

# Employing staff in **Germany**



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## 1.0 INTRODUCTION

The key statutes governing employment relationships in Germany are the Civil Code, the Working Time Act, and the Protection Against Unfair Dismissal Act. German employment laws are increasingly influenced by European Union law.

## 2.0 EMPLOYMENT OF FOREIGNERS

Employers who employ foreign nationals without the necessary work permits commit an offence and are subject to a fine of up to €500,000. The concerned employee may also be fined.

Case-law has ruled that a clause in an employment contract specifically providing for automatic immediate termination if a work permit is revoked or becomes invalid on other grounds is void. Under such circumstances, the employer may terminate the contract by giving the agreed notice.

### 2.1 EEA and Swiss Nationals

Citizens of the European Union (EU), the European Economic Area (EEA), and Switzerland can work in Germany without any visa. If they will work in Germany for more than three months, they will need to register with the town hall. Swiss nationals should also register with their local foreign office and obtain a residence card.

### 2.2 Other Foreign Nationals

A residence permit is required for other foreign nationals to take up employment in Germany.

Germany has a number of bilateral agreements with other countries, such as the USA, which allow citizens of those countries to enter the country visa-free for no more than 90 days within a period of 180 days and subsequently apply for their residence permit for work purposes.

## 3.0 EMPLOYMENT CONTRACT

### 3.1 Form of Employment Contract

Except for fixed term employment contracts, vocational training contracts and non-compete restrictions which must be agreed in writing, an employment contract may be agreed orally, but is generally confirmed in writing.

### 3.2 Written Particulars

German statute requires that employers provide employees with written particulars of key terms and conditions of employment within one month of employment:

- > Names and addresses of the parties;
- > Start date;
- > if fixed term, the length of the term for which the employment will last;
- > Place of employment;
- > Details of the role;
- > Working hours;
- > Salary and all other elements of remuneration and date of payment;
- > Holiday entitlement;
- > Notice period on termination;
- > Any applicable trade union agreements and works council agreements.

### 3.3 Fixed Term Contract

There are two types of fixed term contract – one for a specific timescale, and one for a specific project. If the contract is for a specific project, then the employer must give 2 weeks' notice that it is coming to an end. If the employee continues to work beyond this, then the contract will be deemed to be open-ended.

Fixed term employment can be entered into with or without an objective reason:

- > Without an objective reason – Provided that the employee has no earlier employment with the same employer, the parties may enter into a fixed term contract, or a series of fixed term contracts (up to three renewals), without any justification for a maximum duration of 24 months.
- > With an objective reason – The Part-time Work and Fixed-Term Contracts Act provides a non-exhaustive list of objective reasons for the fixed term employment, which includes cover for maternity leave or sick leave, for seasonal work, for a temporary project, etc.). In this case, the duration of the fixed term employment can be extended beyond 24 months.

There are special provisions for a new business within the first four years of formation, allowing them to take on fixed term contracts without any limit on renewals.

To be effective, a fixed term contract must be agreed in writing and signed in wet ink before the employment starts. Should an employee start work before the contract is signed, it will be deemed to be an open-ended contract.

A fixed term contract will terminate automatically on the expiry of the term. Termination during the term of the fixed term contract is only possible if the contract provides for an early break.

Employers must inform employees on fixed term contracts about any relevant vacancies for open-ended contracts that arise in the Company.

### 3.4 Variations

Generally speaking, variation to terms of employment will require mutual agreement. An employer's right to change the terms of employment unilaterally is very limited.

Where the employer fails to obtain the employee's agreement on the change, the employer may terminate the employee's employment with notice and re-engage the employee on different terms and conditions, provided there is sufficient reasons for the termination and the changes to the terms are reasonable.

Any changes to written particulars must be given in writing no later than one month after the change.

## 4.0 PROBATION

Probationary periods are a common provision in the employment contract and must be agreed in writing. The maximum permissible probationary period is six months.

During the probationary period a two-week notice period applies for both sides.

## 5.0 REMUNERATION

### 5.1 Basic Pay

Pay levels may be set by collective agreement or by the individual contract if no collective agreement is in place.

There is a statutory minimum wage, and further minimum wages may be set by collective agreements.

It is common practice to pay employees monthly in arrears, and it is mandatory to provide employees with an itemised payslip

### 5.2 Other Elements of Remuneration

Employees may receive various bonuses (such as Christmas and holiday bonuses) on the basis of "company practice" (betriebliche Übung) rather than the terms of their employment contract or a collective bargaining agreement. If the employer repeats such payments on a regular basis (at least three times in cases such as Christmas bonuses) without explicitly stating that they are discretionary, the bonuses become part of the employment contract. The content of the contract can be changed only by a "dismissal for variation of contract".

## 6.0 WORKING HOURS AND TIME OFF

### 6.1 Standard Working Hours

Working time is regulated by the Working Time Act.

The daily working hours should not exceed 8 hours; however, this may be increased to 10 hours per day provided that within six calendar months or 24 weeks the average daily working hours does not exceed eight hours.

The maximum working time per week is 48 hours, Monday to Saturday.

The minimum rest breaks are 30 minutes for work lasting more than six but no more than nine hours and 45 minutes when the work lasts more than nine hours. Breaks may be split but must be at least 15 minutes long.

Managers and other 'leading employees' as defined by the law are not covered by the Working Time Act.

The employer must keep records of employees' working time exceeding eight hours a day, for a period of two years.

## 6.2 Overtime

Employers may only require overtime to be worked if it is provided by the employment contract, except in case of emergency. Overtime may be paid at normal hourly rates unless applicable trade union agreement provides for a higher rate.

Work on Sundays and public holidays are strictly regulated.

## 7.0 LEAVE

### 7.1 Vacation and Public Holidays

#### Vacation

Under the Federal Holiday Act (Bundesurlaubsgesetz) the minimum statutory annual holiday entitlement is 20 days based on a five-day working week and 24 days based on a six-day working week. In practice however, it is common to offer 27 to 30 days of vacation per annum.

Statutory vacation is accrued on a pro rata basis for the first six months of the vacation year, or if the employee leaves the company prior to June 30. Once the employee completes six months of service or if they leave the company after June 30, they receive the full annual leave entitlement.

In general, employees must take their annual holidays during the calendar year. However, unused holiday can be carried forward until the 31 March of the next calendar year if the employee was unable to take the holiday due to operational or personal reasons.

Pay in lieu of accrued but unused vacation is only permitted upon termination of employment.

#### Public holidays

There are generally between 10 and 15 public holidays each year, depending on the Federal State. On such days, salary is paid as normal.

### 7.2 Sick Leave and Pay

The statutory sick pay under the Sick Pay Act is 100% of the employee's normal wages for the first six weeks of illness, provided the employee has completed at least four weeks of service.

After the six-week period of full pay, the employee will be entitled to receive a sickness benefit from their statutory/private health insurance scheme for a maximum of 78 weeks within a 3-year period.

Companies which employ no more than 30 people are entitled to apply to the employers' cost sharing fund, (Aufwendungsausgleichsgesetz), from which they can recover sick pay. The fund is contributed to by employers.

From 1 January 2022, electronic certificates of incapacity for work (eAU) must be sent digitally by the treating physician to the health insurance company and from 1st July 2022 employers will obtain them from the health insurance programme rather than from the employee.

### 7.3 Family Leave

#### Maternity

Maternity rights are governed by the Maternity Protection Act. Pregnant employees are entitled to a minimum of 14 weeks leave, with 6 weeks usually taken before the birth and 8 weeks after. If the baby is born late, then the 8 weeks start after the birth. If the baby is born prematurely, or there are multiple births, then leave is extended to 12 weeks.

While on maternity leave, the employee is not allowed to work (the prohibition for the maternity leave period before birth may be waived by the employee) and is entitled to receive full pay, paid by the employer and the statutory health insurance or the Federal Insurance Office.

#### Paternity Leave

There is no separate entitlement for paternity leave under German law.

## Parental Leave

Whilst as noted above, there is no separate entitlement to paternity leave both female and male employees are entitled to take parental leave up to the third birthday of each child.

Parental leave is governed by the Federal Parental Pay and Parental Leave Act.

Any parent with caring responsibility is entitled to take parental leave of up to three years until the child is three years old. Up to 12 months of the three-year entitlement may be transferred to the period between the child's third birthday and eighth birthday with the employer's consent.

Employees on parental leave may be entitled to parental pay from the State. A parental allowance is paid by the authorities for a maximum duration of 12 months of parental leave (14 months if the other parent decides to go on parental leave as well or if the employee is a lone parent).

In the case of adoption, the entitlement starts when the child is taken into care and lasts for a maximum of three years, provided the child is not yet eight years old.

During the parental leave, employers are not obliged to pay the employee's salary.

### Right to request part-time working

Employees working for an employer with more than 15 employees are entitled to request part-time working (between 10 to 30 hr per week), provided they have attained six months of service. The employer may only refuse such a request for operational reasons.

For employers with more than 45 employees, an employee with six months of service may request to work part-time for a fixed term period between one and five years.

Employees on parental leave enjoy a greater entitlement to demand part-time work and they have the right to return to their normal working hours after the end of parental leave.

## Carers Leave

Where a company employs more than 15 workers, employees are entitled to a maximum of six months of carer's leave to provide full-time or part-time care and attention to a close relative.

To take this leave the employee must notify the employer of their intention to take carer's leave at least 10 days before it begins. There is no obligation on employers to pay employees while on carer's leave.

If carer's leave is taken part time, the employer and employee must reach an agreement on the amount of the working time reduction and the distribution of daily working hours. The employer must comply with the employee's wishes in these areas, unless this is not possible for urgent operational reasons.

### Nursing Care Leave

Under the Nursing Care Leave Act, employees are entitled to:

- > Short-term leave of up to 10 working days – for employees to secure immediate nursing care for a close relative in sudden need of nursing aid and to initiate the necessary organisational steps for long-term nursing care;
- > Nursing care time of up to 6 months: for employees to personally attend a close relative in need of nursing care as defined by the law. This entitlement only applies to employers with more than 15 employees.

Nursing Care Leave is unpaid.

### Family Care Leave

This entitlement applies to employers with more than 25 employees.

Under the Family Care Leave Act, employees are entitled to request, for the purpose of caring for a close family member in the home environment, to reduce their working time to a minimum of 15 hours' work per week, for a period of up to 24 months. Employers may only refuse the request for urgent operational reasons.

The total duration of nursing care leave and family care leave must not exceed 24 months for each close relative in need of long-term care.

## 7.4 Other leave – Force Majeure

Employees are generally entitled to paid time off for ‘special reasons’ such as family emergencies, death of relatives, marriage, partner giving birth, etc. There are no specific rules as to the exact amount of time off allowed for special reasons but it should be relatively insignificant.

## 8.0 SOCIAL SECURITY COVERAGE

### 8.1 Introduction

Germany has a comprehensive system of social security. There are four compulsory social security insurance schemes. Employers are responsible for paying half of the total contributions in most cases and deducting the other half from their employees’ wages to pay into these schemes:

- > Pension insurance – 18.6%;
- > Health insurance – 14.6% (paid in equal amounts by the employer and employee);
- > Nursing care insurance – 3.05% (certain childless employees are subject to an additional contribution of 0.25%);
- > Unemployment insurance – 2.5%.

The contributions depend on the employee’s salary up to certain maximum levels. The limitations are lower in the five new federal states (the former German Democratic Republic) in order to take into account the lower level of salaries typically paid.

For 2022, the rates (including both the employee’s and the employer’s parts) are seen below:

#### Social Security Ceilings:

|                        | Formal West German Federal States | Former German Democratic Republic Federal States |
|------------------------|-----------------------------------|--------------------------------------------------|
| Pension Insurance      | €84,600                           | € 81,000                                         |
| Unemployment Insurance |                                   |                                                  |
| Health Insurance       | €54,450                           |                                                  |
| Nursing                |                                   |                                                  |
| Care                   |                                   |                                                  |

### 8.2 Basic Pension

The statutory retirement age is 67 for employees born after 1964, with incremental drops for those born prior to that.

The level of the State pension is generous. Contracting out is only possible if the employee has a recognised pension scheme arranged by a self-regulating professional body or the person with a certain minimum salary has private pension arrangements in place.

Death benefits in the form of a pension are available for spouse and dependants, subject to an insured status of 60 months except on accidental death. Death benefits for spouse will cease on remarriage.

### 8.3 Basic Health Coverage

Germany has a universal health care system provided by statute covering the whole population. The system is partly government funded and partly privately funded. Under the system, medical benefits, hospital care and cash benefits are provided.

Employees with earnings up to 75% of the social security ceiling must participate in one of the public sickness funds. Higher paid employees who earn above this ceiling may choose to either remain in the state scheme or opt out and join a private medical insurance. The employer would generally pay the private health insurance premiums, since

it would be responsible for the state insurance contributions in any case. It would be considered an exception if the employer did not agree to this arrangement.

## 8.4 Unemployment Insurance

The benefit is provided for between six and 24 months depending on age and how long the employee has worked before unemployment. The amount of the benefit depends on the previously earned salary, family status and number of children.

## 9.0 WORKERS' COMPENSATION INSURANCE

### 9.1 Accident Insurance (Unfallversicherung)

The work injury scheme is compulsory for all employees and it is administered by industry-wide employers' associations known as Berufsgenossenschaft. The employer alone must pay contributions to the scheme and the contribution rate varies between 0.7% to 2% depending on the industry.

The insurance scheme provides for full medical treatment, hospitalisation and wage or salary replacement benefits in case of an industrial/office accident and occupational illness, plus disability pension and survivors' pension.

## 10.0 SUPPLEMENTAL BENEFITS

### 10.1 Health Insurance

Additional private health insurance is fairly rare as the mandatory health insurance for employees under the law is fairly generous, the cover being comprehensive, with relatively short waiting times being experienced. However, it is becoming more popular, particularly with overseas headquartered companies, where a plan might be put in place to supplement deficiencies in such areas as dental services or the provision of private rooms for hospital treatment.

### 10.2 Occupational Sick Pay (OSP)

The provision of additional OSP is unusual as the statutory sick pay scheme is generous.

### 10.3 Occupational Pension

Occupational pensions are an extremely common benefit in Germany. Occupational pension schemes normally operate alongside the State pension scheme. Only in certain self-regulating professions (such as the legal or medical profession) do the compulsory professional pension schemes arranged and run by the professional self-regulating bodies commonly replace the State pension scheme.

There are five kinds of occupational pension schemes:

- > Direct pensions (Direktzusage) – a defined benefit plan, currently the most common kind of occupational pension;
- > Direct insurance policies (Direktversicherung) – a life insurance policy;
- > Pension schemes (Pensionskasse) – a pension fund run by the employer and regulated by the insurance supervisory authority;
- > Support funds (Unterstützungskasse) – similar to a Pensionskasse but the employee has no express personal right to any benefit under it;
- > Pension funds (Pensionsfonds) – a pension scheme operated either as a public limited liability company or as a mutual association.

Several of these pension vehicles are complex and costly to operate and can present significant ongoing liabilities to employers. For these reasons it is not common for small employers to establish an occupational pension scheme, particularly if that employer is headquartered overseas and does not have local HR representation.

Under Direct Insurance, employees are entitled to request that an employer divert up to a maximum of 4% of their salary ceiling for the State pension contributions, into pension contributions and instead pay these directly into a pension of their choice - unless it is provided otherwise in any applicable trade union agreements. It is commonly viewed as deferred income.

Please note, this right is not applicable when there is already another kind of occupational pension scheme in place under which part of the salary is converted into pension contributions.

If the employer does not yet operate any company pension, then an employee can demand that one is set up, to enable the State pension contributions to be diverted into it. In practice, it is rare for employees to divert their state pension contributions into an occupational pension scheme.

## 10.4 Death & Disability Insurance

### Accident Insurance

Employers commonly secure a group life insurance plan for employees providing a lump sum pay-out equivalent to 1x–2x salaries in the event of death. Depending on who the beneficiary of the pay-out is – this could be a taxable benefit to the employees.

## 10.5 Company Car

Provision of a company car is fairly common in Germany, although it can constitute a benefit in kind tax liability. There are two methods of calculating the liabilities:

- > Based on actual use
- > Applying a flat rate based on the value of the car

It should be noted that using the ‘actual car usage’ basis involves a considerable degree of record keeping on the employee’s part and the employer is advised to make the employee aware of this at the outset and enforce company rules, in order to avoid future complications when reporting for tax purposes.

While a company car is important, a small employer might often find it difficult to secure a corporate lease without a credit trading history in Germany. Instead, many such employers might tend to provide a car allowance to their employees, in order for them to secure their own individual lease.

## 10.6 Others

### Tax Deductible Saving Schemes

It is common for employers to contribute on behalf of employees into a tax-deductible savings plan. There are regulations regarding the amounts saved and eligibility for individual tax rebates available on the savings.

### Bonus Plans

In addition to Christmas bonus and holiday bonus, employers in Germany may also provide employees with some form of one-off bonus payments for specific events, such as long service anniversaries, marriage, and birth of a child.

## 11.0 TERMINATION OF EMPLOYMENT

### 11.1 Means of Termination

An employment relationship may be terminated in a number of ways:

- > By employer or employee giving the statutory or contractual notice,
- > By mutual agreement,
- > On summary notice (without notice) if there are material grounds to do so.

All employees (except directors of private limited companies) with more than six months service are entitled to statutory dismissal protection under the Protection Against Unfair Dismissal Act, provided that the business has more than 10 employees. The threshold was more than five employees until 31 December 2003; employees employed on that date by an employer with more than five employees will continue to enjoy unfair dismissal protection for as long as the employer has more than five employees who were employed as of that date.

### Termination on the initiative of the employer

Employers with 10 or fewer employees (excluding vocational trainees) may dismiss any employee if the dismissal is not arbitrary, is for a job-related reason and is not discriminatory.

Where an employer has more than 10 employees, unfair dismissal legislation applies where the employee has more than six months service.

In these cases, there are three categories of reasons that justify dismissal:

- > Operational grounds
- > Conduct-related grounds
- > Grounds related to the employees' person and capacity to do the job

In all circumstances, case law has established that dismissal may be used by the employer only as a last resort.

In addition to having justified grounds for dismissal, the employer must ensure that the procedure leading up to dismissal is fair. Dismissal must be the last resort and employers should always assess whether there are any other proportionate means than dismissal.

## 11.2 Notice of Termination

Notice of termination by employer and employee must be in writing in wet ink (i.e. the original letter as opposed to email, fax or photocopy). Furthermore, notice by the employer must be signed by the 'correct person', i.e:

- > The employer personally, or an officer of the employing company in his capacity as such and in accordance with company law rules; or
- > The recognised human resources manager;

or

- > A person with a written power of attorney signed by either of the above.

Beyond the probationary period, the statutory minimum notice period to be given by both parties is four weeks with effect to either the 15th day or the last day of a calendar month, whichever is sooner.

The minimum notice period to be given by the employer then increases with length of service as follows:

| Length of service | Length of notice (to expire at the end of the calendar month) |
|-------------------|---------------------------------------------------------------|
| Over 2 years      | 1 month                                                       |
| Over 5 years      | 2 months                                                      |
| Over 8 years      | 3 months                                                      |
| Over 10 years     | 4 months                                                      |
| Over 12 years     | 5 months                                                      |
| Over 15 years     | 6 months                                                      |
| Over 20 years     | 7 months                                                      |

The notice period required to be given by the employee must not exceed the notice period required to be given by the employer.

German law does not allow payments in lieu of notice; however, garden leave is permissible.

## 11.3 Redundancy

For economic dismissals, the employer must be able to demonstrate a compelling business reason and carry out a fair selection process based on certain social criteria. For large scale redundancies, or where a works council exists, consultation is also required.

The law does not provide for entitlement to redundancy payment. However, a redundancy policy (social plan) agreed between the employer and the works council may entitle the concerned employees to such payment.

## 11.4 Settlement Agreements

Settlement agreement must be in writing and offered by the 'correct person' in order to be valid. The employee is not required to take independent legal advice on its content prior to signing.

## 11.5 Post-Employment Restrictions

Post-employment restrictive covenants (non-compete and non-solicitation) will only be enforceable if the restrictions imposed on the employee go no further than protecting the employer's legitimate business interests. They must therefore be limited in scope, geographical reach and duration (no more than two years). Furthermore, in order for the restrictive covenant to be valid the employer must make a monthly

payment that equals at least 50% of the employee's normal monthly wage for the duration of the restrictions.

The employer may waive the restriction only if it confirms this in writing to the employee before termination of employment. However, even if the employer waives the restriction, the employer's obligation to pay compensation ceases one year after its declaration to waive the restriction.

In practice, due to the considerable costs involved in enforcing restrictive covenants, post-employment restrictive covenants are rarely implemented.

Employers are permitted to agree on post-termination confidentiality clauses to protect business secrets, but the effectiveness of these clauses must be reviewed in light of the Trade Secrets Act, which came into force in April 2019. For a confidentiality clause to be effective, an employer must take reasonable steps to maintain the secrecy of its trade secrets. Employers must, therefore, identify the most relevant and/or important confidential information that could be disclosed during the employment relationship and specifically mention them in a confidentiality clause. Any general clauses that refer to "all confidential information" will likely be considered void.

## 11.6 Providing References

On the termination of an employment contract, the employee is entitled to receive a basic reference from the employer, covering the nature of the role, and how long they were employed for.

If the employee requests it, the employer must also include additional information about the employee's accomplishments and conduct during the employment relationship.

The reference cannot be provided in electronic form, must give the date of the end of the contract and must be hand-signed by the employer.

The wording must be "benevolent" towards the employee and may not hinder the employee's further advancement without good cause.

## 12.0 DISCRIMINATION

The General Equal Treatment Act prohibits discrimination on grounds of: Age, disability, ethnic origin, race, religious belief, secular belief, gender and sexual orientation.

In addition, the basic constitutional right to equal treatment prohibits the unequal treatment of comparable employees in an undertaking in regard to group-based rules and decisions unless there are objective grounds justifying the difference in treatment.

## 13.0 INDUSTRIAL RELATIONS

German trade unions are organised on an industry or trade basis and tend to be regional. Employers are organised in employers' organisations. Membership of both trade unions and employers' organisations is voluntary.

A works council can be formed in any undertaking with five or more employees who are entitled to vote. The setup of a works council is completely at the initiative of the employees. Employers should not hinder the process and should provide the necessary means such as a meeting room, stationery, etc. Works council's right to information, consultation and co-determination depend on the headcount of the employee and the type of issues in concern.

Collective agreements include trade union agreements and works council agreements.

## 14.0 DATA PROTECTION

With effect from 25 May 2018, the EU General Data Protection Regulation (GDPR) applies, and the German Federal Data Protection Act is amended to deal with matters unregulated by the GDPR or where the GDPR allows national law to provide further regulation. There are various data protection authorities at federal and regional level.

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