreed upon in writing, the employment relationship is deemed to be for an indefinite period.

在某些情况下，劳动合同必须以书面形式订立。这一要求尤其适用于固定期限劳动合同。如果双方没有通过书面方式确认固定期限，该劳动关系将被视为不定期限的劳动关系。

2. Elements of the Employment Contract

2.1 Mandatory Rights

The statutory regime not only requires employers to provide certain information about their employment in writing to employees, but also sets out, in certain cases, minimum standards for those terms and conditions.

Examples of mandatory rights for employees include:

Notice of Termination

The minimum statutory notice period is four weeks to the 15th day of a calendar month or to the end of a calendar month. After two years the statutory notice periods for a termination by the employer are extended as follows:

2 years: one month to the end of a calendar month

5 years: two months to the end of a calendar month

8 years: three months to the end of a calendar month

10 years: four months to the end of a calendar month

12 years: five months to the end of a calendar month

15 years: six months to the end of a calendar month

20 years: seven months to the end of a calendar month

It is recommended to agree on the application of prolonged statutory notice periods for a termination by the employee as well.

Individual employment contracts, and also collective agreements may stipulate longer notice periods.

A stipulation to which the notice period applicable to the employer is shorter than the notice period applicable to the employee is invalid, it has to be at least equal to the notice period applicable to the employee.

2. 劳动合同的要素

2.1 雇员的法定权利

法律不仅要求雇主以书面形式向雇员提供劳动关系的特定信息，并且在特定情形下规定了劳动条款和条件的最低标准。

举例而言，雇员的法定权利包括：

解约通知

最低的法定解约通知期限为一个日历月第十五天或一个日历月月底前的四周。如果劳动关系存续已超过两年，法定的雇主解约通知期将如下延长：

2年：日历月月底前一个月

5年：日历月月底前两个月

8年：日历月月底前三个月

10年：日历月月底前四个月

12年：日历月月底前五个月

15年：日历月月底前六个月

20年：日历月月底前七个月

我们建议将上述延长的雇主法定通知期限也应用于雇员通知解约的情形。

个人劳动合同以及集体劳动合同可以约定更长的解约通知期限。

若约定的适用于雇主的解约通知期限短于适用于雇员的解约通知期限，则该雇主解约通知期限无效。雇主解约通知期限至少应与雇员的通知期一样长。

Working Time

The legal working time is eight hours a day from Monday to Saturday and must not exceed ten hours per day. The average of eight hours per working day (48 hours per week) must not be exceeded over a period of six months. For any time worked over eight hours, time off must be granted on another working day within six months. Please note that Saturdays are considered to be a working day in this context, however, most employees have five-day working weeks (Monday to Friday). Sundays and public holidays have to be free, however, in some cases work on Sundays and public holidays is allowed because of an applicable exemption. At least 15 Sundays per year have to be free from any work.

工作时间

法定工作时间是每周一到周六、每天八小时且不得超过十小时。每天八小时的平均工作时间（一周四十八小时）是以六个月为单位计算，即若雇员在其中一天的工作超过八小时，则应保证在六个月内的其他工作日相应减少工作时间。需要注意的是，周六也被视为工作日，然而大多数雇员一周仅工作五天（周一至周五）。除部分例外情况，雇主不得要求雇员在周日和公共假日工作。雇员每年无需工作的周日假期不得少于十五个。

Minimum Wage

A statutory minimum wage applies for all employees working in Germany. The statutory minimum wage is indispensable and there are a few exceptions, e.g. for apprentices and certain types of internships. Currently, the statutory minimum wage amounts to EUR 8.84 per hour, but can be changed every two years.

最低工资

法定最低工资适用于所有在德国工作的雇员。法定最低工资具有强制性，仅允许少数例外，如学徒工或特定类型的实习。德国目前的法定最低工资为每小时8.84欧元，但每两年可能进行调整。

Holiday

There is a minimum holiday entitlement under the German Holiday Act to 24 paid working days, if the employee works six days per week (prorated for a five-day week and for part-timers).

休假

根据《德国休假法》，如果雇员每周工作六天，则一年享有二十四天带薪休假（一周工作五天或非全职工作则按比例调整）。

Sick Pay

Each employee is entitled to receive their full remuneration for a period of six weeks in case of the same continued sickness. After this period they may seek benefits from their health insurance.

病假工资

每个雇员皆有权在同一种疾病的持续病假期间，获得六周全薪。六周之后，他们可从医疗保险中寻求补助。

Protection against Dismissal

(See below).

解约保护

（详见下文）

Pension Scheme

In Germany, each employee who is obliged to pay contributions to the German statutory pension insurance scheme, is entitled to a statutory pension in case of retirement. Additionally, employers may offer company pension schemes.

养老金计划

在德国每一个有义务缴纳德国法定养老保险金的雇员都有权在退休后获得法定养老金。此外，雇主还可以提供企业养老金计划。

An obligation to establish a company pension scheme does not apply, but rather each employee may defer up to 4% of the social security contribution ceiling (i.e., an amount of currently EUR 3,120 per year) of his/her remuneration to the pension scheme. The employer is obligated to provide deferred compensation if asked by the employee.

尽管雇主并没有建立企业养老金计划的法定义务，但雇员有权每年税前提取当年德国社保缴纳基数上限的4%（目前每年最高可3120欧元）缴入其企业养老保险金计划。应雇员要求，雇主则有义务配合提供相应的企业养老计划。

Maternity Rights

Pregnant employees are prohibited from conducting certain works, and in particular entitled to the following rights:

- ✓ time off work for ante-natal care;
- ✓ maternity leave, generally from six weeks before giving birth to eight weeks after giving birth; and
- ✓ protection against dismissals, from the begin of the pregnancy to four months after giving birth;
- ✓ maternity pay from statutory health insurance or the Federal Insurance Office and an additional grant from employer.

孕期权利

怀孕雇员被禁止从事特定工作并且尤其享有下列权利：

- ✓ 请假作产前保健；
- ✓ 产假，通常为产前6周到产后8周；而且
- ✓ 自怀孕起到产后4个月享有解约保护；
- ✓ 从法定保险公司或联邦保险局获得产假补贴并从雇主处获得差额工资。

Parental Leave

Parents are entitled to parental leave in case of a child's birth for a maximum period of three years. Parental leave may be taken in three blocks without the employer's consent. Two blocks may lie between the third and eighth year of the child and last up to two years respectively without the employer's consent being necessary. The employer may refuse the claim of a third block of parental leave between the third and eighth year of life only for urgent operational reasons. During the parental leave the employee is entitled to a statutory parental pay of currently 67 % of the net income, up to a maximum of EUR 1,800 for a period of 12 months, and an additional two months if both parents take parental leave, which is paid by the government. Employees on parental leave enjoy special termination against dismissals.

育儿假

自子女出生，父母有权享有最长为三年的育儿假。育儿假也可分为三段进行，无需得到雇主同意。其中两段、每段最长为两年的育儿假可调整到子女三周岁之后、八周岁前使用，无需经雇主同意。雇主只可在存在紧急的运营需要的情况下拒绝员工在子女三周岁到八周岁之间的第三段育儿假申请。在育儿假期间，雇员有权从政府处获得相当于其净收入67%的法定育儿津贴，每月上限为1800欧元，共计12个月，如果父母双方均使用育儿假，则津贴期限可额外延长两个月。雇员在育儿假期间依法享有解约保护。

Protection against Discrimination

Employees are protected by law against any discrimination because of sex, marital or civil partnership status, race, disability, sexual orientation, gender re-assignment, pregnancy or maternity leave, religion or belief and/or age.

歧视保护

雇员依法不得因其性别、婚姻状态、民族、残疾、性取向、性别改变、怀孕或产假、宗教或信仰和/或年龄遭受歧视。

2.2 Express Terms

Subject to the mandatory rights as set out by statute, the parties to the employment contract are free to determine what terms and conditions will apply to the employment. Generally, it is not possible for the parties to contract out of the mandatory rights.

Express terms are the terms that are explicitly agreed upon by the parties, and can, of course, go beyond the mandatory rights. Express terms can be written or oral, but by reducing these to writing, the risk of subsequent dispute may be minimized.

It is important to remember that an oral express term, for example, a promise by a manager that an employee will be entitled to additional holiday, will be binding on the employer, even though it was not given in writing.

The following are examples of express terms that an employer might include in the contract of employment to protect its business interests:

Probationary Period

A probationary period can be agreed on for up to six months, but must not be extended beyond. Extensions exceeding six months are void.

Confidentiality Clause

This requires the employee to keep business information confidential. Whilst an employee has an obligation to keep very important information confidential anyway, a written term is an opportunity to strengthen the obligation and to specify what information the employer considers confidential.

2.2 明示条款

在法律规定的强制性权利框架内，劳动合同双方可以自由决定劳动关系的条款和条件。通常，双方不得作出违反法定权利的约定。

明示条款是双方明确约定的条款，当然可以高于法定权利的标准。明示条款可以书面或口头订立，签订书面合同可以降低后续纠纷的风险。

需要注意的是，口头的明示条款，比如经理向某雇员许诺增加休假，即使没有书面约定，也对雇主具有约束力。

以下是雇主可以写入劳动合同、保护其经济利益的明示条款的实例：

试用期

试用期最长为六个月，不得延期。试用期超过六个月的部分无效。

保密条款

该条款要求雇员保守商业信息。尽管雇员在任何情况下都负有对重要信息的保密义务，但雇主可通过书面约定强调雇员保密义务，同时细化说明哪些信息为保密信息。

Non-competition Clauses

These prevent the employee from working for a competitor, or from enticing away staff or customers, during or after the termination of his/her employment.

A post-contractual non-compete restriction can only be stipulated effectively if it does not lead to an unreasonable impediment regarding future business activities of the employee and if the employer pays a compensation. As a result, the non-compete restriction shall be limited to a defined restrictive period (a maximum of two years), and also limited with regard to its geographic scope as well as to the types of business to which the restriction applies. At least half of the last received remuneration has to be paid as an adequate compensation for the non-compete restriction. Unless such compensation is paid, a non-compete restriction is not enforceable under German law.

It should be noted, though, that these types of restrictions can be difficult to enforce and great care should be taken with their drafting.

Return of Property Clause

This requires the employee to return the employer's property to the employer upon termination of employment.

Intellectual Property or Inventions Clauses

These make it clear who owns any intellectual property (including patents and copyrights) in anything developed by the employee during the course of his/her employment.

2.3 Implied Terms

Certain terms and conditions of an employment relationship are implied by law, irrespective of what the written contract says.

Terms may be implied into contracts from the way in which employer and employee have conducted their relationship. This is particularly the case where the written contract is silent on a subject and it becomes necessary to imply a term for the employment contract to be able to be interpreted.

竞业禁止条款

禁止雇员为竞争对手工作或在劳动关系存续期间或终止后诱引公司员工或客户。

离职后的竞业禁止只有在对该雇员未来的商业活动不构成不合理阻碍而且雇主支付相应补偿的情况下方为有效。因此，竞业禁止应当限制在一个确定的期限内（最长为两年）并明确限制的地理范围和业务类别。合理的竞业禁止补偿金至少不低于该雇员最近所得收入的一半。根据德国法律，如果不支付补偿金，竞业禁止将不具有强制性。

需要提醒的是，竞业禁止在实践中可能较难落实，所以在起草相应条款时需格外注意。

归还财产条款

要求雇员在劳动关系终止时归还雇主财产。

知识产权和发明条款

该条款可明确规定雇员在其劳动关系存续期间所开发创作的任何事物的知识产权归属（包括专利和著作权）。

2.3 默认条款

劳动关系的某些条款和条件可依法视为双方默认，而不必受书面约定的影响。

默认条款可以通过雇主和雇员的实际行为建立。尤其当书面合同就某一问题未作规定时，有必要运用默认条款对劳动合同进行解释。比如，当雇主向雇员重复三次提供一项受益或者权利后，则该受益或权利就可成为该雇员的合同权利。

So, for instance, a benefit or right may have been repeatedly provided to an employee over three times to have become a contractual entitlement.

2.4 Incorporated Terms

It is also possible to incorporate elements of other documents into contracts of employment by cross-referring to them in the contract.

An example of this would be the incorporation of a collective bargaining agreement, where a union has negotiated on behalf of employees at a particular workplace their levels of pay, holiday etc. Another example might be specific elements of staff handbooks.

2.4 嵌入条款

也可以通过参引的方式将其他文件的内容嵌入劳动合同。

比如，如果工会已经代表特定工作岗位的雇员就其薪资水平、休假等内容达成了约定，该集体劳动合同的规定就成为了个人劳动合同的嵌入条款。员工手册中的特别规定也可以是嵌入条款的另一个来源。

3. Staff Handbooks

Many organizations use staff handbooks in addition to contracts of employment to set out additional terms and conditions that are common to the workforce, or to set out employment policies of the organization.

It is fairly common to enforce policies covering the following areas:

- disciplinary matters and grievances;
- health and safety (such a policy should be in writing bearing in mind the employer's obligations under the statutory regime);
- equal opportunities;
- harassment; and
- other miscellaneous policies, for example, training, expenses, use of internet, car or other benefits, overtime, dress code, business ethics, whistleblowing, anti-bribery and corruption, etc.

3. 员工手册

很多机构使用员工手册作为对劳动合同的补充，规定普遍适用于全体员工的附加条款和条件或该机构的劳动规章。

手册通常包括如下内容：

- 纪律惩戒事项和申诉制度；
- 健康和安全（该规定应采用书面格式并须注意雇主的法定义务）；
- 机会公平；
- 防止骚扰；以及
- 其他各种规定，比如培训、费用、网络使用、配车或者其他福利、加班、着装要求、商业道德、内部举报、反贿赂和反腐败等。

4. Termination of Employment

There are several ways in which an employment contract may end.

4.1 By Agreement

Even though an employment has been entered into for an unlimited period of time, employer and employee may agree to end the relationship by mutual consent at any time.

4.2 By Death

A contract ends in case the employee dies.

4.3 By Expiry

An employment contract may be entered into for a fixed period of time (a fixed-term contract) or for the duration of a specific project (a specific task or specific purpose contract) and the employment will come automatically to an end upon the specific date being reached or that particular project being completed.

Note that fixed-term contracts without cause may only be agreed to if the term does not exceed two years (it may consist of up to four fixed-term contracts that must not exceed two years in aggregate). Otherwise, such fixed-term contract is considered to be a circumvention of mandatory termination protection rules.

While under current legislation fixed-term employment without cause is generally possible for up to two years including three extensions of term if the same employee has not been previously employed, the maximum term shall prospectively be limited to 18 months including only one extension of term. Also, employers with more than 75 employees may in future only use these fixed-term contracts for 2.5% of their staff.

4. 劳动合同的终止

劳动合同可通过多种途径终止。

4.1 通过协议

即使已订立无期限劳动合同，雇主和雇员也可以在任何时候通过双方协商终止劳动关系。

4.2 死亡

若雇员去世，则劳动合同终止。

4.3 合同期满

劳动合同可以有确定的期限（确定期限合同）或者以专门的项目期限为准（专门任务或专门目的合同），即劳动关系随确定日期的到来或特定项目的完成而自动终止。

需要注意的是，无理由的固定期限合同的期限不得超过两年（最多可以由四个期限较短的固定期限合同构成，但其期限总计不得超过两年），否则该固定期限合同将被认定构成对强制性解约保护规定的非法规避。

在目前的立法框架下，如果一员工之前未曾被同一雇主雇佣，则该雇主通常可以以无理由的固定期限方式雇佣该员工，雇佣期可包括三次延期，但总体雇佣期不得超过两年。该最长雇佣期有可能将被缩短为18个月并且仅允许包括一次延期。聘用了75位雇员以上的雇主在未来可能只被允许向占其员工总数2.5%的员工提供固定期限劳动合同。

4.4 By Dismissal

Both employer and employee are able to lawfully terminate the employment contract either with good cause effective immediately or without cause by considering the respective notice period. However, a termination with good cause by the employee is not common practice.

Termination with Good Cause

Any termination which shall be effective immediately requires good cause within the meaning of section 626 of the German Civil Code, thus a serious breach of the obligations under the employment contract. Additionally, any termination has to be declared within a two-week period from the time the respective person gains knowledge of the serious breach of contract.

Good cause within this sense might be, e.g.:

- ✓ a serious violation of the employer's rules and policies;
- ✓ a serious dereliction of duty or the behavior causes major harm to the other party;
- ✓ committing any crime against the employer.

Termination without Good Cause

Both employer and employee may terminate an employment contract by giving the appropriate notice of termination. There are statutory minimum notice periods in Germany, which vary according to the employee's length of service (see above). In case of a termination by the employer, the applicable notice period will be the period stated in the contract or the statutory minimum, depending on which is more beneficial for the employee. Regarding a termination by the employee, the contractual notice period might be decisive, if not agreed otherwise (see above). Please note the explanations on statutory dismissal protection below.

4.4 解约

雇主和雇员都可以在有充足理由的情况下立刻解除劳动合同或者依照相应的通知期限解除劳动合同而无需说明理由。但是，雇员以充足理由解除劳动合同在实际中并不常见。

有充足理由的解约

根据《德国民法典》第626条，任何立即生效的解约都需要充足的理由，如严重违反劳动合同义务。此外，任何解约都必须在相关人员获知该严重违反合同义务的行为后两周内作出。

比如， 充足的理由可以是：

- ✓ 严重违反雇主的规定和章程；
- ✓ 严重失职或给合同对方造成重大损害的行为；
- ✓ 针对雇主的犯罪行为。

无需充足理由的解约

雇主和雇员都可以通过事先发出符合要求的解约通知解除劳动合同。德国法律规定了最短解约通知期限，并可根据雇员的工作年限有所调整（见上文）。在雇主解约的情况下，通知期限以合同约定期限和法定最短期限中相对更有利于雇员的期限为准。在雇员解约的情况下，如果没有其它约定（见上文），一般以合同约定的通知期限为准。请参考下文中关于法定解约保护的说明。

5. Potential Claims on Dismissal

Upon termination of his/her employment, an employee may have two basic types of claims against their employers: contractual or statutory.

5.1 Contractual Claims

Contractual claims are claims for outstanding salary and other benefits, for example, bonus, commission, untaken holidays, etc. accrued and outstanding as at the termination date.

Furthermore, the employee is entitled to a reference letter. Considerable care needs to be taken over the drafting of employees' references. There is an increasing number of cases in which claims are being made either by future employers or past employees for references which are misleading or unfair.

5.2 Statutory Claims – Unfair Dismissal

Protection against Unfair Dismissal Act

An employee is protected by law against dismissals according to the Protection against Unfair Dismissal Act. The Act applies to all employees that:

- have worked at least six months continuously with the employer;
- where the employer regularly employs more than ten employees.

If the Act applies, an employee's contract may only be terminated for specific reasons, such as misconduct, reasons related to the person (e.g. long term disability), or for compelling business reasons (redundancy). In case a termination does not comply with these requirements, it will be considered socially unjustified and thus not valid.

The burden of proof with regard to the social justification of the termination is on the employer in case the employee files a wrongful dismissal claim. It is often difficult to prove that these requirements are met, since they are to be interpreted very strictly according to case law.

5. 解约时雇员享有的潜在请求权

当劳动关系终止，雇员可以拥有两项针对雇主的基本请求权：根据合同约定或法律规定。

5.1 合同约定的请求权

合同约定的请求权针对的是未支付的薪水和其他待遇的请求权，比如合同解除时已产生的但尚未支付的奖金、佣金、未使用的假期等。

此外，雇员有权要求雇主出具工作证明。在起草工作证明时需要格外注意，因为下任雇主或原雇员就工作证明的误导性或不公正性而提起的索赔案件正日趋增加。

5.2 法定请求权 – 不当解约

无需充足理由的解约

在德国，雇员受《不当解约保护法》的保护。该法适用于所有满足如下条件的雇员：

- 至少已连续六个月为雇主工作；
- 雇主必须常规性地雇佣十名以上员工。

如果适用《不当解约保护法》，劳动合同只可在出现特定原因时方可解除，比如不当行为、与个人有关的原因（比如长期丧失工作能力）或者无法避免的经营原因（裁员）。如果解约未满足上述情况，则将被认定为缺乏社会公正性，从而导致无效。

当雇员提起不当解约诉讼时，雇主对其解约的社会公正性承担举证责任。由于相关案例法对于社会公正性的解释要求非常严格，所以雇主很难证明其解约可以满足此类要求。

Special Termination Protection

Some groups of employees enjoy special termination protection. Pregnant women and women that have recently given birth, parents on parental leave, or disabled employees may only be given notice of termination if the competent governmental authority has given its consent. Works council members may only be given notice if the works council has consented to the notice of termination, and even if such consent is given, their employment may only be terminated for cause. Former works council members, candidates to the works council, and organizers of works council elections may only be given notice of termination for cause during the election process and for a certain cooling off period after the election or the end of their office.

特殊解约保护

某些雇员群体可享受特殊的解约保护。对于孕期以及产后妇女、育儿假中的雇员或残疾雇员，雇主只能在取得相关政府部门同意后方可通知解约。对于企业委员会成员，雇主只能在存在解约理由并已取得企业委员会同意后方可通知解约。前企业委员会成员、企业委员会候选人和企业委员会选举的组织者在选举过程中、选举过后及其任期结束的冷静期内，只有在存在充分解约理由的情况下才可被通知解约。

Remedies for Unfair Dismissal

If a notice of termination is considered socially unjustified because it is not based on one of the reasons stated above, the notice of termination is null and void, and the employee will be reinstated by court.

An employee is not entitled to any statutory payments in case of dismissal, unless the parties settle the case and agree upon a severance payment before labor court. Typically during a termination lawsuit, the parties agree on a severance payment that will, on average, amount to $^{1}/_{12}$ of the employee's total annual compensation for each year of service to end the employment relationship.

不当解约赔偿

如果解约通知并非基于上述原因作出而因此被认为缺乏社会公正性，则该解约通知自始无效，法院将恢复雇员的受雇身份。

法律并没有赋予雇员任何获得解雇赔偿的权利，除非双方在劳动法院达成和解并约定遣散金。一般在解约诉讼中，双方同意的遣散金平均额为雇员全年薪资的$^{1}/_{12}$乘以其实际工作年数。

6. Redundancies

The employer is obliged to inform the Federal Agency for Employment within 30 days prior to any redundancy, in cases where:

- the employer regularly employs between 20 and 60 employees, of which at least five are planned to be made redundant;
- the employer regularly employs between 60 and 500 employees, of which at least 25 or at least 10% are planned to be made redundant;
- the employer regularly employs more than 500 employees, of which 30 are planned to be made redundant.

6. 裁员

若雇主有如下裁员计划，则有义务提前30日通知联邦劳动局

- 如其常规雇员人数为20至60人，计划裁员5人或以上；
- 如其常规雇员人数为60至500人，计划裁员25人以上或者全体雇员数的10%或以上；
- 如其常规雇员人数超过500人，计划裁员30人以上。

7. Co-Determination

7.1 Legal Requirements to Co-Determination

In each "establishment", the work force may elect a works council if five or more employees are employed at this establishment. A joint establishment can be formed by one or more companies who run, for example, an office together and are using the staff of this office jointly. The number of members of the works council is determined by the number of employees that are regularly employed in the establishment.

7.2 Co-Determination Rights

The works council has rights of information, consultation, and co-determination.

Generally, co-determination rights cover subjects such as work rules, working time (including over-time and holidays), methods of pay, the introduction and use of technical devices that allow for monitoring employees' conduct and performance (even if they are not intended to be used that way), accident prevention and health protection, fringe benefits and the provision and withdrawal of company owned housing. However, wages must never be determined at establishment level. This is reserved for the partners to collective bargaining agreements (employers or employers' associations and trade unions).

Before any termination, the employer is obliged to contact an existing works council. The works council may agree or disagree with the termination. A termination of an employment without consulting the works council may be null and void.

In companies with more than 20 employees, formalized consultation rights exist for cases of collective dismissals and so-called operational changes, e.g. substantial changes in working methods (provided that a works council has been elected). If a significant part of the workforce is detrimentally affected by such operational change, the works council has the right to demand a social plan.

7. 共同决策

7.1 共同决策的法定要求

每一个拥有五名或五名以上雇员的企业可以选举产生本企业的企业委员会。若多个公司共同使用一个办公室或共同使用该办公室的员工，则可以组成一个联合企业委员会。企业委员会成员的数量由企业常规雇员的人数决定。

7.2 共同决策权

企业委员会拥有知情权、咨询权和共同决策权。

通常，共同决策权涉及工作条例、工作时间（包括加班和假期）、薪酬支付方式、监控员工及其行为和绩效的技术设备的引入和使用（即使并非设备安装的本意）、事故预防和健康保护、额外福利和企业自有房屋的获得及退回。但在企业层面绝对不会就薪资标准作出决定。薪资应由集体劳动合同的当事人（雇主或雇主联合会与工会）协商约定。

在解除任何劳动关系之前，雇主都有义务与已有的企业委员会联系。企业委员会可以同意或者不同意该项解约。一项未咨询过企业委员会解约可能自始无效。

若公司拥有有二十名以上的员工，就集体解约以及经营变更，如工作方式的实质性改变等问题，（如已选出企业委员会）企业委员会享有正式的咨询权。如果该经营变更将对员工中的一大部分产生不利影响，则企业委员会有权要求雇主提供社会方案。

8. Collective Bargaining Agreements

Collective bargaining agreements apply to employees that are members of a trade union, provided that their employer has either entered into a collective bargaining agreement with the relevant trade union or is member of an employers' association that has entered into such collective bargaining agreement, which includes employment conditions, e.g. salary, working time, etc. The trade union has a right to call for a strike in order to emphasize its demands for example for a pay raise for its members under certain conditions.

However, once a collective bargaining agreement is applicable to part of the work force within a company, the company will often apply the agreement to all employees voluntarily. In many cases, the parties agree in their employment contracts that a specific collective bargaining agreement applies even if the parties are not subject to the collective bargaining agreement as such.

8. 集体劳动合同

对于作为工会成员的雇员，如果他们的雇主与相应工会订立了集体劳动合同或者是参与订立集体劳动合同的雇主联合会的成员，该集体劳动合同对该雇员具有效力。集体劳动合同的主要内容包括薪资、工作时间等劳动条件。工会在满足特定条件的情况下有权召集罢工以强调他们的诉求，比如提高工会成员的薪资。

一旦集体劳动合同适用于企业的一部分雇员，企业通常会自愿地将集体劳动合同适用于全体雇员。在很多情况下，即使双方原本都不受集体劳动合同的约束，也会在劳动合同中主动约定适用特定的集体劳动合同。

9. Social Security Contributions

The German social insurance system includes basic pension insurance, basic medical insurance, work-related injury insurance, unemployment insurance and nursing insurance.

The salary paid to the employee is subject to social security contributions that are paid in equal shares by the employee (to be withheld by the employer) and by the employer. The employer's portion adds up to roughly 20 % of the employee's salary, but is limited to roughly EUR 1,000 per month. Special rules apply to employees that earn EUR 450 or less. Students are exempt from social security contributions.

9. 社会保险缴纳

德国社会保险制度包括基本养老保险、基本医疗保险、工伤保险、失业保险和护理保险。

社会保险金由雇员（由雇主代扣）和雇主等额支付。雇主缴纳的部分大约是雇员薪资的20%，但每月缴纳上限约为1000欧元。月薪低于450欧的雇员适用特殊规定。大学生豁免缴纳社会保险金。

10. Employee Liability Limitations

Although the statutory liability of employees is unlimited, according to German labor courts' precedents, liability is actually limited. This limitation is based on the assumption that the employer's business risks arise in his/her sphere and can be influenced by his/her right to give directions and organize the business. Furthermore, the employer may insure against potential risks by use of for example employer's liability and fire insurance, whereas the employee, regardless of how careful he/she might be, may make mistakes, whose consequences may overcharge him/her financially. Limited liability is a mandatory right of the employee and variations thereto, to the employee's detriment, are ineffective.

Regarding damages to a person, liability is excluded in cases of harm to an employee caused by another employee. The aggrieved employee is only eligible for benefits according to the statutory accident insurance. The same applies to external employees who are employed temporarily on the same establishment or are integrated in the employer's establishment (e.g. security personnel, cleaning staff).

10. 雇员责任限制

尽管法律并没有对雇员责任加以限制，但根据德国劳动法院的判例，雇员责任在实践中是得到限制的。雇员责任的限制是基于以下假设，即雇主的经营风险来源于其自身经营活动并受其对经营的指导权和组织权的影响。此外，雇主还可以购买譬如雇主责任险和火险等，避免潜在损失。而与此同时，对于雇员而言，无论其如何谨慎，都可能犯错并造成超过其经济承受能力的后果。责任限制是雇员的法定权利，任何与此相背的、对雇员不利的约定都是无效的。

在人身伤害方面，如果一个雇员的伤害是由另一个雇员造成，则后者无需承担赔偿责任。受伤害员工只能根据法定意外事故保险获得赔付。这同样适用于在企业临时工作的外部员工或在雇主企业从事附属工作的外部员工（比如保安、清洁工）。

Concerning property damages and financial loss, employee liability is limited to the extent of his/her culpability. The limitation applies in three stages:

- in case of intent or acts of gross negligence, liability is not limited;
- in case of average negligence, the employee is partially liable;
- in case of slight negligence, liability is excluded.

According to certain precedents, the liability is limited to the amount of three monthly gross salaries in case of gross negligence and intent, and one month's gross salary in case of average negligence. This restriction is based on the assumption that, in cases of gross negligence or intent, the employee's financial existence should not be jeopardized.

In respect to third-party damages, liability of the employee is generally unlimited. The employee is, however, eligible to be indemnified by his/her employer in cases of damages caused by operational activities, in accordance to the principles of limited liability.

涉及财产损失和经济损失，雇员的赔偿责任取决于其过错程度。限制适用于如下三个层次：

- 在故意或重大过失的情况下，赔偿责任不受限制；
- 在一般过失情况下，雇员承担部分责任；
- 在轻微过失情况下，免于承担责任。

根据判例，在故意或重大过失的情况下，雇员的赔偿责任不超过该雇员三个月的税前收入。在一般过失的情况下，其赔偿责任不超过其一个月的税前收入。限制责任的原因基于以下假设，即使在故意或重大过失的情况下，雇员承担的赔偿责任也不应危及其经济生存。

在雇员对第三方造成损失的情况下，其责任通常不予限制。但根据责任限制原则，如果该损失因其职务行为造成，雇主应保证雇员免受第三人主张之损害。

Your Key Contacts in Germany
您在奥睿德国分所的主要联系人

Dr. André Zimmermann LL.M. is a Certified Specialist for Employment Law (*Fachanwalt für Arbeitsrecht*) and heads Orrick's German Employment Practice. André advises national and international companies on the issues of individual and collective employment law. The main focus of his practice comprises employment aspects of transactions and restructurings, co-determination on operation and board level, service agreements on board members and managing directors, employee incentive schemes, employee data protection and litigation.

André Zimmermann 博士、LLM是劳动法专业律师，负责奥睿德国分所的劳动法业务组。André 就个人劳动法和集体劳动法相关问题向本国以及国际企业提供咨询，其主要业务领域涉及并购交易和重组中的劳动法咨询、企业经营和管理层面的共决机制、管理人员聘用协议、员工激励计划、员工信息保护以及相关诉讼。

Dr. Wilhelm Nolting-Hauff is co-managing partner of Orrick's German offices and focuses mainly on M&A, leveraged buyouts, JVs and strategic alliances as well as corporate formations and general corporate counseling. He has already advised numerous clients on their investments, especially Chinese clients investing in Germany.

Wilhelm Nolting-Hauff 博士是奥睿德国分所的联系管理合伙人，其主要业务范围包括并购、杠杆收购、企业合资与战略合作、公司设立和日常公司法咨询。他已经为包括中国投资人在内的众多客户提供了法律咨询服务。

Dr. Hang Xu is based in our Düsseldorf office. He is a China qualified lawyer who received his doctor of law from the Albert Ludwig University in Freiburg, Germany. Hang focusses on helping Chinese investors doing outbound investments in Europe and especially Germany and has advised numerous Chinese clients on their investments in Germany.

徐杭博士就职于奥睿杜塞尔多夫分所，具有中国律师资格并在德国弗莱堡大学获得法学博士学位。他致力于协助中国投资人在欧洲、尤其是在德国进行投资并且已经为众多中国客户在德国的投资活动提供了咨询。

Louisa Kallhoff is an associate in the Düsseldorf office and a member of the practice group Employment Law. Louisa advises national and international companies on all issues of individual and collective employment law. The main focus of her practice comprises employment aspects of transactions and restructurings, as well as employment and labor law issues such as personnel leasing, co-determination of employees and service agreements of managing directors and board members.

Louisa Kallhoff 是奥睿杜塞尔多夫分所律师及劳动法业务组成员。Louisa 就个人劳动法和集体劳动法相关问题向本国以及国际企业提供咨询，其主要业务领域包括并购交易和企业重整程序中的劳动法咨询以及员工租借、员工共决和管理人员聘用协议等。

Our International Employment Team
奥睿国际劳动法专家

Michael Delikat, a partner in the New York office, serves as Chair of Orrick's Global Employment Law Practice, which has employment law teams in the European Union, Asia as well as the United States. He is also the founder of the firm's Whistleblower Task Force. He previously served as the Managing Director of Orrick's Litigation Division.

Laura Becking, a New York partner and head of the Global Employment & Equity Compensation Practice, has extensive expertise in advising large international corporations on global HR and compensation related legal matters at all stages of the company and employee life cycle in over 100 hundred countries.

Emmanuel Bénard is an employment lawyer, respected for his deep experience with challenging restructuring and complex collective litigation. A partner in Orrick's Paris office, he is Head of the Employment Law Practice in France and Europe.Emmanuel represents numerous French and international companies on all aspects of employment law including international and cross-border issues.

Hélène Daher is an employment lawyer in Orrick's Paris office. Hélène assists and represents French and international clients in all aspects of employment law (pre-litigation, litigation and transactional matters) as well as in their day-to-day human resources needs, including national, international and cross-border issues.

Nicola Whiteley, a partner in London and head of the London Employment Team, has more than 20 years of experience in all aspects of contentious and non-contentious employment law, with a particular focus on complex and/or cross-border issues for multinational clients and on the Technology and Finance sectors.

Mandy Perry, partner in the London office, is a member of the Employment Group. Mandy's practice includes acting in high value litigation disputes in the High Court and Employment Tribunal where she has gained particular expertise in claims involving whistleblowing, discrimination and post termination restrictions.

Yumiko Ohta, partner in the Tokyo office, is a member of the Employment Law Group. Ms. Ohta focuses mainly on employment law advice as well as various corporate transactions including compliance, corporate governance, mergers and acquisitions, joint venture, litigation and general corporate transactions.

Our Expertise

We work closely with our clients' in house counsel, management and human resources to ensure business-savvy and goal-oriented advice that meets the needs of our clients' industry sector and entrepreneurial culture.

We advise companies on a wide range of HR legal matters, including hiring and discrimination concerns, reclassifications risks, multi-jurisdictional and cross-border employment issues, HR data privacy compliance, roll out of employee handbooks and policies, performance management and terminations with a special sector focus on technology companies.

A particular focus of our practice is on restructuring, outsourcing and headcount reductions. We have long-standing experience in negotiating with works councils and unions and in restructuring measures of all kind.

Our global employment practice consisting of 70 specialized employment lawyers and world leading practices in our offices in the United States, Asia and Europe, offers the highest level of employment advice in all major jurisdictions. Our well-established teamwork across offices ensures international advice in employment law in our clients' cross-border projects.

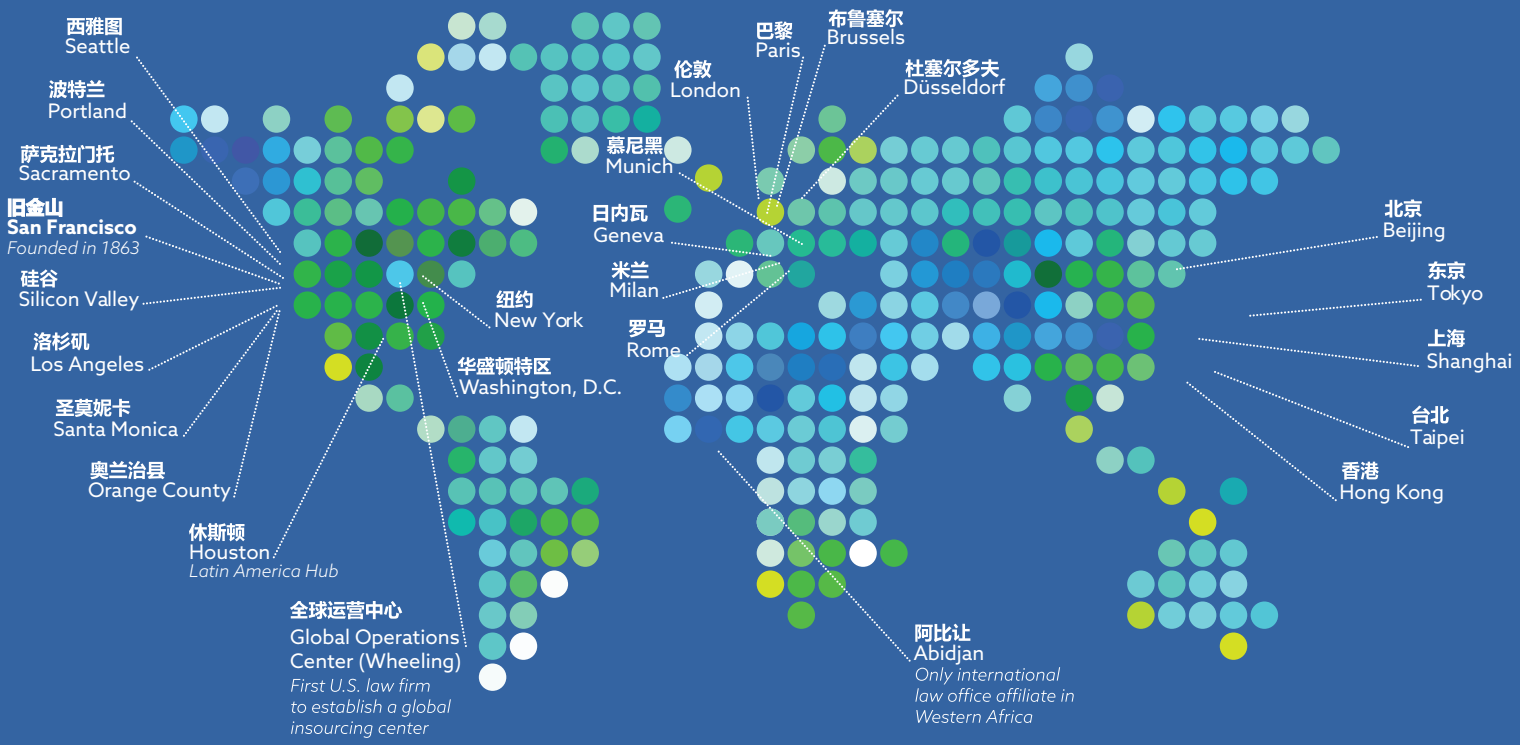
THE RECORDER

Orrick's Employment Law & Litigation group was recently named **Labor & Employment Department of the Year** in California for the fourth consecutive year by *The Recorder,* the premier source for legal news, in recognition of their significant wins on behalf of leading multinational companies on today's most complex and challenging employment law matters.

LAW360

The practice group has also been chosen as **one of the top national employment law practices** by *Law 360*.

Orrick was founded over 150 years ago in San Francisco. Today, *Law360* recognizes Orrick as one of the 20 leading law firms in the world.



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Your contacts in Germany
您在奥睿德国分所的联系人

Dr. André Zimmermann, LL.M.
Partner, Employment Law
合伙人，劳动法

Tel | 电话: +49 211 3678 7265
azimmermann@orrick.com

Dr. Wilhelm Nolting-Hauff
Partner, M&A | China Desk
合伙人，并购业务 | 中国业务组

Tel | 电话: +49 211 3678 7142
wnolting-hauff@orrick.com

Dr. Hang Xu | 徐杭博士
Foreign Counsel, M&A | China Desk
外国法顾问，并购业务 | 中国业务组

Tel | 电话: +49 211 3678 7232
hxu@orrick.com

Your contact in New York
您在奥睿纽约分所的联系人

Mike Delikat
Partner, Employment Law
合伙人，劳动法

Tel | 电话: +(1) 212 506 5230
mdelikat@orrick.com

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