

EMPLOYERS' ESSENTIALS

2021 Edition

Every player interested or already active in the German market needs to have a working knowledge of the key principles of German employment law which offers a good level of protection to employees. This is especially true for multinationals not fully familiar with the concepts of co-determination and dismissal protection, both key elements of German employment law and widespread in the EU. This 101 gives a high level overview of key practical issues employers face.

Remuneration

Salary can generally be freely negotiated between employer and employee except collective bargaining agreements do apply. The Minimum Wage Act (*Mindestlohngesetz - MiLoG*) currently provides for a statutory minimum wage of € 9.50 per hour. The minimum wage will increase to € 9.60 as of July 1, 2021 and to € 9.82 as of January 1, 2022. It is generally binding for all employment relationships and for all employers no matter what size and sector. Only very few exceptions apply to certain employee groups (e.g., students, interns).

Paid Time Off

According to the Federal Vacation Act (*Bundesurlaubsgesetz - BUrlG*), every employee is entitled to an annual minimum of four weeks paid vacation, based on a 5-day work week (Monday to Friday), resulting in 20 days of paid vacation. In practice, however, employment contracts and collective bargaining agreements provide for a higher number of vacation days. Vacation of 25 to 30 workdays per year can be considered standard in Germany. A full vacation claim is acquired only once the employment relationship has existed for six months. Employees must take their annual vacation during the calendar year and employers must generally grant employees vacation unless there are conflicting business reasons.

Working Time

Working time is regulated by several legal sources such as the Working Time Act (*Arbeitszeitgesetz - ArbZG*). Working time may generally not exceed eight hours per workday. Working time may be extended to up to ten hours per day without a special reason being necessary if it does not exceed eight hours per day on the average within six months or 24 weeks.

Working time must be interrupted after more than six hours by a previously determined rest break (*Ruhepause*) of at least 30 min (45 min in case of more than nine hours work) which may be split into periods of 15 min. At the end of a workday, there must be an uninterrupted rest period (*Ruhezeit*) of eleven hours. Workdays are days from Monday until Saturday. Work on Sundays and public holidays is generally prohibited. There is, however, an extensive statutory catalogue of exceptions (e.g., transportation, tourism, hospitals, restaurants).

Holiday and Sick Pay

In accordance with the Continuation of Remuneration Act (*Entgeltfortzahlungsgesetz - EFZG*), for hours not worked due to a statutory holiday, the employer must pay the remuneration the employee would have received on that day. Furthermore, should an employee be prevented from working due to sickness, the employee does not lose the claim to remuneration for a period of up to six weeks. A claim to continued remuneration in case of sickness only takes effect once the employee has been employed for four consecutive weeks.

Maternity Protection

The Maternity Protection Act (*Mutterschutzgesetz - MuSchG*) protects pregnant women and mothers against work-related health hazards and termination of employment. During pregnancy and until four months after childbirth any termination of employment by the employer is principally considered invalid. Employers may not employ a pregnant woman six weeks prior to childbirth and eight weeks after childbirth unless she expressly declares her willingness to work.

Parental Leave

Under the Federal Parental Allowance and Parental Leave Act (*Bundeselterngeld- und Elternzeitgesetz - BEEG*), both female and male employees are entitled to take parental leave up to three years while up to 24 months may be taken after the child's third birthday at the employee's request. The employer is not entitled to reject the employee's claim for parental leave, however, is not obligated to pay the employee's salary during parental leave. Employees may be entitled to parental benefits (*Elterngeld*). These benefits will be borne by the state alone. Employees on or who have applied for parental leave enjoy special dismissal protection. Termination of their employment is only possible for good cause and with the prior consent of a state authority.

Notice Period

Termination of employment usually requires the employer to comply with a notice period. Only in rare circumstances, for example expense fraud or other gross misconduct, is the employer entitled to dismiss the employee with immediate effect for good cause. Employer and employee may generally freely agree on the notice period, however, there are statutory minimum notice periods that need to be observed. The German Civil Code (*Bürgerliches Gesetzbuch – BGB*) provides for minimum notice periods for a dismissal by the employer, depending on the duration of service. The statutory minimum notice period for a termination by the employer during the first two years of service is four weeks to the 15th or the end of a calendar month. Maximum statutory notice period is seven months to the end of a calendar month after 20 years of service. Longer notice periods can be agreed on in employment contracts or collective agreements. However, the notice period for termination by the employee may not exceed the one for termination by the employer. In many cases employment contracts just refer to the statutory minimum notice periods. During the notice period the salary and all contractual and statutory benefits must be paid.

Probationary Period

Most employment contracts provide for a probationary period which may not exceed six months. During the probationary period, both parties may terminate employment by giving two weeks' notice if the contract does not provide for a longer notice period.

Dismissal Protection

Employees may qualify for dismissal protection under the Dismissal Protection Act (*Kündigungsschutzgesetz – KSchG*). The Act only applies to employees who have been employed for more than six months and if more than ten employees are employed in the German operation. Under the Act, termination by the employer will be legally effective only if "socially justified". Social justification means that there is one of three statutory grounds that supports the dismissal (*i.e.*, that there is either a conduct-related, person-related or business reason for the termination). Special dismissal protection applies to some groups of employees such as pregnant women, works council members, employees on parental leave and severely disabled employees.

Fixed-Term Employment

Employment can be entered into for an indefinite or a fixed term subject to limitations of the Part-Time and Fixed-Term Employment Act (*Teilzeit- und Befristungsgesetz – TzBfG*). In case of a valid fixed-term arrangement, the employment relationship automatically ends at the end of the defined term and can only be terminated earlier if provided for in the employment contract. As a rule, fixed-term employment requires a justification by a reasonable ground (*e.g.*, substitute employment during leave, increased demands due to special projects). However, the Act provides for certain exceptions for new hires: Fixed-term employment of



new hires is allowed without a justification being necessary for up to two years. For newly founded companies, the two-year period is extended to four years. Fixed-term arrangements require written form in order to be valid, *i.e.*, wet ink signature by employer and employee. Otherwise, an employment relationship with indefinite term is being established.

Part-Time Employment

The Part-Time and Fixed-Term Employment Act (*Teilzeit- und Befristungsgesetz – TzBfG*) provides for an entitlement to permanently work part-time if (i) the employer regularly employs more than 15 employees, (ii) the employee has been employed with the company for more than six months and (iii) the claim was communicated to the employer in writing three months before the reduced working time begins. The employer has to follow such a request generally, unless business reasons conflict with working part time. Since January 1, 2019, in companies with 45 or more employees, part-time employees will have the additional option to work part-time only for a specified period of time and have a right to subsequently increase their working hours to full time, subject to certain thresholds and depending on the overall number of employees in the company.

Trade Unions and Employers' Associations

Trade unions (*Gewerkschaften*) are associations of employees who join together in an organized union in order to represent the interests of the employees against employers and employers' associations. In Germany, trade unions are industry-specific and focus on specific areas of the economy (*e.g.*, for the metal industry the metal workers' union IG Metall). An employers' association is an association of different companies within a certain industry in order to ensure their interests are represented against the trade unions. The main task of trade unions and employers' associations is to negotiate and conclude collective bargaining agreements (*Tarifverträge*). For many industries it is common practice that wages and other employment conditions are governed by collective bargaining agreements, often setting industry standards beyond their actual scope of application.

Works Councils

Works councils (*Betriebsräte*, i.e., employee-representatives elected by the employees) can be elected in operations with five or more employees if the employees request so. Members are elected for four years and need not be union members. The Works Constitution Act (*Betriebsverfassungsgesetz – BetrVG*) provides works councils with information, participation and co-determination rights in relation to employers' decisions on personnel, social, and operational/economic matters. There is no legal obligation to establish a works council for either the employer or the employees. Notably, the employer does not have to take any initiative to establish a works council or call for election. On the other hand, the employer may not prevent the election of a works council as this would constitute a criminal offence.

Social Security

The vast majority of employees in Germany is subject to the mandatory statutory social insurance scheme consisting of statutory pension insurance (*Rentenversicherung*), unemployment insurance (*Arbeitslosenversicherung*), health insurance (*Krankenversicherung*), nursing insurance (*Pflegeversicherung*), and accident insurance (*Unfallversicherung*). According to the general provisions applicable to all social security insurances, the employer is obligated to register employees in a social insurance scheme with a competent institution of statutory health insurance. The employer must report the beginning and end of employment and must give annual status reports. Contributions to social security schemes, with the exception of accident insurance, are made by the employer and the employee in equal shares.

Wage Tax

The employer is obligated to deduct the income tax from the employee's gross salary and to pay it to the tax authorities on behalf of the employee. Nevertheless, the employee is the legal debtor of the tax.



YOUR CONTACTS

Dr. André Zimmermann, LL.M.

Düsseldorf / Munich
D: +49 211 36787 260
E: azimmermann@orrick.com



Louisa Kallhoff

Düsseldorf
D: +49 211 36787 156
E: lkallhoff@orrick.com



Marianna Karapetyan

Düsseldorf
D: +49 211 36787 127
E: mkarapetyan@orrick.com



Hendrik Völkerding

Düsseldorf
D: +49 211 36787 147
E: hvoelkerding@orrick.com

Copyright: Orrick, Herrington & Sutcliffe LLP, 2021. All rights reserved.

The Orrick logo and "Orrick, Herrington & Sutcliffe LLP" are trademarks of Orrick, Herrington & Sutcliffe LLP.

Version: February 2021

Disclaimer: This publication is for general informational purposes only. It is not intended as a substitute for the advice of competent legal, tax or other advisers in connection with any particular matter or issue and should not be used as a substitute. Opinions, interpretations and predictions expressed in this publication are the authors own and do not necessarily represent the views of Orrick, Herrington & Sutcliffe LLP. While the authors have made efforts to be accurate in their statements contained in this publication, neither they nor Orrick, Herrington & Sutcliffe LLP or anyone connected to them make any representation or warranty in this regard.

Attorney Advertising.