



GUIDE TO GOING GLOBAL EMPLOYMENT

Germany



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INTRODUCTION

Welcome to the 2023 edition of DLA Piper's *Guide to Going Global – Employment*.

GUIDE TO GOING GLOBAL SERIES

Many companies today aim to scale their businesses globally and into multiple countries simultaneously. In order to help clients meet this challenge, we have created a handy set of global guides that cover the basics that companies need to know. The *Guide to Going Global* series reviews business-relevant corporate, employment, equity compensation, intellectual property and technology, and tax laws in key jurisdictions around the world.

EMPLOYMENT

As business grows more global, the challenge for in-house counsel and HR professionals responsible for workforce issues and employment law compliance is intensifying. This guide is designed to meet that challenge head on and has been produced in response to feedback from clients in both established and emerging international businesses. We hope it will become an invaluable resource for you.

This 2021 edition of our popular guide covers all of the employment and labor law basics in 63 key jurisdictions across the Americas, Asia Pacific, Europe, the Middle East and Africa. From corporate presence and payroll set-up requirements, language rules, minimum employment rights, business transfer rules, through to termination and post-termination restraints, we cover the whole employment life span.

We have used our global experience and local knowledge to bring you this newest edition of our guide. With over 300 lawyers, DLA Piper's global Employment group is one of the largest in the world, with one of the widest geographical footprints of any global law firm. We partner with our clients, wherever they do business, to find solutions and manage risk in relation to their legal challenges and objectives.

While this guide provides high-level guidance, it is not a substitute for legal advice, and we encourage you to take advice in relation to specific matters. If you wish to speak to any of our contributors, their contact details are set out towards the back.

We hope that you find this guide valuable and we welcome your feedback.

To learn more about DLA Piper's global Employment practice, visit www.dlapiper.com or contact:

Brian Kaplan
Co-Chair, Global Employment practice
brian.kaplan@dlapiper.com

Ute Krudewagen
Co-chair, International Employment practice
ute.krudewagen@dlapiper.com

Pilar Menor
Co-Chair, Global Employment practice
pilar.menor@dlapiper.com

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This is a general reference document and should not be relied upon as legal advice. The application and effect of any law or regulation upon a particular situation can vary depending upon the specific facts and circumstances, and so you should consult with a lawyer regarding the impact of any of these regimes in any particular instance.

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GERMANY



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LEGAL SYSTEM, CURRENCY, LANGUAGE

Civil law. Member of the European Union (EU) and required to implement relevant EU Directives. The official currency is the Euro (EUR). The official language is German.

CORPORATE PRESENCE REQUIREMENTS & PAYROLL SET-UP

A foreign company can engage employees in Germany without local corporate presence, subject to doing business and corporate tax considerations. For employment and payroll purposes, registrations with tax and social security authorities are required.

Employee earnings are subject to withholdings for social security (up to a ceiling of EUR7,300 gross per month for the states of the former West Germany and a ceiling of EUR7,100 for the states of the former East Germany; about 40 percent borne equally by employer and employee) and wage tax (from 14 percent to 45 percent) to be completed through payroll.

PRE-HIRE CHECKS

Required

Immigration compliance. For certain employment positions (eg, public services, education sector, medical sector and security services), statement of good standing (*Führungszeugnis*) from the Federal Central Register (*Bundeszentralregister*).

Permissible

Requiring a credit reference check or a statement of good standing is only permissible for roles justifying interest in such information and is subject to proportionality requirements.

IMMIGRATION

Free movement of employees for all countries of the European Economic Area (EAA) – the EU, Iceland, Liechtenstein, Norway – and Switzerland. All other nationals require a residence and work permit. Nationals of, inter alia, the US, the UK, Israel and Japan and skilled workers enjoy favorable immigration treatment and have access to fast-track procedures.

HIRING OPTIONS

Employee

Indefinite, fixed-term, full-time or part-time. In principle, a part-time or fixed-term employee may not be treated less favorably than a comparable full-time or permanent employee because of their status. Different treatment is only justified for objective reasons.

Independent contractor

Independent contractors may be engaged directly by the company or via a personal services company. Engagement may be subject to misclassification exposure with high financial risk. Work instructions and organizational integration, in particular, may jeopardize an independent contractor position. Incorrect classification may have severe consequences for the customer with regard to tax and social security (eg, it may yield an obligation to pay the employer's and employee's share of social security contributions for at least up to the last 4 years; and if intentional, up to 30 years). The individual could also claim an employment relationship. Among the possible consequences, the company may be excluded from public tenders and incur administrative fines – and, in if intentional, may be charged with criminal offenses.

Agency worker

Agency workers shall not work for unlimited periods of time at the same business. The agency is required to hold a special permit granted by the Federal Employment Agency. Agency workers have the right to treatment that is equal to that of employees in relation to pay and other essential working conditions, unless a specific collective agreement provides otherwise. There is a statutory maximum lease period of 18 consecutive months for an individual agency worker with the same client; amendment by collective agreements is possible. Previous assignments to the same company shall be taken into account if they took place after April 1, 2017 and the gap between 2 assignments was shorter than 3 months. On the expiration of such period, the employees must either become permanently employed with the employer or must be withdrawn by the temporary employment agency. Additionally, the contractual agreement must be openly declared as agency work, and the exact agency worker must be determined before the start of agency work. Breaches of employee leasing laws can additionally trigger severe consequences for the lessee. In particular, the employee could claim an employment relationship with the lessee by operation of law. Moreover, breaches may trigger administrative fines, and the lessee may be held liable for social security contributions. In addition, the companies may be excluded from public tenders.

EMPLOYMENT CONTRACTS & POLICIES

Employment contracts

Written employment agreements are common but not mandatory, except in the case of fixed-term contracts. The employer must provide a written statement of the core working conditions within various deadlines depending on the particular contract condition (partly no later than the first day of work and partly within 1 week or 1 month of commencement of employment). This must be signed wet ink. Alternatively, the employment agreement can be signed wet ink.

Probationary periods

Permissible, subject to proportionality, for a term of up to 6 months. Statutory dismissal protection will start after 6 months only.

Policies

No mandatory policy requirements. If a works council exists, works agreements will largely replace policies. Without a works council, policies are common, but they are subject to standard contract term provisions, which means they cannot be changed unilaterally to the detriment of the workforce.

Third-party approval

No requirement to lodge employment contract or policies with or receive approval from any third party.

However, if established, the works council has the right to object to the employment in certain cases.

LANGUAGE REQUIREMENTS

No statutory requirements. Employees are often open to English agreements or policies. In case of litigation, the courts will request official translations.

WORKING TIME, TIME OFF WORK & MINIMUM WAGE

Employees entitled to minimum employment rights

All.

Working hours

On average, 48 work hours per week in any 6-month period; working time on a workday may not exceed 10 hours. Uninterrupted minimum break of 11 hours after every workday. Work on Sundays and official holidays requires special permission. Working hours must be recorded by the employer.

Overtime

No overtime rate set forth by statute – instead, subject to contractual agreement, which is largely regulated by standard contract term provisions. The agreement must be fair; any provision incorporating overtime into overall wages must be related to a defined amount of overtime.

Wages

As of October 1, 2022, the legal minimum wage is EUR 12 gross per working hour. Generally, these rules also apply to trainees, except those undergoing compulsory practical training. A few more exceptions are made for arrangements regarding apprentices, volunteers and former long-term unemployed workers. Furthermore, there are also industry-specific minimum wages (eg, in the construction sector).

Vacation

Four weeks per year plus local public holidays (between 9 and 12 days, depending on the state). Additional vacation entitlements beyond the legal minimum vacation entitlement may be agreed in the employment contract or collective agreement.

Sick leave & pay

Statutory sick leave and pay provisions allow for up to 6 weeks of employer-paid sick leave, followed by 72 weeks of sick allowance paid through the public health fund. Sick allowance is based on the earned income within the previous 12 months and amounts to 70 percent of such. It is calculated per calendar day and is limited to the statutory maximum of EUR 116.38 per day (year 2023).

Maternity/parental leave & pay

In Germany, a distinction must be made between maternity protection and parental leave. Maternity protection serves to protect the mother from health risks in connection with childbirth. Parental leave, on the other hand, is available to both parents. The maternity protection period is 6 weeks before birth and 8 weeks after the birth. During these periods, employment is prohibited. The mother can only waive the periods of protection before childbirth. Parental leave paid by the state for 12 months – 14 months if the other parent takes at least 2 months – with a 65-percent net payment rate (ie, Basic Parental Allowance). Further 24 months of unpaid parental leave are possible with full protection within the workplace and the right to return to work. Parental Allowance Plus is available for twice as long as Basic Parental Allowance. The employee can choose either 1 month in which the employee receives Basic Parental Allowance or 2 months in which the employee receives Parental Allowance Plus. If the employee does not work after their child's birth, Parental Allowance Plus is half the amount of Basic Parental Allowance.

Other leave/time off work

According to the German Civil Code, employees may also be entitled to temporary leave for other purposes, such as the death of close relatives, a doctor's visit, or illness and care of family members, among others.

DISCRIMINATION & HARASSMENT

Statutory protection exists against unlawful discrimination and harassment based on race or ethnic origin, gender, religion or belief, disability, age or sexual orientation.

WHISTLEBLOWING

Expected to come into force in the first half of 2023, the Whistleblower Protection Act will require companies with more than 50 employees to provide local reporting channels for reports of breaches of national and EU laws.

The law provides for a list of administrative offenses for violations. The parliament has not yet enacted the draft bill.

BENEFITS & PENSIONS

No benefits required beyond those covered under social insurance contributions. Employers are required to provide all employees with an option to enroll in a deferred salary pension insurance plan with the administration costs borne by the employer.

DATA PRIVACY

Covered by the EU-wide General Data Protection Regulation (*Datenschutzgrundverordnung*, or GDPR) entered into force in May 2018 and the complementing Federal Data Protection Act. Processing of personal data is generally unlawful except as listed by the Act and the General Data Protection Regulation, a works council agreement or free and individual consent. Appointment of data protection officers is required if 20 or more individuals deal with automated processing of personal data, if processing operations are subject to data protection impact assessment or in the case of business processing of personal data for specific purposes. Special rules apply to data transfer outside the EEA. Significant restrictions on monitoring email and internet use exist.

RULES IN TRANSACTIONS/BUSINESS TRANSFERS

Automatic transfer of employment under the EU Acquired Rights Directive/Germany's transfer of business (Section 613a of the Civil Code) rules in case of an asset deal or service provision change. Employees shall receive detailed written information prior to the transfer and may object to the transfer within 1 month after receipt thereof.

There is a duty to inform and consult with the works council. Significant restrictions on changing terms and conditions following a transfer exist. Any dismissal connected to the transfer would be unfair; dismissals for other reasons are possible.

EMPLOYEE REPRESENTATION

Works council: The elected works council plays a major role in the everyday lives of larger German businesses. By law, employees in every business of at least 5 employees may form a works council at their own initiative. The works council has information, consultation and co-determination rights in the area of hiring, positioning and dismissals, internal organization of the business, restructuring and personal planning, among others. Employer and works council shall form works agreements to regulate the affairs of the business, except working time and remuneration, which are reserved for collective agreements with a trade union. Works councils may not call industrial action.

Co-determination on supervisory board level: Companies with a regular workforce over 500 employees in Germany establish a supervisory board with 1/3 elected employee representation and a fairly limited scope of

duties. If the regular workforce in Germany exceeds 2,000, 1/2 of the members of the supervisory board are elected employee representatives with a fixed list of duties. The chairman of the supervisory board is, by law, always nominated from the shareholder's side and has a casting vote, ensuring control by the business owners.

Trade unions: 18 percent of the German workforce are members of a trade union. Trade unions are prevalent in certain sectors (eg, manufacturing, building, transport and the public sector). Trade unions deal with employer associations or individual employers. Once represented businesses agree on a collective agreement, they are widely used by other businesses as reference. Formation of collective labor organizations is a constitutional freedom, as is the right to avoid them.

TERMINATION

Grounds

In a business with up to 10 employees, there is no dismissal protection, and termination can generally occur for any reason. For businesses with more than 10 employees, dismissal protection exists unless dismissal is justified by compelling operational reasons, conduct-related reasons for particular types of misconduct or personal reasons (eg, the inability to work due to health or new job requirements).

Employees subject to termination laws

Employees with less than 6 months' seniority do not have general dismissal protection. This does not apply to special dismissal protection in connection with parental leave, maternity leave, works council membership or discrimination.

Restricted or prohibited terminations

These include pregnant employees, mothers during maternity leave, employees on parental leave, works council members, candidates during elections, data protection officers and severely disabled employees.

Third-party approval for termination/termination documents

The works council, if established, must be consulted regarding each termination. Dismissal of disabled employees, pregnant employees or employees on maternity or parental leave may be permitted by specific authorities.

Collective redundancies require consultation with the works council about a restructuring agreement and a social plan, whereby consent is only mandatory for the social plan; in case of a tie, the employer's decision on the restructuring plan prevails.

Mass layoff rules

Yes, strict information and consultation rules apply where 6 or more employees in a business between 20 and 59 employees are to be made redundant within 30 days; in larger businesses, the threshold is 10 percent or more than 25 individuals; in businesses with 500 or more employees, the threshold is at least 30 employees. The employer must file an application with the Federal Employment Agency; failure to comply will render all notices and agreed terminations invalid.

Notice

4 weeks' statutory notice effective to the 15th or the end of a calendar month; after 2 years of employment, 1 month effective to the end of a calendar month; with a sliding scale of up to 7 months' notice after 20 years of service. Not required for terminations for very serious misconduct.

Statutory right to pay in lieu of notice or garden leave

No statutory right to pay in lieu of notice. The right to garden leave depends on contract terms and merits of the case, applying a weighting of interests between both parties.

Severance

No statutory severance. A valid dismissal will end the employment without compensation, unless it is part of a collective restructuring covered by a social plan agreed with the works council. Invalid dismissal will lead to enforced reinstatement by the labor courts, unless the parties settle the dispute. Settlements are standard; the general formula is between 1/2 and 1.5 times an employee's monthly salary per year of service. There is no maximum threshold on settlements.

POST-TERMINATION RESTRAINTS

Must be in writing. Those that protect the employer's legitimate business interests may be enforced if reasonable. Garden leave is common for senior employees.

Non-competes

Typically no longer than 6 to 12 months, with a statutory maximum of 2 years. Compensation of 50 percent of the employee's wages is required during the non-compete period.

Customer non-solicits

Permissible in narrow circumstances.

Employee non-solicits

Permissible only if related to illegal poaching; an agreement not to hire employees from a certain business is not enforceable.

WAIVERS

Enforceable; subject to legal review if, for instance, employees were not given time to consider.

REMEDIES

Discrimination

Injunction to continue or repeat discriminating actions. Compensation is capped at 3 times an employee's monthly salary if discrimination is related to the recruitment process. Uncapped compensation in all other cases, based on

the claimant's financial loss and injury to feelings. German courts tend to award limited compensation; awards of EUR30,000 have been observed, but they are an extreme exception.

Unfair dismissal

Reinstatement. Therefore, most cases are settled.

Failure to inform & consult

The works council may bring legal action, which can result in administrative fines of up to EUR10,000 if the employer fails to inform and consult with the works council regarding certain matters.

CRIMINAL SANCTIONS

Significant frequent violation of works council information and consultation rights may lead to criminal charges; however, this rarely occurs.

KEY CONTACTS



Dr. Kai Bodenstedt LL.M.
Partner, Head of Employment
DLA Piper UK LLP
kai.bodenstedt@dlapiper.com
T: +49 40 188 88 158
[View bio](#)

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