GETTING THE DEAL THROUGH

Labour & Employment

in 39 jurisdictions worldwide

2014

Contributing editors: Matthew Howse, Walter Ahrens, Sabine Smith-Vidal and Mark Zelek

Published by
Getting the Deal Through
in association with:

Afridi & Angell
Andreas Neocleous & Co LLC
Basham, Ringe y Correa SC
Blesi & Papa
Bloomfield Advocates & Solicitors
BLS Rechtsanwälte Boller Langhammer Schubert OG
Caiado Guerreiro & Associados
Castegnaro – *member of Ius Laboris*
Cederquist
Claeys & Engels – *member of Ius Laboris* co-legal
Dittmar & Indrenius
Gall Legge Grant & Munroe LLP
García Sayán Abogados
Greenberg Traurig LLP
GSG Attorneys at Law
Hoet Peláez Castillo & Duque
Holding Redlich
Hutabarat Halim & Rekan
Iason Skouzos & Partners
Kochhar & Company
Machado Associados Advogados e Consultores
McCann FitzGerald
Morgan, Lewis & Bockius LLP
Noerr s.r.o.
Norrbom Vinding
Philippi, Yrarrázaval, Pulido & Brunner Ltda
Posse Herrera Ruiz
Sagardoy Abogados – *member of Ius Laboris*
TMI Associates
Toffoletto De Luca Tamajo e Soci – *member of Ius Laboris*
TSMP Law Corporation
Țuca Zbârcea & Asociații

Labour & Employment 2014

Contributing editors: Matthew Howse, Walter Ahrens, Sabine Smith-Vidal and Mark Zelek Morgan, Lewis & Bockius LLP

Getting the Deal Through is delighted to publish the fully revised and updated ninth edition of *Labour & Employment*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 39 jurisdictions featured. New jurisdictions this year include Belgium, Ireland, Peru, Slovakia and Turkey. By consulting this book, employers and their counsel can quickly familiarise themselves with the essentials to guide them through all stages of the work relationship, from application, through to hiring, termination and disputes, in multiple jurisdictions.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.GettingTheDealThrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would also like to extend special thanks to contributing editors Matthew Howse, Walter Ahrens, Sabine Smith-Vidal and Mark Zelek of Morgan, Lewis & Bockius LLP for their assistance with this volume.

Getting the Deal Through
London
April 2014

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Rachel Nurse
subscriptions@gettingthedealthrough.com

Business development managers
George Ingledew
george.ingledew@lbresearch.com

Alan Lee
alan.lee@lbresearch.com

Dan White
dan.white@lbresearch.com

Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

First published 2006
Ninth edition
ISSN 1744-0939

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Germany

Walter Ahrens

Morgan, Lewis & Bockius LLP

Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The main statute on individual employment law is the Civil Code, which forms the basis of all individual employment contracts. Certain details of the employment relationship are governed by separate statutes, for example, by the Part-Time and Fixed-Term Employment Act, the Remuneration Continuation Act (which deals with sick and holiday pay), the Federal Vacation Act, the Working Time Act, the Termination Protection Act and the Company Pension Act. The main non-discrimination statute is the General Equal Treatment Act. Relevant collective employment law statutes are the Collective Bargaining Agreement Act and the Works Constitution Act (regarding works councils and their rights), as well as the Co-Determination Act and the One-Third Representation Act, which both deal with employee co-determination in corporate governance.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The Federal Constitution provides that no one shall be discriminated against or privileged due to gender, descent, race, language, homeland, origin, religion, political opinion or disability. This provision applies directly or indirectly to all employment relationships. Discrimination in employment is specifically prohibited by the General Equal Treatment Act. The Act prohibits direct and indirect discrimination on the grounds of racial or ethnic origin, gender, religion, belief, disability, age or sexual orientation, as well as harassment in all forms.

Different treatment may be justified by genuine and determining occupational requirements. In the case of occupational activities within churches and similar organisations, a person's religion or belief constitutes a genuine and legitimate occupational requirement with respect to the organisation's ethos. Age discrimination can be detrimental to older or younger employees and is not subject to an age threshold. Different treatment on the grounds of age shall not constitute discrimination if it is objectively and reasonably justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary. In particular, the Act allows the fixing of ages in company pension schemes.

Employees who have been discriminated against are entitled to compensation of financial and non-financial damage but do not acquire a right to employment. If an employee can establish a prima facie case for discrimination, the employer bears the burden of proof that no discrimination has occurred.

Separate non-discrimination provisions apply with respect to an employee's genetic characteristics and in favour of part-time and fixed-term employees. In addition, employers are generally prohibited from differentiating in any way whatsoever among groups of employees without sufficient reason.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

Law enforcement by government agencies plays a role only in certain areas of employment law. The most important is occupational safety and health, where jurisdiction lies with state authorities. The Federal Employment Agency has some limited enforcement powers, namely with respect to temporary workers under the Temporary Employment Act. The Federal Anti-Discrimination Agency and similar state agencies support individuals in enforcing their rights under the General Equal Treatment Act. Illegal employment, that is, employment without payment of income tax and social security contributions, is pursued by the customs administration, which is supported by the social security providers. Otherwise, employment statutes and regulations are typically enforced by individual employees, works councils or unions bringing actions in the labour courts.

Worker representation

4 Is there any legislation mandating or allowing the establishment of a works council or workers' committee in the workplace?

A works council may be established in any business that regularly employs at least five permanent employees who have reached the age of 18 years and at least three of whom have six months of service. Works council establishment is voluntary. A works council is only established if the employees, even a minority among them, initiate the statutory election process. Works councils have a variety of statutory rights in relation to personnel as well as social and economic matters, ranging from information and consultation to full co-determination. Where the statute provides for co-determination, the employer needs the works council's consent in relation to these matters.

As regards personnel matters, the works council is entitled to be informed of any hiring, pay scale grouping or regrouping and any transfer, and the employer must obtain the works council's consent. Within one week of being informed, the works council may withhold consent for certain reasons set out in the Works Constitution Act, namely if such measure would be in breach of the law, any collective bargaining agreement or agreement with the works council, or if there is factual reason to assume that the measure is likely to result in the dismissal of or other detriment to employees not justified by operational or personal reasons. If the works council withholds consent, the employer needs to ask the labour court to permit such measure. Furthermore, the employer needs to inform and consult with the works council prior to giving any termination notice (see question 35).

In social matters, the following issues are subject to works council consent:

- questions with respect to maintaining order and the conduct of employees in the business;

- scheduling of the daily working hours in the business and their allocation to individual weekdays;
- temporary reduction or extension of the usual working hours in the business (including overtime);
- time, place and method for payment of wages;
- vacation policies and plans;
- introduction and application of technical equipment that can be used to monitor employees' performance or conduct (eg, information and communication systems);
- workplace safety rules;
- institutions administering employee benefits at business, company or group level (eg, a pension fund or a cafeteria plan);
- questions regarding the pay and benefits structure (excluding amounts);
- piecemeal pay (including amounts);
- principles regarding employee suggestion schemes; and
- principles regarding group work.

Typically, the employer and the works council enter into written agreements on such matters (works agreements). If the employer and the works council are unable to agree, each may call for a conciliation board to be formed with an equal number of representatives from both sides and a neutral chair to issue a ruling that will constitute a binding agreement between the employer and the works council.

With respect to economic matters, in a business that employs more than 20 employees entitled to vote on a regular basis, the employer must inform the works council comprehensively and in due time and consult with it about 'operational changes' (closures or downsizings of businesses or material parts thereof; relocations of businesses or material parts thereof; mergers or demergers of businesses; fundamental changes to the organisation, purpose or facilities of businesses; and the introduction of fundamentally new work or production processes). The employer and the works council are required to negotiate an agreement on the implementation of such change that is intended to balance the interests of the employees and the employer (the implementation agreement). If the employer and the works council cannot reach agreement, either party may initiate the conflict resolution procedure described above. In this case, however, the conciliation board may only mediate and does not have the power to impose an agreement on the employer and the works council. The works council may also be entitled to demand a social plan. See question 37 for further details.

Background information on applicants

5 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

As a rule, background checks are allowed to the extent that an employer is entitled to obtain the relevant information directly from the applicant. This is usually the case if the information sought is objectively and intrinsically linked to the specific position and relevant to the work to be performed. Within these limits, employers may, for example, check the background of an applicant by contacting his or her previous employers. Employers are not entitled to obtain an applicant's criminal or credit record directly from the relevant registers. Whether they may ask the applicant to obtain and submit such a record is questionable, since these records are standardised and may also contain information that is not relevant to the specific position. Security checks may be conducted if the position is security sensitive. Psychological, personality and graphological tests also require the applicant's consent, whereas polygraph tests are unlawful. Background checks regarding union membership are not allowed, and checks regarding political or religious affiliation are lawful only if the employer is a political or religious institution. Hiring a third party to conduct background checks is subject to additional restrictions.

6 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

An employer may request a medical examination only to the extent that such examination is relevant to the applicant's physical ability to perform the work, and only with the applicant's consent. The consent requirement, however, is of little help to the applicant, as refusal to consent may cause the employer to reject the application. HIV tests may be required only if the work bears an increased risk of infecting others. Genetic testing of applicants is prohibited.

7 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

Alcohol and drug tests may be required if an applicant, by drug or alcohol-related misconduct, could endanger him- or herself or others or cause substantial property damage. Such tests require the applicant's consent. Refusal to consent may cause the employer to reject the application.

Hiring of employees

8 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

Employers with at least 20 employees are required to employ severely disabled persons for at least 5 per cent of the positions in their businesses. However, non-compliance with this obligation does not give a severely disabled person a right to be hired; instead, such a person may be entitled to adequate compensation under non-discrimination law. The General Equal Treatment Act and the prohibition of discrimination with respect to an employee's genetic characteristics also apply in a hiring context (see questions 2 and 6).

9 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

Statutory law requires only that employment contracts with temporary workers and those parts of contracts relating to fixed terms and post-termination covenants not to compete be in writing. Nevertheless, written employment contracts are a best practice. Written employment contracts are a way to comply with the Documentation Act, which requires employers to provide to employees written summaries of the essential terms of the employment relationship within one month of its commencement, including, at a minimum, the following:

- the names and addresses of the parties;
- the employment commencement date;
- for fixed-term contracts, the envisaged term of employment;
- the place of employment or, if an employee will be employed at more than one location, the information that the employee may be required to work at various locations;
- a brief characterisation or description of the work to be performed;
- the composition and the amount of remuneration, including all components as well as their due dates;
- the agreed working hours;
- the annual vacation;
- the notice periods; and
- a general reference to applicable collective bargaining and works agreements.

10 To what extent are fixed-term employment contracts permissible?

Fixed-term employment contracts are permitted if the limitation in time is justified by reasonable cause. Reasonable cause exists in

particular (without limitation) if the operational need for work is only temporary, if an employee replaces another employee (eg, in the case of illness) or if the limitation is for a probationary period. There is no specific maximum duration for such fixed-term contracts; however, the longer the duration, the more difficult it usually is to establish reasonable cause.

Reasonable cause is not required for:

- fixed-term employment of new employees and employees whose last employment with the employer ended a long time ago – usually at least three years prior (such contract may be extended up to three times, subject to an overall maximum term of two years);
- fixed-term employment by newly established undertakings, unless they are established in connection with a reorganisation of existing undertakings, within four years of establishment (such contract may be extended multiple times, subject to an overall maximum term of four years); and
- fixed-term employment of employees who have reached the age of 52 years and have been unemployed for at least four months (such contract may be extended multiple times, subject to an overall maximum term of five years).

Specific statutes govern fixed-term employment of scientific and artistic university staff and of medical practitioners in further education.

11 What is the maximum probationary period permitted by law?

The statutory maximum probationary period is six months. Collective bargaining agreements may provide for a shorter or longer maximum period. An extension is only possible if a period shorter than the applicable maximum period has initially been agreed to, only up to the applicable maximum period and only by agreement with the relevant employee. During a probationary period of no more than six months, a notice period of two weeks applies. Agreements with apprentices and other training agreements must provide for a probationary period of at least one month but no longer than four months; during such probationary period, notice of termination can be given with immediate effect.

12 What are the primary factors that distinguish an independent contractor from an employee?

An employee is defined as someone who, on the basis of a contract under private law, is obliged to work in someone else's service. Contrary to an independent contractor, who is essentially free to determine his or her work, hours and place of work, an employee is integrated into the employer's operational organisation and subject to the employer's instructions regarding the contents, performance, time, duration and place of work. If the wording of the contract and its practical implementation deviate from each other, practice prevails over wording. Independent contractors who are economically dependent on the employer and, comparable to employees, in need of social protection, are regarded as employee-like persons to whom some employment statutes apply.

Foreign workers

13 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Short-term visas, that is, visas for periods of up to three months, are not subject to numerical limitations.

As regards employees transferring from a foreign corporate entity to a related German entity, visas – for up to three years – are available for only two groups of employees of an internationally active business or group:

- employees with university or similar education, provided that they transfer within the framework of a personnel exchange programme in such business or group; and
- employees whose qualifications are comparable to those of a German skilled worker and who have specific, especially company-specific, know-how, provided that:
- these employees usually work abroad;
- they are employed in the domestic part of such business or group;
- their employment in Germany is absolutely necessary for the preparation of foreign projects; and
- they will work abroad in connection with the implementation of such projects.

Employees from other EU or EEA countries or Switzerland do not require visas for employment in Germany. However, employees from Croatia still require a work permit.

14 Are spouses of authorised workers entitled to work?

Subject to certain conditions, a spouse of an authorised foreign employee is entitled to a residence permit that comprises permission to work. For example, in the event of subsequent family immigration of the spouse and one or more minors, the employee must have the necessary residence permit and sufficient housing space. Spouses of employees from other EU or EEA countries or Switzerland who are not citizens of one of these countries automatically receive a residence certificate; they do not need permission to work.

15 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

In Germany, employers may employ workers from other EU or EEA countries (except Croatia) or Switzerland without the need for a specific residence or work permit. Workers from other foreign countries may be employed in Germany only if they have a residence permit that comprises permission to work. The grant of such work and residence permits is subject to detailed statutory requirements and, in principle, limited to certain occupations and categories of employees. The residence permit usually has to be applied for at the relevant German embassy before entering Germany. The embassy will involve the local foreigners' office and, unless an exception applies, the Federal Employment Agency. Employing a foreign worker who is not entitled to work in Germany constitutes an administrative offence. The maximum fine is €500,000 for the employer and €5,000 for the employee.

16 Is a labour market test required as a precursor to a short or long-term visa?

Before any visa that comprises permission to work is granted to a foreign worker, the Federal Employment Agency must be involved, subject only to limited exceptions for certain occupations and categories of employees. The Federal Employment Agency will regularly perform a labour market test unless another set of exceptions applies. It may approve such visa if the employment of foreign nationals does not cause detrimental effects to the labour market, if German employees or non-German employees with comparable status are not available for the relevant position, and if a foreign employee will not be employed under terms and conditions that are less favourable than those for comparable German employees.

Terms of employment

17 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The maximum daily working time from Monday to Saturday is eight hours. It may be increased to 10 hours if an average of eight hours per day, that is, 48 hours per week, is not exceeded within a period of six months or 24 weeks. Work on Sundays and public holidays, in principle, is prohibited, although numerous exceptions apply. Employees are not entitled to opt out of these restrictions.

18 What categories of workers are entitled to overtime pay and how is it calculated?

Entitlement to and calculation of overtime pay are often governed by collective bargaining agreements, works agreements or individual employment contracts. Individual employment contracts may provide that a certain number of overtime hours will not be compensated separately. Statutory law requires employers to provide overtime pay if it can objectively be expected on the basis of the circumstances of the individual case. Such objective expectation applies to most employees; however, it does not apply where commission is paid in addition to the base salary, nor does it apply to employees who provide certain qualified services (eg, lawyers) or whose annual remuneration exceeds the contribution assessment ceiling in the statutory pension insurance scheme (in 2014, €71,400 in western Germany). Statutory law does not require overtime pay to be higher than pay for the normal hour.

19 Is there any legislation establishing the right to annual vacation and holidays?

Employees are entitled to a minimum paid vacation of 24 working days per year on the basis of a six-day working week, which translates into 20 working days in the case of a five-day working week. During the first six months of the employment relationship, vacation accrues at a rate of one-twelfth of the annual vacation per completed month. After six months of service, employees are entitled to the full annual vacation. Severely disabled employees are entitled to five days' additional paid vacation per year (on the basis of a five-day working week). Vacation is in addition to public holidays, the number of which varies from nine to 13 days per year, depending on the state where the employee works. Public holidays are also paid.

20 Is there any legislation establishing the right to sick leave or sick pay?

Employees are not obliged to work if they are unable to do so due to illness. They are obliged to submit a medical certificate for any inability to work that lasts more than three calendar days; however, an employer may ask for such certificate to be submitted from the first day. Under the Remuneration Continuation Act, employees are entitled to sick pay from their employers for a period of up to six weeks for the same illness. Sick pay is available to all employees who have completed four weeks of service. The amount is essentially equal to the employee's usual remuneration, but without overtime pay and certain expenses. If six weeks have expired and the employee continues to be sick, an employee who is a member of the statutory health insurance system is entitled to sick pay from his or her health insurance provider for a maximum period of 72 additional weeks. This sick pay amounts to 70 per cent of the employee's gross pay, but no more than 90 per cent of the employee's net pay, in each case up to the applicable contribution assessment ceiling.

21 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

There are several types of leaves of absence, the most important being maternity and parental leave.

Maternity leave commences six weeks prior to expected childbirth and ends eight weeks after childbirth (12 weeks in the case of multiple births or pre-term birth). During maternity leave, the employee receives maternity pay from her statutory health insurance provider or the government, and the employer is required to make up the difference between maternity pay and the average net remuneration.

Parental leave may be taken if an employee lives with, cares for, and educates his or her child. Parental leave can be taken until the child's third birthday. With the employer's consent, up to 12 months' parental leave may be taken after the child's third birthday but prior to his or her eighth birthday. Parental leave is unpaid by the employer; however, a government benefit of up to €1,800 is available to employees for a maximum period of 12 or 14 months. Also, employees are entitled to work up to 30 hours per week during parental leave.

Nursing care leave may be taken by an employee who cares in a domestic environment for a close relative who is in need of care. The leave may be taken for up to six months and is unpaid.

A right to paid leave of absence exists where an employee is prevented from working for personal reasons through no fault of his or her own for a relatively short period of time. Examples are major family events such as weddings, medical consultations and home care for close relatives who are sick, in particular for children up to 12 years old.

22 What employee benefits are prescribed by law?

Most employees are members of the social security system, which comprises statutory pension, health, nursing care, unemployment and occupational accidents insurance. Contributions to the statutory pension, nursing care (in principle) and unemployment insurance are borne in equal shares by the employer and the employee. Employees contribute slightly more than the employer to statutory health insurance, as do childless employees over 23 years of age to nursing care insurance. Contributions to occupational accidents insurance are borne solely by the employer. Typical social security benefits are retirement pensions, disability pensions, survivors' pensions, health care and nursing care, as well as unemployment benefits. See question 19 for paid vacation and holidays, question 20 for sick pay and question 21 for maternity benefits.

23 Are there any special rules relating to part-time or fixed-term employees?

The main statute in this area is the Part-Time and Fixed-Term Employment Act. Employees with more than six months of service may request a reduction of their working time. Employers who regularly employ more than 15 employees have to accept such requests to the extent that operational reasons do not require otherwise. Such operational reasons exist, in particular (without limitation), if the reduction materially affects the organisation, the workflow or the safety of the employer's business, or if it causes unreasonably high costs. A similar right exists for employees during parental leave, limited to between 15 and 30 working hours per week. Specific statutory provisions apply to on-call work and job sharing. Pre-retirement part-time work is subject to specific requirements under a separate statute, as is part-time work for the purpose of domestic care. For fixed-term employment, see question 10. See question 2 for non-discrimination.

Post-employment restrictive covenants

24 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Post-termination covenants not to compete are invalid if they have not been agreed to in writing. They are unenforceable if the employer has failed to hand over to the relevant employee a signed document with the covenant or has failed to agree to pay compensation of at least 50 per cent of the employee's most recent contractual remuneration (pay and certain benefits) for the term of the covenant, which must not exceed two years. A post-termination covenant not to compete is unenforceable to the extent that it is not justified by the employer's legitimate business interests or makes the employee's professional advancement unreasonably difficult. If the covenant is valid but unenforceable, the employee may elect to reject or accept the covenant. If the employee accepts the covenant, he or she will be entitled to the compensation the employer has agreed to pay.

Prior to the termination of employment, the employer may waive the covenant not to compete in writing. The effect of such waiver is that the employee becomes immediately free to compete upon termination and that the employer's obligation to pay compensation terminates 12 months from the waiver. Consequently, if the employer waives the non-compete covenant at least 12 months prior to termination, no compensation will be payable.

If the employer or the employee terminates employment extraordinarily, the covenant not to compete becomes unenforceable, and no compensation needs to be paid if the party terminating employment declares in writing within one month of the termination that it will not be bound by the covenant. The employee may also declare that he or she will not be bound if the employer terminates employment ordinarily, unless such termination is justified by reasons relating to the employee's person or conduct, or the employer, when giving notice, agrees to pay 100 per cent of the employee's most recent contractual remuneration for the term of the covenant.

Post-termination covenants not to solicit or not to deal with customers are essentially subject to the same rules. The same applies to post-termination covenants not to solicit employees in favour of the employee bound by the covenant, whereas such covenants are not subject to the foregoing rules and enforceable if they prohibit solicitation only in favour of such employee's new employer. Whether the aforementioned rules apply to covenants not to solicit suppliers has not yet been decided by the labour courts.

See also question 25.

25 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

A post-employment covenant not to compete is unenforceable if the employer has failed to agree to pay compensation of at least 50 per cent of the employee's most recent contractual remuneration (pay and certain benefits) for the term of the covenant. If no compensation at all has been agreed upon, the restrictive covenant is invalid. If compensation has been agreed upon but does not reach the statutory minimum, the restrictive covenant is valid but cannot be enforced by the employer. Rather, the employee may elect to reject or accept it. If the employee accepts it, he or she will be entitled to the compensation that the employer has agreed to pay.

Other employment income that the employee earns or maliciously fails to earn during the term of the non-compete covenant will be taken into account to the extent that such employment income, together with the non-compete compensation, exceeds 110 per cent of the employee's most recent contractual remuneration (125 per cent if the non-compete covenant forced the employee to relocate). The employee is obliged to inform the employer about such other employment income upon request.

Liability for acts of employees

26 In which circumstances may an employer be held liable for the acts or conduct of its employees?

Within the framework of a contractual relationship, an employer is liable for any negligent or wilful breach of contract caused to the other party of the contract by an employee whom it uses to perform its obligations under the contract, provided that an intrinsic factual link exists between the employee's act and the breach. The employer is not liable for any act the employee commits only on occasion of the performance of the contract – for example, if the employee commits a criminal offence that is in no way linked to his or her duties. As regards liability in tort in relation to third parties, the employer may excuse itself by proving proper care and diligence in selecting the relevant employee. The effect, however, of such excuse is limited due to the employer's obligation to indemnify the employee from third-party claims. Such obligation depends on the degree of the employee's fault: where there is a low degree of negligence, full indemnification; where there is ordinary negligence, partial indemnification; and where there is gross negligence or a wilful act, usually no indemnification. Personal injury to employees caused by an occupational accident for which the employer or another employee is responsible is covered by the occupational accidents insurance. Employers are directly or indirectly liable for such damage only if they have acted wilfully or with gross negligence.

Taxation of employees

27 What employment-related taxes are prescribed by law?

An employee's remuneration is subject to income tax, to the solidarity surcharge on such tax and, depending on the employee's religious affiliation, also to church tax. Income tax, the solidarity surcharge and church tax must be withheld and paid to the tax authority by the employer but are borne by the employee. The employer must also withhold the employee's share of the social security contributions (see question 22) and pay such share, together with the employer's share, to the employee's health insurance provider, which acts as a clearing centre.

Employee-created IP

28 Is there any legislation addressing the parties' rights with respect to employee inventions?

The Employee Invention Act governs inventions that qualify for patent or utility patent protection as well as suggestions for technical improvements, that is, other technical innovations that do not qualify for such protection. The Act distinguishes between service inventions, which either result from an employee's work in the employer's business or significantly depend on the business's experience or work, and free inventions, which include all other employee inventions. Employees are obliged to notify the employer in text form without undue delay of any invention they have made during the employment (unless it is obvious that a free invention cannot be used in the employer's business). Service inventions may be claimed by the employer with the effect that the employer acquires all proprietary rights to the invention. The employer is deemed to have claimed the invention if it does not waive the invention in text form within four months after proper notification. Free inventions must be offered to the employer first, at least on a non-exclusive basis, provided that the invention can be used in the employer's business. Employees are entitled to compensation for any service or free invention acquired by the employer and for any suggestion for technical improvement granting protection similar to an industrial property right. The compensation shall be agreed upon between the parties. Failing agreement, employees may apply for determination of the compensation by the labour court. The Employee Invention Act cannot be deviated from to the employee's detriment by mutual agreement.

Data protection

29 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The Federal Constitution guarantees the right to privacy and the right to determine who is to receive personal data. Under the Federal Data Protection Act, an employer may collect, process or use personal data (ie, facts relating to a specific or at least identifiable individual) only if the Act or another statute or regulation so allows or orders or if the employee consents in writing, following provision by the employer of sufficient information on the envisaged purpose of the collection, processing or use. Without employee consent, the employer may collect, process or use personal data for the purposes of the employment relationship if it is necessary for the decision on whether to establish an employment relationship, or for the implementation or termination of the employment relationship. In addition, the employer may collect, store, modify, transmit or use personal data for its own business purposes to the extent necessary to safeguard the employer's legitimate interests, provided that there is no reason to assume that the employee's interests in the omission of the processing or use prevail. Employee personal data may be collected, processed or used for the purpose of investigating criminal offences only if:

- facts (which need to be documented) raise the suspicion that the employee committed a criminal offence in the course of the employment relationship;
- the collection, processing or use is necessary for the investigation; and
- the employee's legitimate interests in the omission of such collection, processing or use do not prevail, in particular (without limitation) if the form and extent of such measures are not disproportionate with regard to the cause.

Third parties receiving personal data from the employer, particularly affiliated companies, may process or use such data only for the purposes for which they were transmitted. Certain sensitive information (eg, regarding health) is subject to additional protection. Transmission of personal data to countries other than member states of the EU and the EEA and certain other countries with a similar level of data protection is subject to further requirements. Employees have to be informed of the storage of their personal data and are entitled to obtain information as to what data is stored, to whom it is transmitted and the purpose of storage. Subject to a de minimis threshold, employers must appoint a data-protection commissioner.

Business transfers

30 Is there any legislation to protect employees in the event of a business transfer?

There is no legislation to directly protect employees in the event of a share deal, since share deals affect only the ownership in the employing company and do not interfere with the employment relationship between the company and the employee. Asset deals and similar scenarios such as outsourcing, however, are subject to the transfer of undertaking legislation. This legislation applies to undertakings and businesses or parts thereof that qualify as a stable economic entity, that is, an organised grouping of persons and assets facilitating the exercise of an economic activity that pursues a specific objective. In order to determine whether the conditions for the transfer of such organised economic entity are met, the courts consider all facts characterising the transaction in question, in particular (without limitation):

- the type of undertaking or business concerned;
- whether its tangible assets, such as buildings and moveable property, are transferred;
- the value of its intangible assets at the time of the transfer;
- whether the majority of its employees are taken over by the new employer;
- whether its customers are transferred;
- the degree of similarity between the activities carried on before and after the transfer; and
- the period, if any, for which those activities were suspended.

If the conditions for such transfer are met, the employment relationships between the employees employed in the relevant undertaking or business or part thereof and the transferor (old employer) pass to the transferee (new employer) with all rights and obligations (including pension liabilities). Rights and obligations from collective bargaining agreements or works agreements become part of the employment relationship with the new employer and, as a rule, must not be modified to the employees' detriment for one year from the transfer. Prior to the transfer, the old or new employer has to notify the employees affected by the transfer in text form of the date or proposed date of the transfer; the reasons for the transfer; the legal, economic and social implications of the transfer for the employees; and any measures envisaged in relation to the employees. Each employee is entitled to object to the transfer of his or her employment relationship to the new employer within one month from receipt of the notification and, if the notification is incomplete or incorrect, also at a later point in time. The transfer does not in itself constitute grounds for the termination of the employment relationship by the old or new employer; terminations for other reasons, however, shall remain unaffected.

Termination of employment

31 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

If an employer employs on a regular basis more than 10 employees (including temporary workers) in a business in Germany, and if the relevant employee has more than six months of service, the employer may ordinarily give notice to terminate only if the termination is justified by reasons relating to the employee's person or conduct or by urgent operational requirements. A typical reason relating to the employee's person is illness; for example, long-term illness with no reasonable chance of recovery or repeated short-term illnesses causing unreasonably high sick-pay costs. Termination for reasons relating to the employee's conduct usually requires a breach of contract in spite of a prior warning relating to a similar breach. Urgent operational requirements exist where:

- the employer's actual headcount exceeds the required headcount;
- the employee cannot be further employed in another vacant position, even after reasonable training or under modified terms and conditions; and
- the employer, in selecting the employee from among comparable employees, has sufficiently taken into account the employee's length of service, age, and number of dependants and any severe disability.

Employees whose continued employment is required by legitimate operational interests – for example, due to their knowledge, abilities and performance or to ensure a well-balanced personnel structure – are excluded from this social selection. What these statutory requirements mean in detail has been worked out by the labour courts in countless judgments.

32 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Written notice to terminate must be given prior to dismissal. The standard statutory notice period is four weeks, expiring on the 15th or the last day of a calendar month. The notice period for the

employer increases to one month, expiring at the end of a calendar month, after two years of service, and by one additional month each after five, eight, 10, 12, 15 and 20 years of service, up to a maximum of seven months, expiring at the end of a calendar month. Collective bargaining agreements may provide for longer or shorter notice periods, and individual employment contracts for longer notice periods; however, the notice period for the employee may not be longer than for the employer. Pay in lieu of notice is only possible by agreement with the employee. Such agreement, however, is usually not advisable for the employee, as social security benefits are thereby negatively affected.

33 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

An employer may dismiss an employee extraordinarily with immediate effect for an important reason. This requires facts on the basis of which the employer, taking into account all circumstances of the individual case and balancing the interests of the parties, cannot reasonably be expected to continue the employment relationship until the expiration of the notice period or the agreed-upon termination date, respectively. Written notice to terminate must be given within two weeks from the employer's becoming aware of the circumstances justifying immediate termination. These statutory requirements have been further developed by the labour courts over time. Examples of reasons for extraordinary terminations are taking vacation without approval, simulated sickness, serious insult or assault against the employer or fellow employees, and criminal offences in employment, in particular to the employer's detriment.

34 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

A statutory right to severance exists only in particular cases. An employer that has given notice to terminate for urgent operational requirements may offer the employee severance in the notice contigent upon the employee's not bringing an action in court within the statutory limitation period of three weeks. Upon expiry of the notice period, the employee is then entitled to severance equal to half the monthly remuneration per year of service. Such offer, however, is usually not advisable for the employer. Another case may arise in labour court proceedings. If the notice is invalid, but the employee cannot be reasonably expected to continue employment, he or she may apply for dissolution of the employment relationship by the labour court against payment of severance. The employer may file such application if facts exist on the basis of which continued employment cannot be expected to be beneficial for the purposes of the employer's business. Such severance may amount to up to 12 times the monthly remuneration (or up to 15 times for employees aged 50 years or older with at least 15 years of service, or up to 18 times for employees aged 55 years or older with at least 20 years of service). Monthly remuneration is defined as monetary and non-monetary earnings in the month in which the employment relationship ends, based on the employee's regular working hours. A right to severance also exists where a social plan so provides. Social plans usually include detailed provisions on how severance is to be calculated. Please note that it is also very common for employers and employees to settle termination protection claims that have been filed with the labour court in return for payment of negotiated severance.

35 Are there any procedural requirements for dismissing an employee?

The works council (if any) must be informed and consulted prior to the employer's giving notice. It has seven days to raise concerns (three days in cases of extraordinary termination). A notice to terminate that is given without prior information of and consultation with the works council is invalid. Information that is available but not given to the works council at this stage cannot be used by the employer to justify the termination in any labour court proceedings that may follow. See question 36.

36 In what circumstances are employees protected from dismissal?

Severely disabled employees may be dismissed only after prior approval by the integration office.

The dismissal of a female employee is prohibited during pregnancy and the four-month period after childbirth if the employer, when giving notice, was aware of the pregnancy or childbirth or if it is informed thereof within two weeks from receipt of the notice by the employee. The relevant state agency may approve a termination for reasons unrelated to pregnancy or childbirth in exceptional cases. Similar protection exists for employees on parental or nursing care leave or during part-time domestic care work.

Works council members must not be given notice during their terms of office unless reasons for extraordinary termination exist and the works council or, in lieu of it, the labour court, has approved such termination. This protection continues for one year following the termination of office, save that no works council approval is required in this case. Employees initiating works council elections, election committee members and candidates for works council elections enjoy similar protection during the election process and for a period of six months thereafter (three months in the case of initiating employees). Exceptions apply if the relevant business, or that department thereof where the works council member, initiating employee, election committee member or candidate works, is closed down.

37 Are there special rules for mass terminations or collective dismissals?

Collective dismissals regularly constitute 'operational changes', which the employer may implement only after having tried to achieve an agreement with the works council. If the works council refuses to enter into such agreement (the implementation agreement), the employer needs to apply to a conciliation board and postpone the implementation of such dismissal until such board has met, in order to avoid employee claims for damages resulting from any premature implementation. Please note that, in some states, any premature implementation may be prevented by an interim injunction obtained by the works council. Therefore, the whole process of trying to achieve agreement may take up to six months, in exceptional cases even longer. In the case of an operational change, the works council is usually also entitled to demand a social plan, providing in particular for severance to be paid to the employees to be dismissed. Failing an agreement between the employer and the works council, the conciliation board may determine the financial volume and the details of the social plan.

Prior to implementing a collective dismissal, the employer is obliged to inform and consult with the works council and to notify the Federal Employment Agency before it gives notice to terminate within 30 calendar days to:

- more than five employees in businesses regularly employing more than 20 but fewer than 60 employees;
- at least 10 per cent of the employees or more than 25 employees in businesses regularly employing at least 60 but fewer than 500 employees; or
- at least 30 employees in businesses regularly employing at least 500 employees.

Termination notices that are to take effect prior to the expiry of one month from the notification may do so only subject to the Federal Employment Agency's approval. The Federal Employment Agency

Update and trends

Following general elections in autumn 2013, the new government – a grand coalition formed by Christian and Social Democrats – announced an ambitious agenda of proposed changes to German labour and employment law. The most important changes include:

- Minimum wage: A minimum wage of €8.50 per hour shall be introduced to all industries, effective 1 January 2015. Collective bargaining agreements may provide for a lower minimum wage only until 31 December 2016. The amount of the minimum wage shall be reviewed by a commission of representatives from employers' associations and unions in regular intervals, starting mid-2017.
- Part-time work: While employees who wish to work part-time already have the right to reduce their working hours, such right permits only an indefinite reduction. Going forward, employees may choose between an indefinite reduction and a reduction for a limited period.
- Temporary workers: A maximum term of 18 months for posting a temporary worker with any one employer shall be introduced. Different maximum terms may be agreed in collective bargaining agreements or, on the basis of a collective bargaining agreement, in an agreement with a works council. Temporary workers shall be paid the same wages as regular employees after nine months of service at the latest. They shall not be deployed as strikebreakers. For works council purposes, temporary workers shall be counted as regular employees. This would be relevant for various thresholds, relating for example to the number of works council members in a business, the number of works council members to be fully released from work for the performance of their works council duties, and the necessity to negotiate or conclude an implementation agreement or a social plan. These plans reinforce a general trend in the labour courts to treat temporary workers more like regular employees.
- Collective bargaining agreements: The government plans to extend the scope of application of collective bargaining agreements. Currently, the government may declare a collective bargaining agreement generally applicable to all employers and employees in the relevant industry, regardless of the employers' association or union membership, where the employers bound by such collective bargaining agreement employ at least 50 per cent of all employees in the industry. Now, instead of the 50 per cent requirement, it shall suffice that a particular public interest exists in the application of the relevant collective bargaining agreement across the relevant industry.
- Competing collective bargaining agreements: Following a recent change in court practice, several collective bargaining agreements may apply to different groups of employees in a business. This change has made life more difficult for employers, in particular in the airline, rail, and healthcare industries, where unions compete against each other and call for industrial action more often. The government, supported by employers' associations and large unions, plans to limit again the number of collective bargaining agreements that apply in any one business. The collective bargaining agreement which applies to the majority of employees in the business shall prevail. Whether such limitation complies with the constitutional rights of unions whose collective bargaining agreements would no longer apply remains to be seen.
- Equal opportunities for women: The government plans to introduce gender quotas for supervisory boards, management boards, and senior management levels. Supervisory boards of listed companies that have 50 per cent employee representatives and are to be elected from 2016 onwards shall have at least 30 per cent female members. Companies that are either listed or have 33 or 50 per cent employee representatives on their supervisory boards shall be required to determine binding target levels for women on the supervisory boards, the management boards, and in senior management roles; to publish such target levels; and to transparently report about them. One or more target levels must be reached prior to the next general elections, which will be held in 2017.

may (but rarely does) extend this period to two months in individual cases.

38 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

German law does not permit class or collective actions to be brought by employees. Employees may only assert labour and employment claims on an individual basis. While employees could jointly file individual claims in the labour courts, this is rarely done in practice.

39 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Employers are not allowed to impose, but may agree on, mandatory retirement in a collective bargaining agreement, works agreement or individual agreement. Such agreement may provide for mandatory retirement once an employee has reached the regular retirement age (traditionally 65 years, now gradually increasing to 67 years). Agreements providing for mandatory retirement at a point in time when the employee can claim a retirement pension prior to having reached the regular retirement age are deemed to mean the regular retirement age, unless the agreement was entered into or confirmed by the employee no more than three years prior to such point in time. Mandatory retirement ages that are lower than the regular retirement age require specific justification under the General Equal Treatment Act (see question 2). For example, the mandatory retirement age of 60 years for pilots and cabin crew members has been held unenforceable.

Morgan Lewis

Walter Ahrens **wahrens@morganlewis.com**

Opernturm, Bockenheimer Landstrasse 4
60306 Frankfurt am Main
Germany

Tel: +49 69 714 007 66
Fax: +49 69 714 007 10
www.morganlewis.com

Dispute resolution

40 May the parties agree to private arbitration of employment disputes?

An employer and an employee cannot submit a dispute to private arbitration.

41 May an employee agree to waive statutory and contractual rights to potential employment claims?

An employee cannot, in advance, waive statutory rights or rights under collective bargaining agreements or works agreements. Even if a specific right (eg, to sick pay or vacation) has arisen under a statute, the employee is usually not entitled to waive it. However, following the termination of employment, the employee may waive in a court settlement statutory claims to compensation for untaken vacation. Rights resulting from a collective bargaining agreement (eg, remuneration claims) may be waived only in a settlement approved by the parties to the collective bargaining agreement, and rights resulting from a works agreement may be waived only with the works council's consent. Rights under an individual employment contract may be waived.

42 What are the limitation periods for bringing employment claims?

The standard limitation period for employment claims is three years and commences upon the end of the year in which a claim arises and the creditor becomes aware, or should become aware without gross negligence, of the circumstances justifying the claim and the identity of the debtor. However, a variety of other limitation periods apply to specific claims, notably to actions in court challenging a notice to terminate or the validity of a fixed term. The limitation period for such actions is three weeks from receipt of the notice or expiry of the fixed term. Claims for compensation of financial or non-financial damage under the General Equal Treatment Act must be filed with the employer in writing within two months after the employee becomes aware of the different treatment, unless otherwise provided for in a collective bargaining agreement.

LABOUR & EMPLOYMENT 2014 ISSN 1744-0939