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RE- ORGANIZA- TION

A Labor and Employment Law Guide
to Restructuring in Germany

HIDDEN
SECRETS



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Reorganization

A Labor and Employment Law Guide
to Restructuring in Germany

Presented by

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Introduction

Quoting Winston Churchill:

»To improve is to change – to perfect is to change often.«

In the same vein, many executives and their organizations have come to recognize that processes of change are by no means always driven by economic necessity. **Change** – in the positive sense – has come to be seen as more than simply a means to enable companies to survive. **Change** presents opportunities to realign structures, to develop new products, to penetrate new markets or to remain or become more attractive to highly qualified personnel, including present employees and new hires.

But when it comes to labor law, change often means that companies have to negotiate agreements to with their works councils to reconcile their interests with those of their employees and set up a social compensation plan, for such change will frequently also involve operational changes.

This Hidden Secret offers a succinct overview of what is involved in operational change and the concomitant labor law issues that must be addressed. This publication focuses on examination of the measures involved in a reduction in work force / head count.

We have written this Hidden Secret especially for practitioners (Chief Human Resources Officers, management and HR directors). The idea is to provide an insight into what is involved in operational change – including everything from co-determination aspects (Works Constitution Act – *Betriebsverfassungsgesetz*) to protection against dismissal and collective redundancy (Protection against Dismissal Act – *Kündigungsschutzgesetz*).

In addition, we would also like to share the experience that we have acquired over the years pertaining to dozens of reorganization projects. Optimal implementation of operational change often hinges upon the quality of the answers to the questions that arise in the course of planning and organization of such. In this context, we address the issues that are crucial to the successful implementation of operational change.



The presentation is complemented by visuals and check lists intended for use in actual practice.



01

Overview of Restructuring

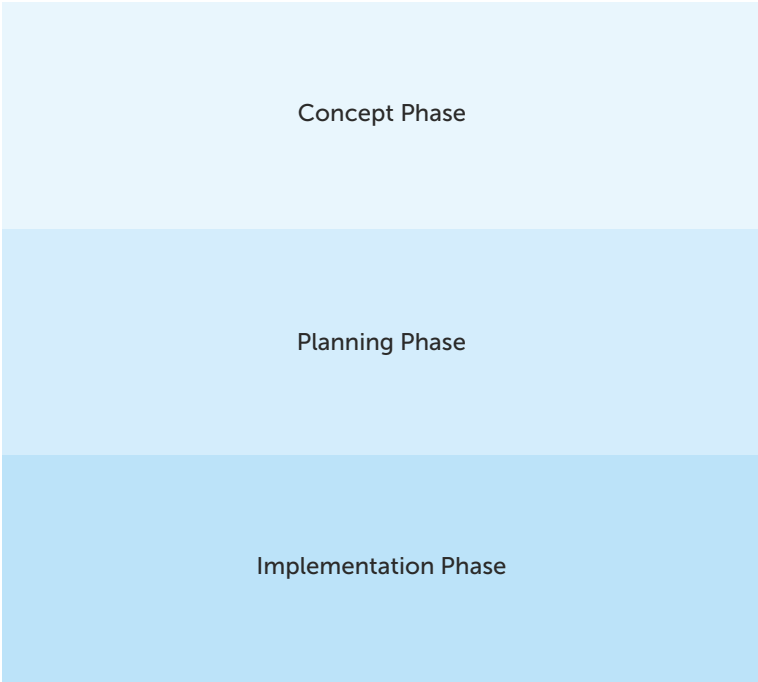
The focus of this Hidden Secret is on the various **phases** involved in the planning and implementation of operational change. What we mean by operational change in this context is change that involves a reduction in workforce.

The initial phase is the **concept phase**, which is when management first starts to examine the possibility of a change and starts to think about how it could be implemented.

In a second phase, the **planning phase**, a concrete timetable is prepared to show what has to be done and how long the various steps are likely to take.

The final phase is the **implementation phase**. First of all, the works council is informed. This is followed by negotiation with the works council, which in the ideal case will result in **reconciliation of the interests** of the company and its employees and a **social compensation plan**. Finally, the measures agreed are actually implemented.

In the event it should prove impossible to reconcile the interests of the employer and those of the workforce and agree upon a social compensation plan, consultation of a **conciliation committee** (comparable to arbitration) will then be initiated by either the employer or the works council. The employees affected then receive notice of dismissal. In the case of collective redundancy, the Federal Employment Agency must also be notified in advance and a transfer company may be involved.



Concept Phase

Planning Phase

Implementation Phase



Phases involved in operational change with a reduction in workforce

concept



advance planning

brainstorming

situational analysis

legal and de facto

definition of purposes
of operational change

planning

preparation of
a timetable for the
implementation phaseimplemen-
tationnotification of works
council of impending re-
dundancies and, if appro-
priate, notification of
economic committee and
European works councilwhich works council
is responsible?negotiation with
works council

- reconciliation of interests
- social compensation plan
- conciliation committee if appropriate

implementation of
operational change

- notification of collective redundancy
- notices of dismissal
- transfer company

02

Implementation of Operational Change

1. Which Works Council is Responsible?

2. Reconciliation of Interests



3. Social Compensation Plan

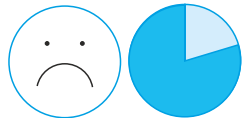
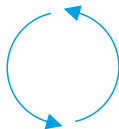
4. Implementation

4.1 Dismissal due to redundancy

4.2 Collective redundancy

4.3 Transfer company

In the initial phase, the concept phase, it is first of all important to determine whether the planned reduction of the workforce even qualifies as an operational change (*Betriebsänderung*). The following criteria make it possible to determine whether an operational change is involved:



*operational entity
with more than
20 employees with
voting rights?*

operational change

*major disadvantages
for workforce or
a significant part
of the workforce?*

more than
20 employees
with voting rights?



with the operational entity
or a joint operation

independent of individual operational entities

including part-time employees, employees
with fixed-term contracts and temporary
personnel with the operational entity for more
than six months

operational change

downsizing or shutdown of the entire
operational entity or significant operations

relocation of entire operational entity or
significant operations

merger with or division of operational entities

fundamental changes in operational
organization, the activities of the operational
entity or operating facilities



introduction of completely new work
procedures and production processes

major disadvantages
for the workforce
or significant parts
of the workforce?

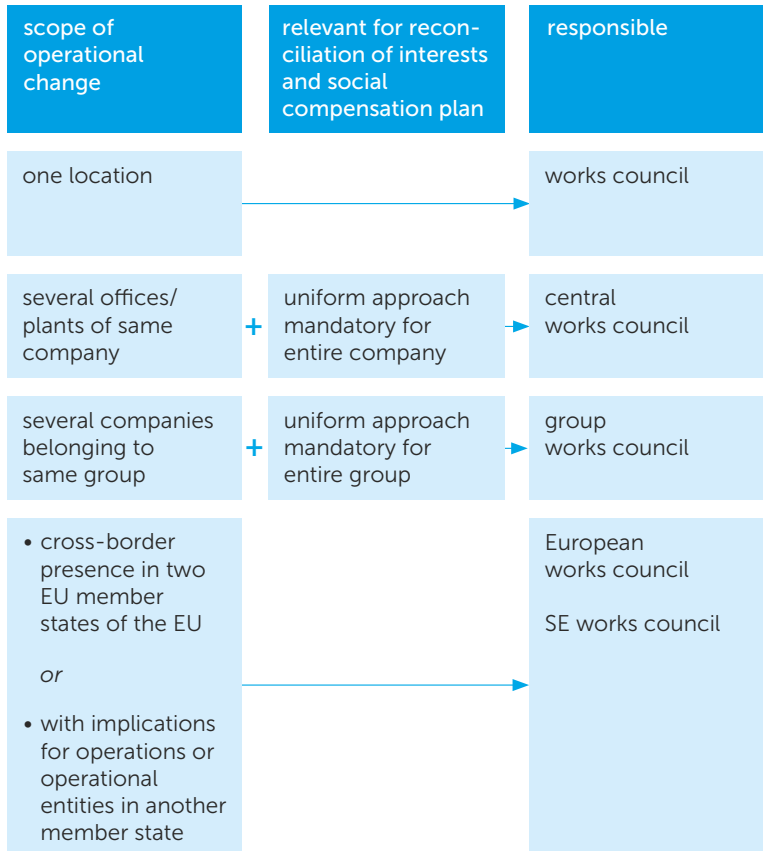
depends upon number of
employees affected

reduction in force?



1. Which Works Council is Responsible?





2. Reconciliation of Interests

Implementation begins once the conceptual and planning phases have been completed. But it is first necessary to notify the responsible works council of the intended measures and the planned reduction to the size of the workforce in connection with the operational change.



The **economic committee** must also be notified - if one exists. An economic committee will generally have been established if an operational entity has more than 100 regular employees.



The employer will then have to negotiate with the works council to reconcile the interests of the company and the employees.

prerequisites	operational change
▼	separate from social compensation plan
procedure	not a works agreement, but a special type of collective agreement
	in writing and signed by both the operational entity and the works council
▼	obligatory procedure without compulsory agreement
purpose and function	to plan operational change
content	whether, when and how the intended operational change will be implemented

SPECIAL CASE: INDEMNIFICATION

If an employer fails to honor commitments undertaken under a reconciliation of interests agreement without a compelling reason, the entity will be required to compensate the employees accordingly. Employees who have been dismissed because of such failure can bring action for financial compensation –in addition to any settlement which was agreed under a social compensation plan – and generally claim compensation amounting up to 12 months' gross salary. However, employees who have reached the age of 50 and have been with a company for at least 15 years can claim 15 months' gross salary and employees who have reached the age of 55 and have been with a company for at least 20 years 18 months' gross salary. In addition, an operational entity can be required to compensate employees for economic disadvantages incurred (example: higher cost of transportation in the case of relocation of an operational entity) for a period of twelve months.

Similarly, compensation may be due if an operational entity makes no attempt to achieve a reconciliation of interests and carries out an operational change nevertheless. If employees are dismissed or suffer financial disadvantages (example: loss of wages), they can claim financial compensation.

An attempt to reach an agreement to reconcile the interests of employees with those of their employer involves going through the entire procedure from initial notification of and negotiations with the works council up to consultation of a conciliation committee.








An attempt to achieve reconciliation of interests without involvement of a conciliation committee cannot be legally effective.



Negotiations with
works council



reconciliation of interests		social compensation plan
planning of operational change	goal 	mitigation/alleviation of economic disadvantages for the workforce
	special conditions 	<ul style="list-style-type: none"> • company must be at least four years old • specific thresholds must be exceeded when only a reduction in force is involved
whether, when and how the operational change will be implemented	subject of negotiation 	e. g. <ul style="list-style-type: none"> • settlements • compensation for loss of income • assistance in connection with retraining or support gaining further qualifications
special type of collective agreement signed by both parties	in the case of agreement 	works agreement signed by both parties
conciliation committee: agreement not, however, compulsory	in the case of failure to negotiate an agreement 	conciliation committee: agreement also compulsory after operational change

Reconciliation of Interests

3. Social Compensation Plan

Apart from an agreement covering reconciliation of interests of the parties involved, a works council may – if such change can be expected to result in economic hardship for employees – require preparation of a social compensation plan during the implementation phase of any operational change. The purpose of a social compensation plan is to compensate for or alleviate the economic hardship suffered by employees.

Many social compensation plans involve primarily payment of settlements to redundant employees. Such settlements are often based on a formula that factors in income and seniority.

The formula could then be: 0.5 gross monthly salary/wages for each year of service. Separate payments are also often provided to take into account dependent children and other support obligations or severe disability.

Example: An employee earns € 3,500.00 gross per month and has been with a company for 15 years. On the basis of the above formula, the employee would then receive a severance payment in the amount of a gross € 26,250.00.

prerequisites	operational change threshold values if only dismissals are planned (reduction in force) not applicable in the case of companies that have not been in existence for at least four years
procedure	works agreement in writing and signed by both the operational entity and the works council can also be enforced by conciliation committee retroactively
purpose and function	compensation for or alleviation of economic hardship future-oriented
content	severance payments compensation financial support for retraining or additional qualification measures, etc. principle of equal treatment

CONCILIATION COMMITTEE

If an operational entity and its works council fail to reach an agreement regarding a social compensation plan during the implementation phase, the conciliation committee can be consulted after negotiations break down. The conciliation committee is under obligation to make a decision and its decision can take the place of an agreement. The conciliation committee involves mandatory internal arbitration and can be compared to an arbitration tribunal.





The conciliation committee is under obligation to provide a decision and its decision can take the place of an agreement.

prerequisites	failure to agree upon a social compensation plan
✓	initiation by employer or works council
composition	neutral chairperson
✓	same number of arbiters appointed by employer and works council
result	findings of conciliation committee replaces the agreement between employer and works council
	arbitration binding/compulsory but subject to judicial review
	agreement upon a social compensation plan still also possible after implementation of operational change

COMPULSORY SOCIAL COMPENSATION PLAN WHEN THE CHANGE ONLY INVOLVES A REDUCTION IN WORKFORCE

A social compensation plan is, however, not always obligatory if operational change involves only a reduction in force. If only a reduction of the workforce is involved without other operational changes (example: no shutdown of machinery or no closure of an entire department), then threshold values are the deciding factors:

REDUCTION IN WORKFORCE ALONE – WHEN A SOCIAL COMPENSATION PLAN IS COMPULSORY

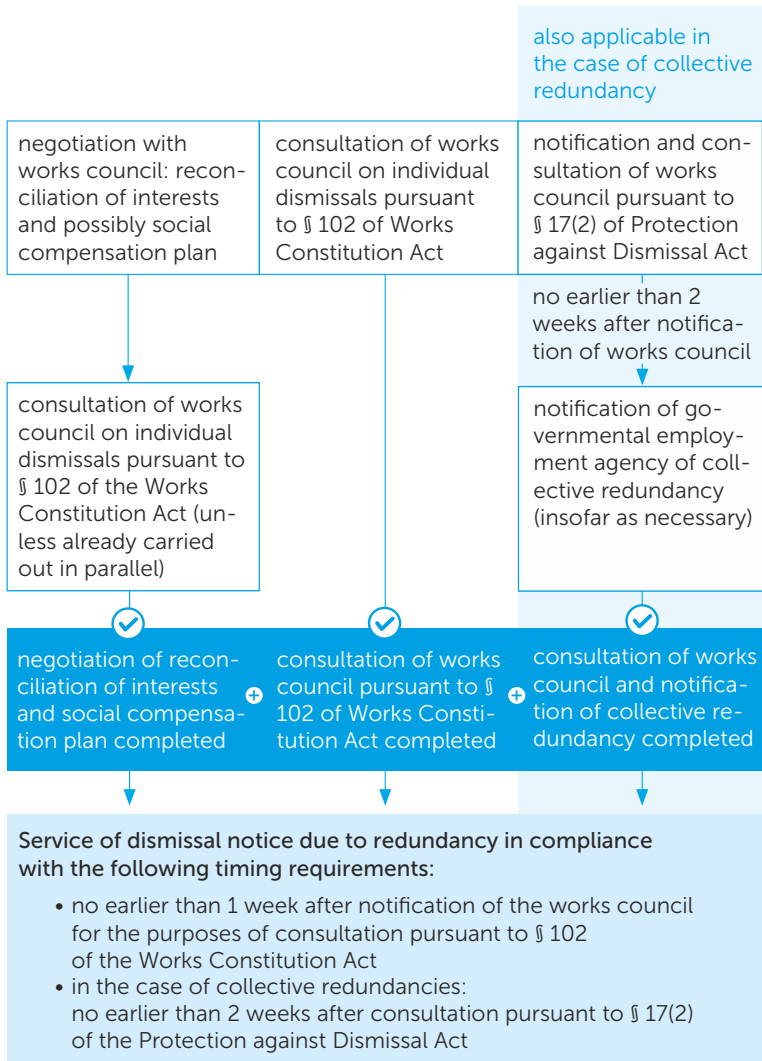
size of operation (number of employees) 	scope of reduction in workforce 
21 – 59 employees	20 % of workforce, but at least 6 employees
60 – 249 employees	20 % of workforce or at least 37 employees
250 – 499 employees	15 % of workforce or at least 60 employees
500 or more employees	10 % of workforce, but at least 60 employees

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4. Implementation





4.1 Dismissal due to redundancy

Whenever an operational change entails a reduction in the workforce, it is necessary to comply with the general provisions of law, which govern the protection against dismissal when it comes to the implementation phase.

The Protection against Dismissal Act gives companies the right to dismiss employees for operational reasons if they have become redundant, if there is no other possibility for employment for them with the same organization and if other employees are entitled to greater protection against dismissal on the basis of social criteria.

– **Elimination of positions:**

A position is considered to have been eliminated if the corresponding activity is no longer required due to an organizational decision on the part of the company (example: outsourcing of activities or relocation of activities to another site or country – nearshoring or offshoring). In such cases, that means that compelling operational considerations will prevent further employment of an employee in his previous position. This is referred to as dismissal due to redundancy.

– **Further employment not possible:**

When a position is eliminated, there must be no possibility for further employment with the company in another vacant position – even after reasonable reskilling or retraining.

– **Selection on the basis of social criteria**

Employees are assigned to pool groups with others who carry out similar jobs. They are then ranked on the basis of social criteria and, resulting from the ranking, their need for protection against dismissal. The need for protection against dismissal is based on age, seniority, dependents and severe disability (social criteria). Employees with less need for protection against dismissal are terminated first.

– **Consultation of works council:**

Companies must notify their works councils and provide them with all important information prior to any dismissal. Such information will regularly include the employee's name, compensation, period of notice, reason for elimination of the position and reason for selection on the basis of social criteria. The works council then has seven days to time state its position as regards the dismissal.

Any notice of dismissal due to redundancy must comply with the specific period of notice that applies for the respective employee. Periods of notice are fixed in individual employment contracts or collective agreements. Periods of notice can vary between two weeks and seven months with effect as of the end of a calendar month.



*Compliance with
terms of dismissal period!*

redundancy

further employment not possible

- urgent operational reasons

assessment of social criteria to select candidates for dismissal from amongst employees in comparable positions

- seniority
- age
- dependents
- severe disability



consultation of works council

notification of works council



position of the works council within 7 days

consultation of disability officer

notification of disability officer



position of the disability officer within 7 days

special protection against dismissal subject to approval of authorities

Maternity Protection Act
(*Mutterschutzgesetz* – MuSchG)

Federal Parent Allowance and Parental Leave Act
(*Bundeselterngeld- und Elternzeitgesetz* – BEEG)

Social Code IX (*Sozialgesetzbuch* – SGB IX)

4.2 Collective redundancy

In the case of collective redundancy, further requirements must be met during the implementation phase. In this phase, companies must be especially careful and proceed cautiously, for the procedure involved in redundancies that have to be reported to the authorities is rife with formalities, which makes it easy to make mistakes. The process can be broken down into two parts: The first part concerns notification of and consultation with the works council. The second then covers notification of the responsible government employment agency of the collective redundancy.



It is necessary to be especially careful and proceed with caution when it comes to collective redundancy!

notification of works council	at least two weeks prior to notification of the governmental employment agency in writing (no formal signature required) offer to consult no earlier than one week after notification
consultation with works council	consultation need not necessarily lead to an agreement consultation ends upon announcement of position of works council or after two weeks of consultation
notification of government employment agency	even if no works council exists use of official forms provided by the authority office with regional jurisdiction if the company has a works council: works council must receive a copy of the paperwork
service of notice of dismissal	

NOTIFICATION OF WORKS COUNCIL AND GOVERNMENT EMPLOYMENT AGENCY

OF



- *reasons for planned dismissals*
- *number and job categories of employees to be dismissed*
- *number and job categories of employees normally employed*
- *period during which dismissals are contemplated*
- *criteria to be applied for selection of employee to be dismissed*
- *criteria to be applied for determination of any severance payments*

DISMISSAL OF EMPLOYEES WITHIN 30 CALENDAR DAYS

employees



including managerial personnel and managing directors

dismissal



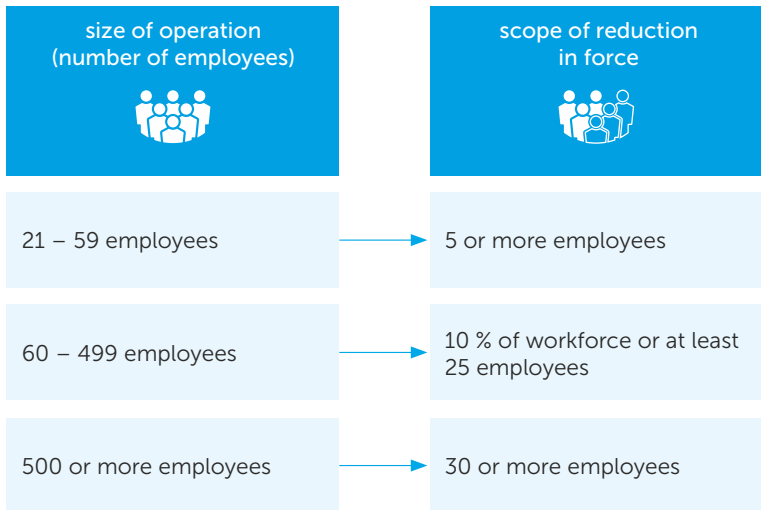
receipt of notice of dismissal

dismissal in the case of special protection against dismissal

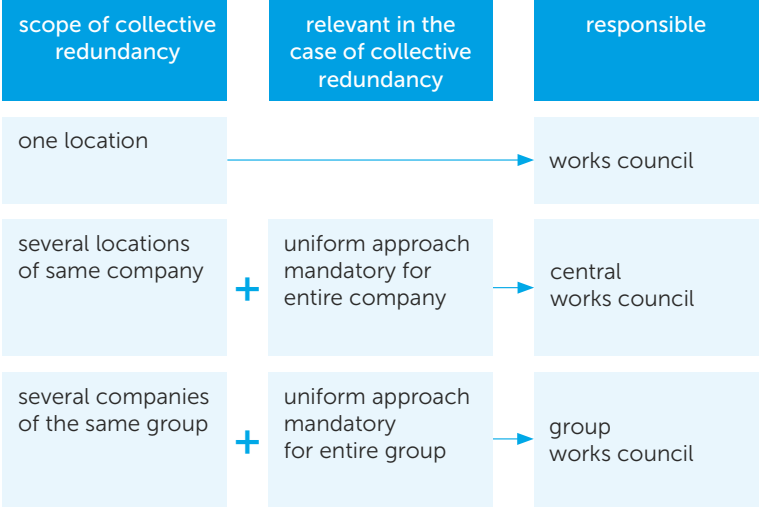
including rescission agreements

application for permission to dismiss employees who qualify for maternity rights or are on parental leave or have a severe disability

WHEN IS NOTIFICATION OF COLLECTIVE REDUNDANCY MANDATORY?



WHICH WORKS COUNCIL MUST BE CONSULTED?



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4.3 Transfer company

In the case of an operational change that results in permanent elimination of positions, employees may be offered the possibility of assignment to a transfer company. Employees with a transfer company receive a short-time transfer allowance for up to a maximum of twelve months. Employees assigned to a transfer company are reskilled and referred for employment.



*Short-time transfer
allowance for up to a maximum
of twelve months*

<p>prerequisites</p> <p>✓</p>	<p>permanent elimination of positions due to operational change</p> <p>employees faced with unemployment</p> <p>consultation of governmental employment agency prior to operational change</p>
<p>goal</p>	<p>integration of employees into labor market</p>
<p>implementation</p> <p>✓</p>	<p>one year</p> <p>governmental employment agency pays short-time transfer allowance</p>
<p>content</p> <p>✓</p>	<p>employer pays social-security contributions and any increase in the allowance</p> <p>possibility of support from European Globalization Fund</p> <p>establishment of transfer company by a third party (company)</p>
<p>actions</p>	<p>voluntary</p> <p>employment application coaching</p> <p>reskilling</p> <p>employment search assistance, etc.</p>



03

Check List for Successful Implementation of Operational Change

Does the company have a works council?

notification of economic committee?



RESPONSIBLE

- works council?
- central works council?
- group works council?

Involvement of European works council?

Have conditions for dismissal been met?

involvement of works council?

consultation of disability officer?

redundancy?

Is a collective redundancy involved?

notification of governmental employment agency?



RESPONSIBLE

- works council?
- central works council?
- group works council?

Use of a transfer company?

- reconciliation of interests?
 - > if not, possibility of indemnification

- social compensation plan?
 - > if not, possibility of enforcement by conciliation committee

- information
- statement

- further employment not possible
- selection on the basis of social criteria



- notification of and consultation with responsible works council



04

Glossary

A - Z

CENTRAL WORKS
COUNCIL

representative body of employees to be established when a company has several works councils.

COLLECTIVE
REDUNDANCY

dismissal of a larger number of employees (§ 17(1) of the Protection against Dismissal Act) within a period of 30 calendar days, in which case the respective works council must be informed and consulted and the governmental employment agency notified.

COMPANY

organizational entity based on economic or other purposes served by an establishment or several organizationally affiliated establishments of the same undertaking.

CONCEPT PHASE

period during which an entrepreneur first contemplates implementation of an operational change and starts to consider the concrete form such a change might take.

CONCILIATION
COMMITTEE

independent arbitration body organized under co-determination law that makes decisions in regard to the content of a social compensation plan if a company and its works council cannot come to an agreement.

ECONOMIC COMMITTEE	body established to assist and support a works council by consulting with the entrepreneur on economic matters and informing the works council accordingly.
EMPLOYEE	any person who has agreed to perform work defined by others as instructed under a civil law contract in a position of personal dependency while in the service of a third party. (including apprentices and home workers).
EMPLOYER	natural or legal person with at least one employee.
EUROPEAN WORKS COUNCIL	employee representative body of companies involved in cross-border activities within the European Union or the European Economic Area.
FURTHER EMPLOYMENT	possibility of assigning an employee to another, vacant position involving activities that are considered equal to or less desirable than the employee's previous position.
GROUP	several legally independent companies under the same management.

GROUP WORKS COUNCIL	representative body that can be established by the various individual central works councils of a group of companies.
IMPLEMENTATION PHASE	actual deployment of operational change.
JOINT OPERATION	operation resulting from consolidation, organization and targeted deployment of physical and intangible means available to an establishment to achieve common operational goals under the control of a common managerial structure with at least a notional legal connection between several companies to permit common management.
NOTICE OF DISMISSAL	notification of unilateral termination of employment by an employer.
OPERATIONAL ENTITY	organizational entity within which an entrepreneur, working alone or together with his employees, pursues certain objectives with the help of physical and intangible means.
OPERATIONAL CHANGE	downsizing, closure or relocation of an operational entity or a significant part thereof, consolidation of the operations with another those

of another operational entity, division into separate operations, major change in operational organization the activity of the entity or operational facilities or introduction of completely new procedures and production process.

PERIOD OF NOTICE period that elapses between service of notice of dismissal and actual termination of the employment relationship, at which an employee that has received notice will leave the company. Periods of notice are defined primarily by law and in employment contracts or collective agreements and will regularly range in length from two weeks up to seven months.

PLANNING PHASE phase during which the entrepreneur prepares a concrete timetable that shows what has to be done and how long the various steps are likely to take.

RECONCILIATION OF INTERESTS agreement between an employer and a works council covering the implementation of operational change.

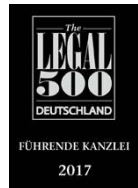
REDUNDANCY elimination of employment for urgent operational reasons exclusively on the basis of an

	entrepreneurial decision.
SE WORKS COUNCIL	employee representative body of a European stock corporation (Societas Europaea –SE).
SELECTION ON THE BASIS OF SOCIAL CRITERIA	process of choosing candidates for dismissal on the basis of equitable consideration of seniority, age, dependents and serious disability.
SOCIAL COMPENSATION PLAN	agreement between an employer and a works council on measures to alleviate the economic disadvantages of employees due to a contemplated operational change.
TERMINATION	unilateral act by virtue of which a party seeks to terminate an employment relationship with future effect.
TRANSFER COMPANY	independent organizational entity created to accommodate employees affected by the elimination of employment to avoid redundancies and improve their chances for reinsertion into the labor market.
WORKS COUNCIL	representative body of employees that has the right to be notified of and consulted on certain operational matters.

References

Who's Who Legal Germany 2018 - Labour & Employment

WWL says: »Jan Tibor Lelley draws high praise from international sources as one of the leading labour and employment practitioners in the country.«



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