

Newsletter No 24 (EN)

German Labour Law
June 2005

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Introduction to the Updated Edition

With its “Agenda 2010”, the German Government aimed at a comprehensive reform of the German labour market. With regard to labour law, changes are made notably concerning the protection against dismissal and limited-term employment contracts (see Part 1, II, 3 and 7c). For the first time, there is a standard statutory claim to a severance payment (under certain circumstances) in the case of dismissals for operational reasons (redundancies). The new law entered into force as of 1 January 2004 onwards.

Furthermore on 9 July 2004, the Upper House of Parliament voted through the so-called labour market reforms (the so-called “Hartz IV” legislation). With the agreement of the Upper House, a law that represents the greatest and most comprehensive change in German welfare legislation since the introduction of labour and social insurance in the nineteenth century passed its last parliamentary hurdle (see Part II, VIII).

Part I: Individual Labour Law

I. Legal Framework

Labour relations between employers and employees in the Federal Republic of Germany are regulated by legislation, collective agreements and individual contracts of employment. The so-called "freedom of coalition" is guaranteed both to employers and employees under the German Constitution (Grundgesetz, GG). For the social partners, this ensures the freedom to negotiate collective agreements, i.e. autonomy in collective bargaining. The Basic Law furthermore guarantees freedom of association as well as free choice of equal treatment and in particular obliges the state to support the effective realisation of gender equality.

The major sources of labour law are:

- European Law (Directives and Ordinances of the European Union are dominating more and more the national labour law of the Member States; EU Directives must be implemented and EU jurisprudence from the European Court of Justice has legal binding power)
- Federal legislation
- Legislation of the Federal States
- Ordinances
- Collective agreements
- Employment agreements

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- Company internal practices/Working Rules and Regulations
- Employer's right to give instructions and
- Case law.

There is no consolidated Labour Code in Germany; minimum labour standards are laid down in separate acts on various labour related issues, which are supplemented by the government's ordinances.

The following Acts may be considered the key ones:

- The German Civil Code (*Bürgerliches Gesetzbuch*, *BGB*) defines the employment relationship and constitutes matters of dismissal without paying attention to protection against unfair dismissal. However, issues like protection against unfair dismissals, sick leave and holidays are treated in the specific Acts mentioned below.
- The Works Constitution and Employees' Representation Act (*Betriebsverfassungsgesetz*, *BetrVG*) regulates co-relations between employers and employees.
- The Act on Collective Agreements/Collective Bargaining Contracts Act (*Tarifvertragsgesetz*, *TVG*) governs collective agreements.

Other labour legislations are:

- Concerning Employment Relationships:
 - Federal Paid Leave Act/Federal Vacations Act (*Entgeltfortzahlungsgesetz*, *EngeltFG*; *Bundesurlaubsgesetz*, *BUrlG*)
 - Employment Safety Act (*Arbeitsschutzgesetz*, *ArbSchG*)
 - Act regulating the Payment of Wages and Salaries on Public Holidays and in Case of Sickness (*Entgeltfortzahlungsgesetz*, *EFG*)
 - Protection against Unfair Dismissal Act (*Kündigungsschutzgesetz*, *KSchG*)
 - Act on the Commercial Transfer of Employees (*Arbeitnehmerüberlassungsgesetz*, *AÜG*)
 - Social Code III (*Sozialgesetzbuch III*, *SGB III*)
- Concerning Occupational Training:
 - Occupational Training Act (*Berufsbildungsgesetz*, *BBiG*)
 - Act on Part-Time and Fixed-Term Employment (*Teilzeit- und Befristungsgesetz*, *TzBfG*).

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- Concerning Occupational Safety and Health, and Working Conditions:
 - Maternity Protection Act (*Mutterschutzgesetz, MuSchG*)
 - Young Workers Protection Act (*Jugendarbeitsschutzgesetz, JArbSchG*)
 - Working Time Act (*Arbeitszeitgesetz, ArbZG*)
 - Act on the Payment of Child Raising Benefit and Child Raising Leave (*Bundeserziehungsgeldgesetz, BerzGG*)
 - Insolvency Ordinance (*Insolvenzordnung, InsO*).
- Concerning Individual Dispute Settlement:
 - Labour Court Act (*Arbeitsgerichtsgesetz, ArbGG*)
 - Code of Civil Procedure (*Zivilprozessordnung, ZPO*).

Labour legislation is interpreted by the labour courts. Some matters, especially labour-strike regulations, are partly or even totally left to case law.

II. Individual Labour Law

Individual Labour Law is the area of labour law which regulates the relations between an individual employee and an employer. In particular, it covers the content and obligation aspects of the contract of employment and employment relationship, employee rights and employee protection.

An employee is defined as a person who works for another (the employer) on the basis of a contract under private law. The employee is in a relationship of personal subordination and subject to direction and control of his/her immediate superiors. Contrary to this, a person is considered to be an entrepreneur, if she/he is running a firm as owner or leaseholder.

Where no relationship of subordination exists but the individual depends economically on the enterprise, he/she may be a person treated in law similar to an employee (e.g. home workers, artists, musicians or freelancers). In recent years, there has been an intensive discussion accompanied by legislation as to the demarcation of self-employment and the related issue of so-called fake freelancers, (“Scheinselbständige”). The latter can be characterized as persons who (i) run a firm without staff covered by the system of compulsory insurance (health-, pension-, nursing care insurance) (ii) work regularly just for one customer and (iii) do work that is typical for dependent employees.

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Such individuals are treated equal to employees. Collective agreements can also be concluded for them. In general, the provisions of labour law are applicable to them as well as far as it concerned to protect them. This is especially true to the compulsory statutory insurance.

1. Employment Relationship

An employment relationship is created by a valid employment agreement. The contract of employment consists only of the specific working arrangements that are agreed between employer and employee, whereas the employment relationship encompasses the entire legal relationship between the contracting parties. The rights and obligations concerned may be laid down either by the individual contract, by collective agreement or by law.

This difference between the employment relationship and the contract of employment is particularly evident in the situation where the contract of employment is invalid and the employee has already taken up employment. In these circumstances, a legally valid employment relationship with retrospective effect including all rights and obligations between employer and employee will be presumed in the form of a ***de facto employment relationship***.

The contract of employment is a contract of service by which the employee undertakes to perform services in accordance with the instructions given by her/his superiors (sec. 611 of the BGB). This contract establishes an employment relationship between the respective parties. Since the terms and conditions of employment and the rights and obligations of the parties are fixed mainly by statutes, collective agreements and works agreements, the actual contract usually contains working hours and nature of the activity only. Any further benefits agreed on that exceed these fixed minimum terms and conditions to the employee's advantage also forms part of the contract. The contract may not, however, deviate from the provisions of statute law, collective agreements or works agreements to the detriment of the employee. To this extent, freedom of contract is restricted under labour law.

2. Working Hours

Protection of working time is governed by the Working Time Act (Arbeitszeitgesetz, ArbZG), the Maternity Protection Act (Mutterschutzgesetz, MuSchG) and the Young Workers Protection Act (Jugendarbeitsschutzgesetz, JArbSchG). The protection applies to white-collar workers as well as to blue-collar workers and vocational trainees.

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In general, working time is defined as the time from the beginning until the end of work without any breaks (sec. 2 (1) ArbZG and sec. 4 (1) JArbSchG). The statutory working time is 8 hours per day, except for Sunday and statutory public holidays, which are normally arranged to be a resting period (sec. 3 and sec. 9 ArbZG). The statutory weekly working time is thus 48 hours, but most employees in Germany have a regular working week of below 40 hours stipulated in their collective agreement. Following a recent ruling of the European Court of Justice standby service is also included in the 48 hours weekly working time. Following the ruling, the German legislator has changed the Working Hours Act. Pursuant to this, annual average working hours, including standby service, may not exceed 48 hours per week unless the employee has given his or her consent to this (which he or she can withdraw at any time).

The daily working time shall not exceed 8 hours in case of expectant or nursing mothers (sec. 8 MuSchG). The same applies to employees or trainees under 18 years (sec. 8 JArbSchG). There is also a ban on young workers working on Saturday (sec. 16 JArbSchG).

In all other cases, the regular daily working time may be extended up to 10 hours only if the mean of the daily working time in the following 6 months is 8 hours per day (sec. 3 ArbZG). This encourages flexibility of working time. However, 11 hours of uninterrupted rest after daily work must be guaranteed (sec. 5 (1) ArbZG). Also night work is legally permitted only under some strict preconditions (sec. 6 and sec. 7 ArbZG).

3. Permanent, Fixed-Term Contracts of Employment and Part-Time Work

As a rule, the contract of employment is concluded for an unlimited period. It is, however, possible for the employer and the employee to conclude a contract for a limited period only.

a. Fixed-Term Contracts

Any fixed-term contract must be consistent with the Act on Part-Time Work and Fixed-Term Employment Relationship (Teilzeitbeschäftigungsförderungsgesetz, TzBfG). The duration of fixed-term contracts must be set according to objective conditions such as a specific end date, the completion of a specific task, or the occurrence of a specific event. As of 2004 it is easier for start-up companies and those setting up businesses to limit the term of employment relationships. In the first four years after establishment of the company, they can limit employment relationships up to a total term of four years without requiring any objective reason for doing so. Before, limitations without an objective reason were subject to a general maximum limit of two years.

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b. Part-Time Work

Part-time work is also governed by the Act on Part-Time and Fixed-term Employment Relationship (Teilzeitbeschäftigungsförderungsgesetz, TzBfG). It is defined as any work week of fewer hours than the weekly hours worked by full-time workers. Every full-time worker who has been employed for at least 6 months in the same establishment can request to work part-time. The employer shall accept this request unless he/she regards the request as not feasible in view of operational reasons such as when the reduction of working time may have negative impact on the organization, work flow or safety, or would lead to excessive costs. If the employer does not react to the request until a month before the desired date of entry, the request is legally considered accepted. Please note that these rules are not applicable to companies with less than 15 employees. Furthermore any kind of unjustified discrimination between part-time workers and full-time workers is prohibited.

4. Paid Leave (Vacation), Sick Leave, Special Leave

Vacation is regulated by the Federal Paid Leave Act (Bundesurlaubsgesetz, BUrlG) and by collective agreements. The statutory minimum entitlement amounts to 24 days per calendar year, not including Sundays and public holidays (sec. 3 (1) and 2 BUrlG). Saturdays are thus included in the calculation. Additional days of paid leave may be added by the particular collective agreement. In fact, a period of 4 up to 6 weeks per calendar year is usually granted by collective agreements.

Sick leave is regulated under the Act on Payment of Wages and Salaries on Public Holidays and in case of Sickness (Entgeltfortzahlungsgesetz, EntgeltFZG). If the employee has been employed for at least 4 weeks and he/she was not to blame for his/her incapacity to work, continued payment of wages can be claimed for a period of up to 6 weeks (sec. 3 (1) EntgeltFZG). The employee is thus currently entitled to claim 100% of the average income (sec. 4 (1) EntgeltFZG).

Child raising leave is governed by the Act on the Payment of Child Raising Benefit and Child Raising Leave (Bundeserziehungsgeldgesetz, BerzGG). The claim to such leave can be made by female as well as male employees but is inadmissible whilst the ban on occupation under the Maternity Protection Act applies. During child raising leave, the mutual duties laid down in the employment contract are suspended.

Another entitlement for continued payment during leave of absence is laid down in sec. 616 of the German Civil Code (Bürgerliches Gesetzbuch, BGB). Wages can also be

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claimed if the employee is prevented from working for personal reasons (such as e.g. death in the family, birth or attending a funeral of a relative or family member) and the absence is for an insignificant period. In fact, the employee is not always entitled to entirely claim such leave, because sec. 616 BGB may be - and in practice often is - limited or even unrecognised by collective or contractual agreements.

5. Remuneration

Actual salary is determined in the individual contract of employment, but cannot be lower than the minimum wage established in the relevant collective agreement. Unlike many other countries, there is no statutory minimum wage in Germany.

As a general rule, remuneration is determined by mutual agreement. This principle may be restricted, but only in observance of the applying statutory protection. Any salary payments are subject to tax and social security contributions (pension, unemployment, health and nursing care insurance). These must be withheld from the salary by the employer and paid respectively to the tax office or the social security institutions, along with the employers' own social security contributions. The employer and the employee each pay half of the social security contributions, and employers must pay their share in addition to the salary.

6. Termination

An unilateral declaration of intention by one contracting party to another, stating that the contractual relationship is to be ended, takes effect when the other contracting party receives it. Notice must be given in writing in order to have legal effect.

German labour law makes a distinction between ordinary termination (with notice), whereby the employment relationship is ended when the period of notice expires (sec. 622 BGB), and extraordinary termination (without notice). In the latter type of termination, the notification takes the effect of an immediate cancellation of the employment relationship (sec. 626 BGB).

Termination by the employer is unlawful if it contravenes one of the regulations of protection against unfair dismissal or a contractual restriction of the right to terminate and the employee then invokes these infringements.

Provided no contractual restriction has been agreed, termination by the employee is lawful if due notice is given or if the termination is for cause. Termination by the employee without notice is subject to the same rules as those for summary dismissal by the employer.

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7. Employee Protection

Employee protection comprises all the regulations on rights in employment, which take account of the employee's particular position of vulnerability in the employment relationship. They include especially health and safety, restrictions on working hours, maternity protection, youth employment protection, protection against unfair dismissal and protection against discrimination.

a. Maternity Protection

Maternity protection is governed by the Maternity Protection Act (Mutterschutzgesetz, MuSchG), which is supplemented by the Ordinance on Maternity Protection at the Workplace.

As a general duty the employer has to organise workflow and workplace in favour of the pregnant and nursing employees (sec. 2 (1) MuSchG). This protection applies as soon as the employer has been informed about the existent pregnancy. A ban is then put on heavy physical work or piecework as well as on work with dangerous materials (sec. 4 (1) and (2), sec. 3 MuSchG and sec. 1 of the Ordinance). In cases of the employer's misconduct he/she will be punished for a regulatory offence or even for a criminal act (sec. 21 (1-4) MuSchG).

During pregnancy and until 4 months after childbirth, the employee is additionally protected against any dismissal either with or without notice (sec. 9 MuSchG). The same absolute protection applies to the period of child-care leave according to the Act on the Payment of Child Raising Benefit and Child Raising Leave (Bundeserziehungsgeldgesetz, BerzGG). During a period of 6 weeks prior to the birth and until 8 weeks after the birth, the pregnant and nursing mother may not be occupied by the employer. In cases of premature or multiple birth, this ban lasts until 12 weeks after birth. During this period of maternity leave, the employee is paid maternity allowance out of a statutory health insurance fund and a supplement by the employer.

Another protection of the pregnant female is determined by case law: Usually unlawful answers given in the course of a job interview may lead to the entitlement of the employer to revoke the employment agreement. In such a case the employee is not protected from unfair dismissal. However, such deception is only deemed to be illegal if the question concerned is permissible. Otherwise the applicant may lie without consequence. This is true for questions regarding pregnancy because it would amount to discrimination as between male and female applicants. Only in exceptional cases (e.g. the expectant mother is not capable to do the work in question or if the question shall serve

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to the protection of the expectant mother or the unborn child) this type of question may be lawful and must be answered honestly. According to a recent decision of the European Court of Justice for fixed-term employment agreements the question regarding pregnancy is justified only where the pregnancy does substantially not allow the work for the entire contractual period. Furthermore it has to be stressed that any questions as to whether the candidate wants to have children are never allowed.

b. Youth Employment Protection

The employment of children is prohibited according to the Young Workers Protection Act (Jugendarbeitsschutzgesetz, JArbSchG). This applies not only to children under 15 years but also to those who are older and still obligated to attend full-time schooling (sec. 5 (1), and sec. 2 (1), (3) JArbSchG).

Workers under the age of 18 may perform their apprenticeship or traineeship. In this case the employer must observe a special protection, also laid down in the above-mentioned Act. The daily working hours must not be more than 8 and any occupation between 8 pm and 6 am is forbidden. During work, breaks of suitable duration must be ensured and Saturdays as well as Sundays are, apart from very exceptional cases, arranged to be a time for rest. Moreover, there is a ban on dangerous work, piecework, time-based work and on underground mining work.

c. Protection against Unfair Dismissal

The major sources of regulation concerning this issue are the German Civil Code and the Protection Against Unfair Dismissals Act (Kündigungsschutzgesetz, KüSchG). However, as of 1 January 2004 the latter applies only to establishments regularly employing more than ten full-time employees (not counting vocational trainees and marginal part-time workers). Before the threshold amounted to 5 employees; however, those employees who currently have protection against unfair dismissal under the old law will not lose the protection against unfair dismissal. Also, a worker must have completed a qualifying period of six months work without interruption to be eligible for protection under this law (sec. 1 (1) and sec. 23 KüSchG).

As aforementioned (see Part I, II 6), a distinction is made between ordinary termination with notice and extraordinary termination without notice. In both cases, termination at the initiative of the employer is limited by reasons of law.

Periods of notice are also stipulated by law. The minimum statutory period amounts to four weeks, and is increased by one month each time the worker has completed his/her 5th, 8th, 10th, 12th and 15th year of working for the same employer. The maximum enti-

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tlement is seven months, after the worker has completed a 20-years period of employment. However, years of service before the employee is 25 years old are not taken into consideration to calculate his/her entitlement to notice. Collective agreements may specify longer or shorter periods of notice, whereas individual contracts of employment may only specify longer periods of notice.

Extraordinary termination is legally possible where there is a cause which makes it unacceptable for the respective party to continue the employment relationship until the end of the notice period, alternatively the contractual date of expiration. Typically it applies to cases of serious misconduct and is only possible within two weeks as of the moment when the notifying party finds out the facts that are decisive to terminate the employment relationship. In case of litigation, the same party will be required to prove the facts on which the extraordinary termination is based on.

In the case of an ordinary termination with notice the employment relationship ends when the period of notice expires. The declaration of an ordinary termination must be “socially justified”. There are three possibilities of social justification:

Dismissal on grounds of personal capability: The termination must be grounded on circumstances related to the employee’s permanent personal attributes such as lack of vocational, physical or mental qualification for the work in question, advanced age or serious illness.

Dismissal on grounds of conduct: Here the circumstances which lead to a termination must be related to wilful conduct on the part of the employee.

The line between dismissal on grounds of personal capability and dismissal on grounds of conduct is, however, fluid. Grounds relating to conduct concern individual acts committed by the employee, whereas grounds relating to personal capability are associated with certain permanent personal characteristics and abilities of the employee.

Redundancy/Termination for operational reasons (betriebsbedingte Kündigung):

Termination in the sense of redundancy is for a reason within the employers sphere of influence in running the company. Redundancy is lawful only if justified by urgent operational requirements. These can relate to economic, technical or organizational changes. The transfer of an establishment is, however, not an admissible reason. As of the amendments of the law on protection against unfair dismissal from 2004 onwards an employer will, when terminating employment, alongside with his written notice, be able to offer a newly created “statutory compensation payment” for the case that the employee decides not to file a complaint for unfair dismissal. This statutory compensation payment comprises a half monthly gross salary per year of employment. It is for

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the employee to decide whether or not he/she thinks it advisable to take court action, bearing in mind that, if the dismissal is held to be justified, he/she might leave the court empty handed. Therefore, judicial proceedings will be less likely when compensation is offered since, in the past, most employees sued their employers for re-instatement not because they wanted to resume work but because this was the only way to receive compensation.

In this context, further amendments concern the criteria for selecting the employees to be made redundant. From January 2004 onwards, they are considerably simplified: employers will only be obliged to take into consideration the duration of the employment relationship, age of the employee, his/her financial obligations towards family members and severe disabilities as recognised by statute. Furthermore, certain persons who are of particular importance for the establishment due to their knowledge, abilities and performances can be ignored in the selection-process as outlined above. As a result, the new rules in connection with the termination of employment will make consequences of redundancy better predictable because the criteria of selection concerning worker who are to be made redundant have been considerably simplified.

Where there is a staff committee, the employer is obliged to consult it before each case of dismissal either with or without notice, even though the council's response is not binding on the employer. The staff committee has a period of three days in case of extraordinary dismissal and one week in case of ordinary termination to agree or declare reservations in writing. Otherwise agreement is presumed by law. Termination without proper hearing of the staff committee is ineffective.

A worker who intends to take action against his/her termination must file a submission before a labour court within a time limit of three weeks as of the date he/she has received the notice. If the court is not convinced that either the ordinary termination is socially justified, or the extraordinary dismissal is for important reasons, it may order the worker's reinstatement, with back pay. In this context the termination is "socially justified" if the employee had been selected by social criteria as duration of the employment, age, marital status, having children and others. Unless the court decides that reinstatement is impractical it may assign the employer to pay compensation. The compensation is normally equal to a one-month pay per each year of service, with a maximum of twelve months. In case the worker is aged more than 55 years and is employed twenty or more years, the compensation may be even equal to eighteen-months pay.

Special rules apply to collective redundancies in establishments employing more than twenty employees, which call for the consultation of the staff committee and the setting up of a social plan.

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Some groups of employees benefit from particular protection against ordinary and extraordinary dismissal due to certain individual circumstances. These specially protected groups include disabled workers, pregnant women and staff committee members.

d. Equality

The principle of equal treatment is laid down as a basic right of the German Constitution (GG). Any discrimination on grounds of sex, race, nationality, handicap, religion, political opinion and trade union activities is inadmissible. In order to fulfil the obligations arising from EU directives, sections 611 a and 611 b of the German Civil Code (BGB) were enacted in 1980. Direct and indirect discrimination on grounds of sex, also prior to the establishment of an unemployment contract, have thus been prohibited by law. A prohibition is also on sexual harassment. Although there are already special statutory provisions in force such as the Act of the Promotion of Employment (Beschäftigungsschutzgesetz, BeSchuG) and regulations are already been provided for in criminal law, the particular situation of the work environment together with its existing subordinate relationships cannot be sufficiently taken into account. The Act on Employment Protection defines sexual harassment as any deliberate, sexually oriented behaviour which injures the dignity of employees at the workplace.

Another development in this respect refers to the implementation of three EU anti-discrimination Directives. The deadlines for implementing the directives have all passed when the European Commission finally announced last year that it would file suit against Germany before the European Court of Justice. In 2005 the German Legislator finally took action and implemented the directives into the Anti-Discrimination Act.

The implementing law prohibits discrimination based on racial or ethnic origin, sex, religion or belief, disability, age or sexual orientation in employment and occupation (the prohibited grounds). It protects employees, job applicants and pensioners, against discrimination by the employer, other employees and third parties, such as clients of the employer. It also provides remedies for employees who suffer discrimination on one of the prohibited grounds. "Discrimination" also covers harassment, sexual harassment and instructions to discriminate. Furthermore a federal anti-discrimination office shall be established. Employees may file a discrimination complaint either with this office or with their employer. If the employer fails to implement measures to stop the discrimination, the affected employees may stop working to the extent that this is necessary for their protection but they will continue to be paid. Employees who are discriminated against will be entitled to financial compensation for non-financial damage.

8. Employment of Foreigners

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On 1 January 2005 the New Immigration Act (“Zuwanderungsgesetz”, ZuwG) entered into force. It contains a complete revision of the entire law dealing with foreigners and constitutes the first comprehensive reform of the existing aliens law into a modern immigration law. Among various changes the provisions regarding the employment of foreigners have been completely revised. Under the old Regime two permits have been necessary, namely a residence permit and a work permit. The permits have been connected in that a residence permit can be issued only if and when the labour office decides that a work permit can be issued. According to the new Act the work permit will be issued together with the residence permit, subject only to internal approval by the labour office (one-stop-government). This is a significant simplification of process. Foreigners will therefore only have to deal with one authority. Abroad this will be the foreign missions (embassy and consulate visa offices); in Germany the alien authorities. The labour administration is involved via an internal employment approval procedure where this is required. Moreover, the Federal Employment Agency checks whether the employment of foreigners will have a negative effect on the labour market. Another precondition for approval is that the foreign employee will not be employed under less favorable conditions than a comparable German employee.

9. Deductions from Salary (Taxes and Social Security Contributions)

These deductions mainly arise from the employer's obligations under public law to hold back **Wage tax**, **Church tax** where applicable and the **Social Security Contributions** (there are five branches of social insurance: pension, health, long-term care, accident and unemployment insurance) payable by employees, and to forward them to the tax office and social security collecting agencies. The amount of such deductions is determined by the employee's gross pay and marital status.

Wage Tax is a form of income tax which is levied on earnings from work as an employee. It is deducted at source by the employer and must be forwarded to the tax office by the tenth day of the following month. Taxation of an individual's income is progressive. In other words, the higher the income, the higher the rate of tax payable. The basis for calculation is gross pay, minus any tax-exempt allowances. In addition a solidarity surcharge of 5.5% is levied on the actual income tax amount. As of 1 January 2005, the basic personal allowance amounts to EUR 7,664. The basic tax rate has been reduced to 15% (in 2004: 16%), while the top rate amounts to 42% (2004: 45%). The top rate applies only to taxable income in excess of EUR 52,151.

The **Social Security Contributions** for health, unemployment insurance, the statutory pension scheme, long-term care and accident payable by the employee represent half of

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the total contributions that must be paid over to the social security institutions. The employer deducts them from the employee's gross pay and must then provide the other half from own resources and pass on the total to the institutions concerned. Accident insurance contributions are paid only by the employer.

However, social security contributions are not necessarily compulsory for an employee. Individuals whose earnings are above the so-called "Beitragsbemessungsgrenze" (income limit for chargeable contributions, in 2005, EUR 3,900 gross per month or EUR 46,800 per annum) may choose whether they will opt to remain in the statutory insurance scheme, insure themselves privately or dispense with insurance protection altogether.

The rates of contribution for the statutory health insurance amounts to an average of 14.5% in 2005, the long-term care insurance amounts to a rate of 1.7% (additional contributions are to be made by childless taxpayers in the amount of 0.25%) of the gross salary.

Unemployment insurance is the branch of statutory social security that insures employees against the risk of unemployment. The primary purpose of unemployment insurance is the prevention of loss, and only secondarily it includes the support in the form of payments (unemployed benefit). It therefore provides not only insurance payments but also funding for job creation and protection and, in the context of employment promotion, funding for fostering vocational training, entry into active employment and occupational rehabilitation. In 2005 the rate of unemployment insurance amounts to 6.5% of the gross salary. Unemployment insurance is administered by the Federal Institution for Employment (recently renamed into "Bundesagentur für Arbeit").

The majority of gainfully active individuals working as employees and some of those working on a self-employed basis are subject to obligatory insurance under the statutory pension scheme. The protection provided covers total disability, occupational incapacity, retirement and death of the insured person. The statutory retirement pension is normally paid from the age of 65 onwards, but in certain cases even earlier. If the insured person dies there are entitlements to a widow or widower's pension and to an orphan's pension for children who are still attending school or undergoing vocational training. The amount of the pension is graded according to the income of the insured person and the duration of the insurance period. In 2005, employers and employees both pay one half of 19.5% of the latter's gross monthly salary up to a certain income level up to a certain income level (EUR 62,400 in West Germany and EUR 52,800 in East Germany).

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III. System of Labour Courts and Labour Court Procedure

The labour law jurisdiction is governed by the Labour Court Act (Arbeitsgerichtsgesetz, ArbGG). The German labour court system is three-tiered: labour courts of first instance (Arbeitsgerichte), higher labour courts (courts of appeal) in the second instance (Landesarbeitsgerichte); and, at the top, the Federal Labour Court (Bundesarbeitsgericht), which has the final say in labour law matters.

Proceedings concerning an individual employment relationship or any appeal of one by either side of the dispute lead to a judgement. They always start with a conciliatory hearing, because the Local Labour Court's first intention is an amicable settlement of the case. If a settlement is concluded at this stage, the court will generally not charge court fees other than the initial filing fee. Although each party must meet its own costs for legal representation, the losing party must bear the attorney fees of both parties. Proceedings for protection against dismissal are also given priority in the first instance (sec. 61 a ArbGG).

Disputes in terms of Works Constitution Law are part of another proceeding. They are leading to a court order which permits only restrictively amicable settlements.

Also social security cases are heard by separate courts. This is due to the fact that social security law in Germany is strictly separated from labour law, and is understood to be a part of public law. Therefore, disputes arising in the field of social security are not settled by labour courts (or administrative courts), but by special social security courts (Sozialgerichte). The large majority of the cases heard before these courts deal with questions concerning either the statutory pension scheme or unemployment insurance or total disability law.

IV. Federal Institution for Employment

The Federal Employment Service (*BfA*¹) particularly organizes job placement and the planned promotion of employment (sec. 33 ff. EPA), the implementation of job creation schemes and the administration of unemployment insurance.

¹ *BfA = Bundesagentur für Arbeit*

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V. Unemployment and “Hartz” legislation

1. Unemployment Insurance

Unemployment insurance is mandatory for all employees in Germany. Contributions are 6.5% of gross monthly salary up to a certain level split equally between employer and employee.

Unemployment benefits are granted if the employee is unemployed and has worked (and paid contributions) for at least 12 month in the last three years (note that this period will be shortened to two years). To receive unemployment benefits, the employees must register at the local employment office (Arbeitsagentur) immediately, as payments will be made only from the registration date and delays can lead to further penalties.

Furthermore the employee must not “risk his/her job wilfully” if this causes unemployment (e.g. if the employee quit his job by himself or signs a cancellation agreement). Otherwise, normally a 12 week blocking period is applicable if the employee can not prove that he/she has an important reason for quitting his/her job. An important reason exists if it is unreasonable for the employee after considering all circumstances to continue the employment, for instance the employee wants to move to his spouse or partner, binding working conditions are not kept or in case of workplace bullying or harassment. In this context a recent decision of the German Federal Social Court² has to be cited, ruling that in general in case of a contract of cancellation a blocking period always applies.

Besides this, a jobless person who wants to get unemployment benefit has to look for a job actively, and must be available for labour exchange at every working day, otherwise the payments will be interrupted for some weeks.

Benefits are around 60% (67% in case of children) of the previous net salary. The length of time one is entitled to payments depends on the length of former employment and age. Benefits are restricted to one year for people up to 45 years. While receiving benefits one must report regularly to the local Institution of Employment and the former employee is responsible for proving that he/she is looking for work if requested.

² BSG vom 18. Dezember 2003, Az.: B 11 AL 35/03R

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2. Severance Payments

Different types of severance payments can be observed in Germany. The first type is based on the Protection Against Unfair Dismissal Act (KüSchG). It is applicable for firm with more than ten employees and employees with more than six months of tenure. Severance payments can be the outcome of dismissal protection claims if ordinary dismissal are socially unjustified or extraordinary dismissals are causeless. In these cases severance payments are arranged if one party makes the application to cancel the employment relationship (although the dismissal was socially not justified), because a further co-operation between the employer and the employee cannot be expected. A court decision is not necessary for a severance payment. Frequently the parties come to an agreement with the help of a court without an official decision and in many cases employees and employers agree upon a certain amount without using a court at all. They may anticipate the costs and the uncertain outcome of claims and are both better-off – in terms of expected utility – with a mutual agreement. Additionally, many firms worry about a loss of reputation if conflicts concerning dismissal become public knowledge.

A second type can occur in the context of operational changes in connection with mass dismissal and social plan.

Both types are paid as a lump sum. The size of severance payment is not clearly determined by law. There is a scope of discretion of the courts and usually (depending on the Federal State in which the proceedings take place) for each year of employment either a half or one monthly gross salary will be granted.

From a German tax perspective, a severance payment is considered compensation for the loss of future earnings and not past earnings. As of 1 January 2004 employees may receive EUR 7,200, EUR 9,000 or EUR 11,000 tax free depending on their age and seniority. The balance of the severance pay is given favourable tax treatment which reduces the effects of progressive taxation provided it is received during the course of one calendar year. The German tax authorities will only tax severance payment if Germany remains the country of residence at the time the payment is made.

As of 1 January 2003, an employee must inform the Employment Agency personally and without delay as soon as he or she finds out that his/her employment will end. If the Employment Agency is not duly informed, the employee will face a reduction in unemployment benefits (see above 2.).

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3. “Hartz” Legislation

The Hartz concept is the name given to the recommendations resulting from a commission on reforms to the German labour market in 2002. Named after the head of the commission, Peter Hartz (Volkswagen’s personnel director), it went on to become part of the German governments Agenda 2010 series of reform. The reforms of Hartz I-III took place between 1 January 2003 and 2004; Hartz IV began on 1 January 2005.

Hartz I and II both came into effect on 1 January 2003, aiming at making new types of jobs easier to create, and cover for example the foundation of “staff services agencies”, support for further vocational education from the Job Agency, subsistence payments by the Job agency, new types of employment like the “Minijobs”, which lower or gradually rising taxes and insurance payments, a grant for entrepreneurs, known as the “Ich-AG” (Me inc.) and a rise in the number of job centres.

Hartz III came into effect on 1 January 2004. It aimed at restructuring and reforming the Job Centre, changing its name from the Bundesanstalt für Arbeit or Arbeitsamt (Federal Labour Institution) to the Bundesagentur für Arbeit or Agentur für Arbeit (Federal Labour Agency).

The Hartz IV reform came into effect on January 1, 2005. This part of the reform brings together unemployment benefits and social security benefits, leaving them both at approximately the lower level social security claimants received (up to EUR 345 per month plus cost of “adequate” housing).

Prior to 2005, 12 up to 32 months (depending upon the claimant’s age and work history) of full unemployment pay were followed by “Arbeitslosenhilfe” (unemployment benefits, 53 to 57% of the last net salary). From 2005 on, reception of the full unemployment pay (renamed to “Arbeitslosengeld I”) is restricted to 12 month in general and 18 month for over-55-years-old. This is now followed by the (usually much lower) Arbeitslosengeld II if the claimant fits the requirements. Whether or not the claimant is eligible for Arbeitslosengeld II now depends on his or her savings, life insurance and the income of husband or wife; only when these reserves are used up will a claimant get money from the state. The Institute for Economic Research in Halle estimates that the average long-term unemployed person will receive approx. EUR 350 per month compared to 530 before the reform.

Unemployment benefit II is in reality not a revised form of unemployment benefit but rather its abolition and transformation into social security. In the future, those who have worked for many decades and lose their job through no fault of their own will be subject to the same humiliating conditions that apply to those drawing social security

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benefits. Under the previous regulations, unemployment benefits were calculated according to the last net wage. The long-term unemployed, those out of work for more than one year, received 53% of their last wage. The income and property of a partner or others living in the same household was not taken into consideration. By paying contributions into the unemployment insurance scheme during his/her working life, an unemployed person had a legal claim to unemployment benefit. This legal claim is now void.

Like social security, “unemployment benefit II” entitlement is checked down to the last detail. The income and property of any partner living in the joint household will now be taken into account. Also current bank account statements are required, as are statements showing the level of any savings. An unemployed person and his or her partner can only receive benefits if their savings are below EUR 2,000 for each year of their life, up to a maximum of EUR 13,000 per partner. If an unemployed person has previously taken out capital-based life insurance for their old age they would have to cash this in prematurely and use up any proceeds – receiving far less than originally deposited. This fate will await quite a few, in view of the fact that some 70% of German citizen have taken out life insurance.

Furthermore, in order to receive even the diminished payments, unemployed persons can now be forced to accept any legal job, even if the pay does not provide subsistence and no matter how advanced their (previous) professional formation.

When the number of people who count as unemployed rose in January 2005 due to the new statistics introduced with Hartz IV and because of seasonal reasons (unemployment is much higher in the winter), this is what finally brought the total official figure over the psychologically important 5 million, the highest mark since January 1933 (just before Hitler came to power). That number alone is expected to stifle domestic demand further, and to lead to another marked drop in consumer spending after 3 already dismal years in the retail industry.

Several constitutional lawyers dispute the legality of Hartz IV law. The gravest problem seems to lie in the level of aid; EUR 345 per month, though more or less covering the most basic needs, are simply not enough for the constitutionally guaranteed “life in dignity” in a high-cost country like Germany. Another problem is the gross disproportion between the employees social insurance payments and the benefits (e.g. 30 years of unemployment insurance premiums equate some five full years of unemployment money, not the 12 month conceded by Hartz IV. Other doubts arise from then new so-called “1 EURO-Jobs” which in nature part resemble the forced labour last seen under the Third Reich dictatorship. A couple of constitutional complaints have already been announced for 2005.

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Part II: Collective Labour Law

Labour relations between employers and employees are regulated in Germany by legislation, collective agreements and contracts of employment. The so-called “freedom of coalition” is guaranteed both to employers and employees under the German Constitution (GG). For the social partners, this ensures the freedom to negotiate collective agreements, i.e. autonomy in collective bargaining. Collective Labour Law is the area of labour law which regulates collective relations between employers and employees. In particular, it covers the works constitution and staff representation, the right to organize and collective bargaining autonomy.

The following Acts may be considered the key ones:

- The Works Constitution and Employees’ Representation Act (*Betriebsverfassungsgesetz*, *BetrVG*) regulates relations between employers and employees.
- The Act on Collective Agreements/Collective Bargaining Contracts (*Tarifvertragsgesetz*, *TVG*) governs collective agreements.

I. Trade Unions and Employers’ Association Regulations

There is no trade union law in Germany. Even though trade unions are generally defined as associations with no legal capacity, they are legally entitled to collectively bargain as well as to take legal action or to be taken to court (sec. 2 (1) Act on Collective Agreements *TarifVG* and sec. 10 Labour Court Act, *ArbGG*).

The duties and rights of trade union members are laid down in the relevant trade union's constitution. Even though the constitutions may vary between different trade unions, they traditionally establish similar essential duties and rights. Members are obliged to pay union dues, of which the amount is based on the individual wage level. At the same time they are entitled to be supported in labour disputes as well as to legal advice. The membership only ends by termination upon the worker's initiative or by exclusion on the basis of the trade union's decision, which must be in accordance with its constitution.

Employers’ associations are generally defined as associations with legal capacity. Many of the regional associations are industry-based and those of the same branch usually finally merged into an association at Federal level. The Federal associations of the different branches are unified in the two most important central confederations, the Confed-

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eration of German Employers' Associations (*BDA*)³ and the Federal Union of German Industry (*BDI*)⁴. The *BDA* represents the enterprises' interest as an employer, whereas the *BDI* seeks to further their economic and political interests.

II. Collective Bargaining Agreements

The right of the collective industrial organizations to regulate terms and conditions of employment on their own responsibility and independently from any influence is guaranteed by the German Constitution (GG). More specifically, they have the right to create an appropriate system to regulate working life and to adjust it regularly to current economic and social developments through the conclusion of collective agreements.

Collectively agreed terms and conditions of employment apply only to members of the organizations concluding the collective agreement. In practice, however, they are usually applied to all employment relationships.

Thus, it is primarily the parties of a collective agreement who create a uniform system of employment conditions covering all establishments within each individual collective bargaining region. The most important consequence for the employees is that they are able to unite in trade unions to negotiate conditions with the employers' side, instead of having to deal with the employer on an individual basis in negotiating their terms and conditions of employment. If necessary, they can impose these by means of strikes.

In accordance with the Basic Law, collective bargaining autonomy must not be undermined by prohibiting industrial action and replacing it by state-imposed arrangements or compulsory arbitration.

III. Workers' Representation in the Enterprise

Workers' representation in the enterprise is governed by the Works Constitution Act (Betriebsverfassungsgesetz, BetrVG). This Act is decisively based on the term establishment. An establishment is the organizational unit in which the employer alone or together with his staff pursues particular working objectives. In an establishment regularly employing five or more employees its employees may decide to elect a staff committee. The staff committee's period of office is four years (sec. 21 BetrVG).

³ *BDA = Bundesvereinigung der Deutschen Arbeitgeberverbände*

⁴ *BDI = Bundesverband der Deutschen Industrie e.V.*

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The number of members of a staff committee is determined by the number of workers normally employed in the establishment. It varies from one member in establishments occupying from 5 to 20 workers to 31 members in establishments occupying from 7,001 to 9,000 employees. In establishments with more than 9,000 workers the number of members of a staff committee is increased by two members for every additional 3,000 workers. Manual and non-manual workers have separate representation on a staff committee.

The works council has rights of participation as well as of co-determination. The right of participation includes the right to be informed and to make recommendations. The right of co-determination is by far of much more practical effect, because it entails the possibility of blocking a decision of the employer which is dependant on the staff committee's agreement. It covers subjects such as

- working rules
- working time including overtime and holiday roster
- methods of pay
- introduction and use of technical devices for monitoring employees' conducts and performances
- accident prevention and health protection
- fringe benefits and the provision and withdrawal of company-owned housing.

IV. System of Labour Courts and Labour Court Procedure

The labour law jurisdiction, which also includes trade union disputes, is governed by the Labour Court Act (*Arbeitsgerichtsgesetz, ArbGG*).

There are three instances, namely Local Labour Courts, Regional Labour Courts and the Federal Labour Court as the final instance.

Proceedings concerning an individual employment relationship or any appeal of one by either side of the dispute lead to a judgement. They always start with a conciliatory hearing, because the Local Labour Court's first intention is an amicable settlement of the case. Proceedings for protection against dismissal are also given priority in the first instance (sec. 61 a ArbGG).

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Disputes in terms of Works Constitution Law are part of another proceeding. They lead to a court order which permits only restrictively amicable settlements.

Appendix 1: Sources

Dr. Heinrich Schönfelder
Schönfelder, Deutsche Gesetze
(Collected texts of Civil, Criminal and Procedure laws)
117th Edition, Munich, April 2003

Dr. Otto Palandt
Kommentar zum Bürgerlichen Gesetzbuch
(Commentary to the German Civil Code)
62nd edition, Munich 2003

Prof. Hans C. Nipperdey
Nipperdey I, Arbeitsrecht
(Collected texts of all Federal Labour laws)
69th edition, Munich, April 2003

www.arbeitsamt.de

www.ilo.org

www.eurofound.eu.int

www.germany-info.org

Appendix 2: Useful Addresses and Web-Pages

1. Federal Agency for Employment

Bundesagentur für Arbeit
Regensburger Straße 104
90478 Nürnberg
Germany
Tel: +49 (0) 911 179-0
Fax: +49 (0) 911 179-2123
E-Mail: www.arbeitsagentur.de

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2. International Labour Organization (ILO)

www.ilo.org

Programme	Phone	Fax	Internet E-Mail Addresses
ILO Regional Office for Europe and Central Asia in Geneva (EUROPE)	<u>Regional Director:</u> +41/227 99 66 50 <u>Secretariat:</u> +41/22 799 66 66 <u>Switchboard:</u> +41/22 799 61 11	+41/22 799 60 61 +41/22 798 86 85	europa@ilo.org
Branch Office: Bonn/Germany	<u>Director:</u> +49/228 35 90 49 +49/288 36 23 22 +49/228 36 39 88	+49/228 35 21 86	bonn@ilo.org
MDT: Bangkok (ILO/EASMAT)	<u>Director:</u> +66/2 288 22 19 +66/2 288 22 20 <u>Deputy Director:</u> +66/2 288 17 11 +66/2 288 17 96	<u>Director:</u> +66/2 288 30 62 +66/2 288 30 58 <u>Deputy Director:</u> +66/2 288 30 60 +66/2 288 30 43	bangkok@ilo.org
Area Office: Beijing	<u>Director:</u> +86/1 0653 250 91 +86/1 0653 250 92 +86/1 0653 250 93 +86/1 0653 250 94 +86/1 0653 250 95 <u>Deputy Director:</u> +86/10653 250 96	+86/1 065 3214 20	beijing@ilo.org
Branch Office: Tokyo	+81/3 546 727 01 +81/3 546 727 02 +81/3 546 727 03	+81/3 546 727 00	tokyo@ilo.org
Area Office: Jakarta	<u>Director:</u> +62/2 131 413 08 +62/2 132 586 5 +62/2 131 555 75	+62/2 13100766	jakarta@ilo.org

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