EMPLOYMENT LAW

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Employment Law

in Germany

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German Labor and Employment Law

The German Labor and Employment Law system is not codified in a special labor code, but can be found in various laws, including the German Constitution *(Grundgesetz)*, regulations, and collective bargaining agreements between employers, employers' associations, and unions. German Labor and Employment Law generally is intended to protect the employee.

As a consequence human resources directors and executives need practical solutions to comply with the ever-changing legal framework Germany has created for its work force. This *Hidden Secret* is for them and their international businesses and German operations who want an easy-to-use legal resource.

It is also available online, as *Employment Law in Germany* on the go:

https://buse.de/insights/employment-law-germany

Table of contents

Keywords 6

01 Hiring 10

02 Compensation and Benefits 26

03 Time Off/Leaves of Absence 36

04 Termination Issues 46

05 Layoffs/Work Force Reduction/Redundancies 56

06 Unfair Competition/Covenants Not to Compete 64

07 Personnel Administration 70

08 Privacy 80

09 Employee Injuries/Workers' Compensation 90

10 Unemployment 92

11 Health & Safety 94

12 Unions & Industrial Relations 96

Keywords

A
Advance Notice (Redundancies) 58
Advertising 22
Applications for Employment 18

B
Background Investigations 24
Benefits 62

C
Care Giver Leave 43
Child Labor 32
Covenants Not to Compete 67

D
Disability Leaves 41
Discrimination 15
Discrimination Claims 52
Drug Testing 83

E
Employee Injuries/Workers' Compensation 90
Employment Applications 18
Employment References 24

Keywords

F
Family and other Medical Leaves 40
Fingerprints 88
Forms of Employment Agreements 12

G
Giving Employment References 77

H
Harassment 53
Health & Safety 94
Health Insurance 33

I
Industrial Relations 96

L
Lie Detector Test 86

M
Meals and Rest Periods 75
Medical Information 85
Minimum Age 31
Minimum Wage 28

N
Negotiations with Works Council 58
Non-solicitation of Employees and Customers 69

O

Off-Duty Conduct 85
Overtime Issues 34

P

Paid Sick Leave 39
Paid Time Off 40
Paid Vacation 38
Parental Leave 41
Payment upon Discharge or Resignation 76
Personnel Records 75
Personnel Records and Information 84
Pregnancy Leave 41
Privacy 80
Public Holidays 40

R

Reconciliation of Interests 58
Recordkeeping 78
Recruitment 22
References 77
Required Postings 72
Required Training 74

S

Searches 86
Separation Agreements, Use of 63
Severance Pay 53

Keywords

Severance Pay (Redundancies) 62
Social Compensation Plan 58
Social Insurance 33
Social Security Numbers 87
Surveillance and Monitoring 89

T
Temporary Worker (Leased Employees) 22
Termination Claims 48
Trade Secrets 66
Transfer of Undertakings (TUPE) 25

U
Unemployment 92
Unions 96
Use of Employment Contracts 20
Use of Separation Agreements 63

W
Wage Payments 31
Whistleblower Protection 54
Workday 35
Worker's Compensation 45, 90
Work Hours 35
Works Council 58
Workweek 35
Wrongful Termination Claims 48

BUSE

01
Hiring

A
Forms of Employment Agreements

B
Discrimination

C
Employment Applications

D
Use of Employment Contracts

E

Advertising/
Recruitment

F

Employment
References/
Background
Investigations

G

Transfer of
Undertakings
(TUPE)

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01 Hiring | A

Forms of Employment Agreements

The standard employment contract in Germany is for an indefinite period of time. An employment contract is concluded by an offer from the employer and an acceptance by the employee. An employee often (although considerable social change can be seen here) stays with her or his employer until she or he reaches retirement age, unless the employment is terminated before, or unless otherwise agreed by the parties.
Under the Part-Time and Fixed-Term Employment Act (*Teilzeit- und Befristungsgesetz*), however, other forms of employment are possible.

1. Fixed-Term Employment

There are two types of fixed-term employment contacts:
Fixed-term according to the calendar – i.e., fixed date – (*Befristung ohne Sachgrund*), and fixed-term established by the purpose of the employment (*Befristung mit Sachgrund*). Fixed-term employment according to the calendar is established without a specific purpose, and is permissible for up to two years, if there was no previous contract with the same employer, § 14 para. 2 Part-Time and Fixed-Term Employment Act.

Fixed-term employment established for a purpose is permissible for longer than two years. The **Part-Time and Fixed-Term Employment Act** stipulates in § 14 para. 1 objective grounds that employers can use to initiate a fixed-term employment established by purpose:

- There is only a temporary need for the job
- The fixed term is agreed to following training or study, and is designed to facilitate the employee' s transition to a subsequent job;
- The employee is substituting for another employee;
- The job or the work is designed for a fixed term;
- The fixed term is a probationary period;
- The fixed term is agreed to because of personal reasons on the part of the employee;
- The employee's salary comes from government budgets, which are assigned to that type of employment;
- The fixed term is agreed in a court settlement.

Any fixed-term employment contract must be in writing.

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2. Part-Time Work

Part-time work is possible under § 6 to § 13 Part-Time and Fixed-Term Employment Act. Employees who start with full-time jobs can request part-time work for an unlimited period from their employers if the company has regularly more than 15 employees and if the employee has more than six months of seniority. Additionally, in companies with regularly more than 45 employees, employees with more than six months of seniority can request so called "bridging part-time work" (*"Brückenteilzeit"*). This means part-time work for a predetermined period between one and five years, after which the employee automatically returns to full-time work. The employer can object to such part-time work claims only for important business reasons (e.g. if the part-time work has a significant negative impact on the work organization or process or imposes a disproportionate economic burden on the company). Labor courts tend to grant part-time work to employees – particularly women with young children – if they file legal action after the employer has refused to consider their request.

01 Hiring | B

Discrimination

The German Constitution prohibits discrimination and preferential treatment against any individual because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions. Discrimination against disabled individuals is also unlawful in Germany. These guidelines apply to applicants for employment, as well as to current employees.

In addition the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*) prohibits direct or indirect discrimination based on race, ethnic origin, sex, religion or belief, disability, age, or sexual identity. It is unlawful to discriminate against or to instruct to discriminate against in any employment. This includes, in particular, that it is unlawful to discriminate in connection with access to employment, to self-employment, or professional career and occupation as well as the employment and working conditions, vocational guidance and training. Such discrimination can lead to damage claims against the employer and senior staff. The General Equal Treatment Act calls for employers to compensate employees for any monetary damages resulting from discrimination and financial damages for non-economic-losses.

The employee may also refuse to work or file a complaint against the employer.
In line with the current case law of the Court of Justice of the European Union, a blanket headscarf ban for Muslim women can be seen as an example for discrimination based on religion. Since the employer is bound to respect the employee's religious freedom guaranteed by the German Constitution, the employer can only prohibit the wearing of a headscarf with the aim of ensuring a policy of neutrality when workers are in contact with customers or with other workers. However, in order for it to be lawful, the employer must demonstrate that the wearing of a headscarf by an employee constitutes a specific risk of disturbances within the establishment or of a loss of income.

Discrimination against part-time-workers is likewise unlawful under § 4 Part-Time and Fixed-Term Employment Act.

Germany has adopted a law on the equal participation of men and women in leadership positions in the private and public sectors. According to § 96 para. 2 and 3 Stock Corporation Act (*Aktiengesetz*), a gender quota of 30 percent applies to supervisory boards of companies that are listed and to which co-determination laws apply. If the management board of these companies consists of more than three members, there must be at least one female and one masculine member of the management board (§ 76 para. 3a Stock Corporation Act). The quota regulation therefore addresses

stock companies, limited partnerships by shares (*Kommanditgesellschaft auf Aktien*) with more than 2000 employees and European Stock Corporations (*Societas Europaea*). These companies must comply with the quota, when assigning vacant supervisory seats. In case of non-compliance with the quota the election is invalid and the companies are required to leave the seats vacant (»empty chair«).

In addition, companies that are either listed or to which co-determination laws apply, are obliged to set targets to increase the proportion of women on supervisory boards, management boards and at the top-level management, according to §§ 76 para. 4, 111 para. 5 Stock Corporation Act. As a minimum target is not intended, the affected companies can set their minimum targets on their own.

According to the Remuneration Transparency Act (*Entgelttransparenz-gesetz*), male and female employees must receive equal pay for work of the same, similar or of equal value. In order to hold companies accountable to this equal pay requirement, employees can claim information from their employers, e.g. on the company's salary policy or promotion scheme (§§10-16 Remuneration Transparency Act). If an unequal pay between male and female employees is revealed, the employer must disprove that it involves discrimination based on sex.

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01 Hiring | C

Employment Applications

In Germany, employers may not seek information from applicants that is otherwise protected by law. For example, a prospective employer may not ask questions concerning religion, political attitude, or union membership, although exceptions are made for employers whose businesses are based on certain religious beliefs or political attitude. Nor may an employer seek information concerning pregnancy.

In addition, it is recommendable for employers in job interviews not to ask any questions related to race, ethnic origin, sex, religion or belief, disability, age, or sexual identity. Such questions could constitute discrimination claims under the General Equal Treatment Act. The same applies to job offers/vacancies in the press or media.

If relevant to the specific job or position, the employer may seek information regarding criminal convictions. However, the employer can only consider an applicant's convictions that led to a criminal record under the Federal Criminal Record Act (*Bundeszentralregistergesetz*).

Under **§ 670 Civil Code** (*Bürgerliches Gesetzbuch*), the employer is responsible for the employee's expenses in connection with an interview (e.g. travel, accommodations). However, the employer can exclude the reimbursement if the employee is informed accordingly together with the invitation to the interview.

In an office where a Works Council is established, and where more than 20 individuals are employed, the Works Council must be informed before a new employee is hired, **§ 99 para. 1 Works Constitution Act** (*Betriebsverfassungsgesetz*). If the employer wants to use a questionnaire for interviews, the design of such a document is subject to co-determination rights of the Works Council.

01 Hiring | D

Use of Employment Contracts

It is essential that employers put a fixed-term employment contract in writing. Otherwise, by law, the employment will be for an indefinite period of time.

Under the **Documentation Act** (*Nachweisgesetz*), within the first month of employment, the employer is required to provide to the employee a written document that includes at least the following information:

- Name and address of employer and employee;
- Date of commencement of the employment relationship;
- If a fixed-term contract, the term of the employment relationship;
- Place of work and, if the employee is required to travel, an indication that employment will take place at various locations;
- Description of tasks and duties;
- Remuneration, including extra pay, incentives, and special payments, and other components of the remuneration and pay day;
- Working hours;
- Annual vacation;

- Notice periods for termination of employment;
- Reference to collective bargaining agreements and other agreements between the employer and employees' representatives if applicable to the employment relationship.

Contracts of interns have to be provided directly (§ 2 para. 1a Documentation Act). It is quite common in Germany to use non-compete clauses in employment contracts for key employees. These must be in writing, and are fully enforceable if the requirements in §§ 74 to 75d German Commercial Code (*Handelsgesetzbuch*) are met.

See page 67 below.

01 Hiring | E

Advertising/Recruitment

Employers should ensure to comply with the laws and guidelines described on › page 18 above, when advertising for or recruiting employees in Germany. In particular, it is important to comply with the General Equal Treatment Act.

› See page 15 above.

In case of recruiting a temporary worker, further obligations for employers must be taken into account. Temporary work is a form of employment where workers are employed by temporary work agencies which in return hire them out to a third party (the client company) where they work temporarily under the client company's direction and supervision. The temporary worker is hereby considered an employee of the temporary work agency.

The Personnel Leasing Act *(Arbeitnehmerüberlassungsgesetz)* limits the maximum period for a temporary worker to 18 months. The temporary worker has to be explicitly mentioned in the contract to avoid any circumvention of the law.

In addition the Equal Pay Principle obliges the temporary work agency to pay the same wage that a comparable employee of the hiring company earns. Exemptions are generally only allowed during the first 9 months. After that, the same wage compared to an employee of the hirer must be paid. Any violation of the Personnel Leasing Act can result in heavy fines, up to € 500.000.

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Employment References/ Background Investigations

In Germany, employers are generally free to check employment references and other information presented by job applicants. This can be done by inquiries to third parties and, in particular, former employers. However, the Constitutional individual personal right of the applicant (*Allgemeines Persönlichkeitsrecht*), EU General Data Protection Regulation (GDPR) and Federal/State data protection legislation (Federal Data Protection Act *(Bundesdatenschutzgesetz)*) have to be considered in terms of privacy and protection of personal data.

01 Hiring | G

Transfer of Undertakings (TUPE)

In § 613a Civil Code Germany has enacted European Union TUPE regulations (Regulation 2001/23/EG). If a transfer of undertakings takes place, the receiving company steps into the employer position for all employees affected by the transfer of undertaking. The affected employees have the right to object to the transfer of their employment relationship to the receiving company. The objection has to be filed by the employee within one month notice after being informed about details of the transfer. German labor courts tend to review the information given by the employer with high scrutiny. Failing to meet the test applied by the courts can result to objections to the transfer far beyond the one month notice period.

02
Compensation and Benefits

A
Minimum Wage

B
Minimum Age

C
Wage Payments

D
Child Labor

E

Health Insurance and other Social Insurance

F

Overtime Issues

G

Workday/ Workweek/ Work Hours

BUSE

02
Compensation and Benefits | A

Minimum Wage

The Act on Minimum Wages (*Mindestlohngesetz*) stipulates in Germany a minimum wage per working hour. On January 1st 2024, the statutory minimum wage will increase in two stages. Initially, the lowest wage threshold will be € 12.41 gross per hour. 2025 it will rise to € 12.82. The minimum wage generally applies to all industries and private and public sector and is indispensable (§ 3 Act on Minimum Wages). The law allows exemptions for e.g., internships, compulsory practical trainings, employees without vocational training younger than 18 years old (§ 22 para. 2 Act on Minimum Wages, § 2 Young Individuals' Protection in Employment Act (*Jugendarbeitsschutzgesetz*)) or employees hired from long-term unemployment (§ 22 para. 4 Act on Minimum Wages) and includes transitional rules for some industries. But employers have to consider very carefully if their intern/trainee might in fact be an employee and therefore addressed by the Act on Minimum Wages.

In addition to the Act on Minimum Wages, wage is often specified in collective bargaining agreements between employers and unions. These agreements are binding for employers if they are members of an employer

association or if they have negotiated bargaining agreements with the unions on their own, without the employer association (*Haustarifvertrag*).

Wages agreed to between employers and employees that do not exceed two-thirds of the amount in the relevant bargaining agreement are deemed unfair and void; if this is the case, payments must be made according to the relevant collective bargaining agreement.

Collective bargaining agreements can be declared generally binding by government order, § 5 Act on Collective Bargaining Agreements (*Tarifvertragsgesetz*). In this case, the agreement is binding for all employers and employees in the particular industry.
The minimum wage also applies for employees of foreign companies operating in Germany, regardless if the foreign company has an office or site in Germany or not. If a collective agreement states a higher minimum wage than the statutory one, this higher wage is binding and the employer may not cut the higher wage.

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Any agreement cutting, excluding or ignoring the minimum wage is legally void and not enforceable. Furthermore employers are obliged to keep records of the start, end and duration of the individual's daily working time (*Mindestlohndokumentationspflichtenverordnung*). However, according to § 17 para. 1 Act on Minimum Wages, this documentation obligation addresses only employees in a marginal employment and those economic sectors or branches of industries mentioned in § 2a Act to Combat Undeclared Work and Unlawful Employment (*Schwarzarbeitsbekämpfungsgesetz*).

Violations of the statutory minimum wage may be punished with a fine up to € 500,000 (§ 21 para. 3 Act on Minimum Wages). In addition to the employer also the instructing entrepreneur is liable.

02
Compensation and Benefits | B

Minimum Age

Under the Young Individuals' Protection in Employment Act, the minimum age for employment is 13 years. Nevertheless, the employment of children is permissible only with the parent's consent and if the job is suitable for children. The Young Individuals' Protection in Employment Act defines a »child« as any person under the age of 15 years and a »young individual« as any person aged at least 15 and who is not yet 18 years old. In spite of this, young individuals will be legally treated as children as long as they are required to be in full-time education.

02
Compensation and Benefits | C

Wage Payments

Germany has no general legislation concerning standard pay days in employment relationships. However, it is common that salary is paid monthly at the end of the calendar month for work performed during that month. The Act on Minimum Wages stipulates that minimum wage has to

be paid at the latest on the last bank day of the month following the month where the employee has performed her/his work, § 2 para. 1 no. 2 Act on Minimum Wages.
Under the Documentation Act (› see page 20 above) an employer must provide written information regarding when salary payments will be made.

02
Compensation and Benefits | D

Child Labor

The Young Individuals' Protection in Employment Act regulates the employment of minors. Employment of persons under the age of 13 is generally not permitted. According to § 5 para. 2 Young Individuals' Protection in Employment Act, exceptions are only permissible in case of occupational therapy, internships or in order to comply with a judicial instruction.

02
Compensation and Benefits | E

Health Insurance and other Social Insurance

In Germany, statutory social insurance is mandatory for most employees. It covers pension insurance, unemployment insurance, home and institutional care insurance, employee accident insurance, and health care insurance. The employer and employee each pay about 50% of the social insurance premiums. Currently, the payment amounts to approximately 40% of an employee's gross monthly salary, with the employee and employer each paying about 20%.

The statutory health insurance under the **Social Code No. V** (*Sozialgesetzbuch Fünftes Buch*) performs and promotes health care and avoidance of illness. It includes medical treatment, dental treatment, provision of pharmaceuticals, etc.

02
Compensation and Benefits | F

Overtime Issues

Germany has no regulations dealing explicitly with extra salary for overtime work. The regular working day is eight hours. In general, the employer will pay for overtime work. In addition, many collective bargaining agreements provide for extra salary for overtime work and/or night work. German labor courts take the view that senior employees and executives may be expected to work overtime without any additional payment.

If a Works Council is established, any overtime work is subject to co-determination under the Works Constitution Act.

02
Compensation and Benefits | G

Workday/Workweek/Work Hours

Under the Hours of Employment Act (*Arbeitszeitgesetz*), a workday should not exceed eight hours. Employees may work up to 10 hours per day if, within six calendar months or 24 weeks, the average working hours per day do not exceed eight hours.

Employees who have worked more than six but fewer than nine hours in a workday must be given a break of at least 30 minutes; those who work longer than nine hours must be granted a 45-minute break in total. Employees must also have a break of at least 11 hours between workdays.

Work on Sundays and bank holidays is generally not permitted.

The Hours of Employment Act includes various exemptions to provide flexibility to the medical care, health, restaurant and other industries.

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03

Time Off / Leaves of Absence

A

Paid Vacation

B

Paid Sick Leave

C

Paid Time Off

D

Family and Other Medical Leaves

E

Disability Leaves

F

Pregnancy Leave/ Paternal Leave

G

Caregiver Leave

H

Workers' Compensation

03
Time Off / Leaves of Absence | A

Paid Vacation

Under the Federal Vacation Act (*Bundesurlaubsgesetz*), the minimum amount of paid vacation per calendar year is 24 days. This number is based on a workweek of six days, and can be less if the workweek is shorter than six days. Thus, for example, it is possible to grant 20 days of vacation based on a five-day workweek.

Many collective bargaining agreements provide 30 days of vacation per year for a workweek of five days. It is also not uncommon to agree on that number in employment contracts.

To use her or his vacation claim, an employee must apply for vacation on a certain date and request approval from her or his employer. The law orders the employer to approve the request if there are no urgent operational reasons not to do so.

Unused vacation claims have to be paid at termination if they cannot otherwise be used for leave of absence during notice periods.

It should be noted that the remaining vacation is no longer automatically time-barred. Employers must ask their employees to take their vacation.

03
Time Off / Leaves of Absence | B

Paid Sick Leave

Germany requires employers to provide employees with six weeks of paid sick leave for each illness that result in incapacity to work. The sick pay leave is regulated under the Continued Remuneration Act (*Entgeltfortzahlungsgesetz*).

Employees are required to inform their employer in due course if they are incapable of working and also how long such incapability may presumably last. Employees with three days of sick leave must produce a written medical certificate no later than the next (fourth) day of incapability attesting to the illness.

The electronic certificate of incapacity for work is mandatory from 2023. With the "eAU" procedure, employees will no longer have to present their certificate of incapacity for work to their employer. Instead, the health insurance companies provide the relevant incapacity for work data electronically and employers then retrieve this data.

Following six weeks of sick pay by the employer, employees will receive sick allowance by their health insurance in the amount of 70 % of their last salary. The maximum period for this coverage is 78 weeks within three years per illness. However, the system in Germany is changing rapidly, and further developments in legislation are expected.

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03
Time Off / Leaves of Absence | C

Paid Time Off

Germany observes up to 12 paid public holidays, depending on the state. The minimum number of paid public holidays is nine.

Employers often grant paid time off to employees during their notice period. It is important to note that time off can only be granted if the employee agrees or if this option is included in the employment contract. German labor courts have ruled that, unless otherwise stipulated in the employment contract, employees are entitled to continued employment through the end of their contract and then cash out the accrued leave.

03
Time Off / Leaves of Absence | D

Family and Other Medical Leaves

Germany has extensive legislation to protect pregnant employees, employees with newborn children, and employees with children up to the age of three. › See page 41 below.

03
Time Off / Leaves of Absence | E

Disability Leaves

Under German labor and employment law, disabled individuals are protected. Social Code No. IX (*Sozialgesetzbuch Neuntes Buch*) stipulates promotion, protection, and reintegration of disabled persons.

Under § 208 Social Code No. IX, disabled persons have an additional vacation claim of five days per vacation year.

03
Time Off / Leaves of Absence | F

Pregnancy Leave/Parental Leave

The **Maternity Protection Act** (*Mutterschutzgesetz*) excludes women from performing certain tasks during their pregnancy and for eight to 12 weeks following the birth of the child. A pregnant employee does not have to work during the last six weeks before the (expected) birth of her child.

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Under § 15 Federal Parental Allowances and Parental Leave Act (*Bundeselterngeld- und Elternzeitgesetz*) parents of a newborn child can claim up to three years of unpaid time off to take care of their child. This total time off can be claimed by the mother and father simultaneously or individually. Employees who take time off under the Act are permitted to work up to 32 hours (or 30 hours for parents of children born before September 1st 2021) per week (i.e., part-time) during this period with either their current or another employer. Employees who take time off have special protection against termination during their time off (§ 18 Federal Parental Allowances and Parental Leave Act).

In addition they can claim payments from public funds to pay up to 12 months of this time in the amount of 67% of the last net wage (*Basiselterngeld*), at least € 300 per month (§ 2 Federal Parental Allowances and Parental Leave Act). If both parents take time off, the time paid by public funds can be extended up to 14 months (§ 4 para. 3 Federal Parental Allowances and Parental Leave Act). The »*Elterngeld PLUS*« stipulates further options to combine employment and education. Employees who want to do part-time work can split their claim among 24 months with half

of payments from public funds, at least € 150,00 per month (§§ 4 para. 3, 4a para. 2 Federal Parental Allowances and Parental Leave Act). The claim can be extended up to 28 months if both parents are working for four months between 24 – 32 hours (or 25 – 30 hours for parents of children born before September 1st 2021) per week at the same time (§ 4b Federal Parental Allowances and Parental Leave Act). Both payments can be combined flexible. The main differences between Basiselterngeld and »*Elterngeld PLUS*« are the promotion period and the higher number of parents working in part-time under »*Elterngeld PLUS*«.

03
Time Off / Leaves of Absence | G

Caregiver Leave

The Home Care Leave Act (*Pflegezeitgesetz*) entitles employees to organize nursing of close relatives or nurse them themselves and regulates the consequences for the employment relationship. Employees who have

to organize nursing care for close relatives because of an urgent need must be granted up to 10 unpaid days time off (§ 2 Home Care Leave Act). Employees who do not receive compensation by the employer can demand a compensation for the loss of wages by the home and care insurance (§ 44a para. 3 Social Code No. XI (*Sozialgesetzbuch Elftes Buch*)). In companies employing regularly more than 15 employees, they can claim up to six unpaid months off or part-time work per close relative to provide care (§§ 3 para. 1, 4 para. 1 Home Care Leave Act). The salary difference is covered by interest-free credits accrued in monthly rates. Employees taking leave under the Act have special protection against termination of their employment during the time off (§ 5 Home Care Leave Act).

The Family Caregiver Act (*Familienpflegezeitgesetz*) aims to facilitate the balance of work and family caregiving. In companies employing regularly more than 25 employees the Act stipulates a claim of up to 24 months reduced working time up to 15 hours per week for employees who are active as caregivers to family members at home (§ 2 para. 1 Family Caregiver Act). The salary difference is covered by interest-free credits accrued in monthly rates. Employees taking leave under the Act have

special protection against termination of their employment during the time off (§ 5 Home Care Leave Act, § 2 para. 3 Family Caregiver Act). Both caregiving models can be combined flexibly.

03
Time Off / Leaves of Absence | H

Workers' Compensation

Germany has under the Social Code No. VII (*Sozialgesetzbuch Siebtes Buch*) a system of workers' compensation insurance that provides coverage in case of accidents at the workplace, including accidents that occur on the way to or from work, and disease resulting from the job. The employer alone is responsible for the payments to this part of the social security system; the employee is not expected or required to contribute to the system.

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04
Termination Issues

A

Wrongful Termination Claims

B

Discrimination Claims

C

Severance Pay

D

Harassment

E

Whistleblower Protection

BUSE

04
Termination Issues | A

Wrongful Termination Claims

In Germany, it is possible to terminate employment contracts with (*fristgemäße Kündigung*) or without notice, with immediate effect (*fristlose Kündigung aus wichtigem Grund*). Termination without notice has to be issued within two weeks of obtaining knowledge of the facts for the termination. It is also possible to issue constructive dismissal and change the essential conditions of employment unilaterally (*Änderungskündigung*). The *Änderungskündigung* aims to change the working conditions and not to terminate the employment.

The respective minimum notice periods can be found in the Civil Code, collective bargaining agreements, and the employment contract itself. In accordance with § 622 Civil Code, statutory notice periods increase with the seniority of the employee. The standard notice period is four weeks to the 15th or end of the calendar month, and increases to seven months to the end of the calendar month after 20 years of employment. Upon agreement by the employer and employee, a worker still in his or her probationary period has a notice period of two weeks.

The Protection Against Dismissal Act (*Kündigungsschutzgesetz*) protects employees against wrongful termination. The Act previously applied to employees who work in branches with more than five employees and who have been employed for more than six months; respectively the branch must have more than 10 employees. Under the Protection Against Dismissal Act, termination is permissible for the following causes:

- Personal reasons;
- Conduct; or
- Business reasons.

Termination based on personal cause is often a result of illness of the employee. If an employee is incapable of work due to illness, the employer may give notice if:

- A negative prognosis for the employee's future health applies;
- the employer's business is affected seriously by the incapable employee, e.g., is experiencing a financial burden because of paying for

sick leave (› see page 39 above); and

- the employer's interest to end the employment contract outweighs the employee's interest in keeping her or his job. German labor courts tend to review carefully every detail in these types of cases.

German labor courts have ruled that a valid termination based on inappropriate conduct requires in general a prior warning by the employer and continued inappropriate conduct after the warning.

Termination based on business reasons requires, for example, an employer's decision to restructure the business in a way that certain jobs or positions in the organization are no longer needed. In a process called social selection (*Sozialauswahl*), the employer then has to identify who among the employees should be given notice if more than one job or position is redundant. In the process of *Sozialauswahl*, the employer has to consider the following factors for the employee:

- Seniority;
- Age;
- Number of dependents or family maintenance obligations; and
- Disability (if any).

The employee with the highest factor(s) in the *Sozialauswahl* keeps her or his job.

It is important for employers in Germany to know that an employee who brings legal proceedings in front of a labor court claiming wrongful termination may be entitled not only to reinstatement to her or his former position, but also to payment of outstanding salaries. The employee can claim remuneration for the months during which she or he did not receive her or his salary payment because the employer thought the employment relationship had been terminated.

However, the Protection Against Dismissal Act permits employers to avoid litigation in case of termination for business reasons by offering severance pay equal to one-half month's gross salary for each year of service to the company.

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In offices where Works Councils are established under the Works Constitution Act, the council must be informed before any employee termination is issued. The Works Council has one week to inform the employer about any concerns regarding the intended dismissal. In case of intended termination without notice, the Works Council has to inform the employer immediately, but within three days at the latest.

04 Termination Issues | B

Discrimination Claims

In Germany employers can face claims for direct or indirect discrimination on the basis of race, on the grounds of ethnic origin, sex, religion or belief, disability, age, or sexual identity under the General Equal Treatment Act. › See page 15 above. The individual discriminated against can sue for damages or non-financial losses, may refuse to work, and may file a complaint with the relevant department of the company or with the **Federal Anti-Discrimination Agency** (*Antidiskriminierungsstelle des Bundes*). Claims for damages or non-financial losses must be made in writing within a period of two months after the most recent discriminatory conduct; otherwise the claim lapses.

04
Termination Issues | C

Severance Pay

In Germany, employers are generally not required to offer severance pay to employees who are terminated. However, in an effort to avoid litigation, enacted legislation permits employers to offer severance pay to employees who are laid off for business reasons.

See page 48 above.

04
Termination Issues | D

Harassment

§ 3 para. 4 of the General Equal Treatment Act provides protection against sexual harassment at the work place. The affected individual can institute legal proceedings against the employer for damages or non-financial losses.

See also page 15 above.

04
Termination Issues | E

Whistleblower Protection

In July 2023, the new German **Act on Whistleblower Protection** (*Hinweisgeberschutzgesetz*) entered into force The law protects whistleblowers who report wrongdoing in certain areas e.g. criminal activities. According to the law German based legal entities with 50 or more employees must establish internal reporting channels.. External reporting channels are established at government agencies. The information is given to an external reporting office.The law also stipulates damages claims and fines for individuals who file misleading reports The law prohibits any retaliation against whistleblowers.

In Germany, whistleblowers are generally liable in the field of trade secrets. However, according to § 5 Trade Secret Protection Act (*Geschäfts-geheimnisgesetz*), they receive a certain level of protection under specific circumstances (› see page 66 below).

From 2023, enterprises with at least 3,000 and, from 2024, enterprises with at least 1,000 employees have to comply with the new §§ 3, 8 and 9 Supply Chain Due Diligence Act (*Lieferkettengesetz*) and implement complaint

procedures allowing the reporting of risks and violations related to human rights and concerning environmental obligations.

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05

Layoffs/Work Force Reduction/Redundancies

A

Advance Notice, Negotiations with Works Council, Reconciliation of Interests and Social Compensation Plan

B

Severance Pay

C

Benefits

D

Use of Separation Agreements

Advance Notice, Negotiations with Works Council, Reconciliation of Interests and Social Compensation Plan

The Works Constitution Act stipulates that the Works Council has to be informed in due course and in detail concerning the intended layoffs/work force reductions, even before the process is started. This is required by law if a change of business/alteration (*Betriebsänderung*) is started by the employer in companies with regularly more than 20 employees. Depending on the size of the company, the employer must also inform the following employee committees:

- Finance Committee (*Wirtschaftsausschuss*). This committee, which is outside the Works Council, needs to be informed separately about the economic matters of the company.
- Central Works Council (*Gesamtbetriebsrat*) and Combine Works Council (*Konzernbetriebsrat*), if established.
- European Works Council (*Europäischer Betriebsrat*), if there is one, needs to be involved in the process, based on the **European Works Council Law** (*Gesetz über Europäische Betriebsräte*), if the intended layoff/work force reduction affects companies in Germany as well as in other memberstates of the European Union.

Included among the information shared with the Works Council should be written documents detailing the financial situation of the company and any other information as required by the Works Council.

Experience has shown that the first disputes with the Works Council or the unions often occur in this early phase of information sharing. Works Council and unions often claim insufficient information, or even the complete lack of information at this point. From the employer's point of view, it is, of course, essential to present to the Works Council only as much information as legally required.

During the negotiation phase prior to the change of business/alteration (*Betriebsänderung*), the company negotiates a reconciliation of interest (*Interessenausgleich*) and social compensation plan (*Sozialplan*) with the Works Council.

The reconciliation of interest is an agreement between the employer and the Works Council that describes the company's intended restructuring (in particular, the changes in the organization and the number of employees to be dismissed); the schedule for termination; and other related measures.

According to the Works Constitution Act, any approval of the Works Council concerning reconciliation of interests and termination of the respective employees is not required. However, the law stipulates that the employer has to at least try to reach agreement with the Works Council concerning a reconciliation of interests. This means that the employer must undertake good-faith negotiations, even if they fail in the end.

In the reconciliation of interests, for example the criteria pursuant to which employees are going to be dismissed are based on data given by the social selection (› see page 51 above) under the Protection Against Dismissal Act. It is extremely important that the social selection is performed without any material mistakes, since every mistake puts the legal validity of the termination at risk for possible litigation in front of the labor courts.

The social compensation plan is an agreement between the employer and the Works Council that stipulates the social (financial) compensation for the layoff/work force reduction. In particular, the social compensation plan covers any losses of present possession and any financial losses for the

employees in connection with the termination.

Unlike the reconciliation of interests, the social plan agreement is enforceable by the Works Council. This means that if the negotiations on the social compensation plan fail, the Conciliation Committee (*Einigungsstelle*) determines the scope and extent of the financial compensation for the employees who are to be laid off. The procedure of the Conciliation Committee is similar to an arbitration process, and its decision is binding for both the employer and the Works Council.

The Works Council must also be informed and consulted with regarding any so-called mass layoffs, under § 17 para. 2 sentence 1 Protection Against Dismissal Act. And, finally, the **labor office** (*Agentur für Arbeit*) has to be informed concerning any intended layoffs, including details on the number of affected employees. The information has to arrive at the labor office prior to any termination.

05
Layoffs/Work Force Reduction/Redundancies

B

Severance Pay

Employers are generally not required to provide severance pay for employees who are laid off. However, a social compensation plan agreed to with the Works Council (and which the Works Council can legally claim) can require respective payments in case of workforce reductions. Such an agreement is binding for employers.

05
Layoffs/Work Force Reduction/Redundancies

C

Benefits

Employers are not required to provide benefits except the agreed salary for employees who are laid off. As with severance pay, however, a social compensation plan agreed to with the Works Council can require respective payments in case of workforce reductions. Such an agreement is binding for employers.

05
Layoffs/Work Force Reduction/Redundancies | D

Use of Separation Agreements

Separation Agreements are often used in Germany to avoid litigation. They are in general fully enforceable.

However, not all claims can be settled by a separation agreement. In particular, it is not permissible to waive claims from collective bargaining agreements and minimum wage in a separation agreement. Therefore, when drafting such an agreement, it is important to review in detail what claims should be settled. German labor courts generally require employers to inform employees about possible consequences, e.g., in tax and social security law, when negotiating a separation agreement.

06

Unfair Competition/ Covenants Not to Compete

A

Trade Secrets

B

Covenants Not to Compete

C

Non-Solicitation of Employees and Customers

06
Unfair Competition/Covenants Not to Compete | A

Trade Secrets

According to § 4 para. 2 Trade Secret Protection Act, an employee bound by an employment contract may not disclose trade secrets concerning her or his employer's business. § 2 no. 1 Trade Secret Protection Act defines a trade secret as information (a) which is neither in its entirety nor in the precise arrangement and composition of its components generally known or readily accessible to the persons in the circles who normally handle this type of information and therefore of economic value and (b) which is subject to appropriate secrecy measures by its lawful owner under the circumstances and (c) for which there is a legitimate interest in secrecy.

However, under specific circumstances defined in § 5 Trade Secret Protection Act, the acquisition, use or disclosure of a trade secret is not considered unlawful and, thus, whistleblowers are exempt from criminal prosecution, § 23 Trade Secret Protection Act.

06
Unfair Competition/Covenants Not to Compete | B

Covenants Not to Compete

Under § 110 Industrial Code (*Gewerbeordnung*) and § 74 to § 75f Commercial Code, the employer and employee can agree on covenants not to compete after termination of the employment contract.

Such agreements will be enforceable if:

- The period of non-covenant does not exceed two years;
- the non-covenant agreement is necessary to protect the employer's business;
- the agreement does not jeopardize the employee's future professional career;
- the employer pays to the employee a financial compensation of at least 50% of all remuneration and benefits at the date of termination of the employment contract for the period of non-covenant; and
- the agreement is agreed to in writing.

Prior to termination of the employment contract, any competitive actions by the employee in the employer's business is unlawful, and can be used by the employer to terminate the employee for cause, in many situations even with immediate effect.

06
Unfair Competition/Covenants Not to Compete | C

Non-Solicitation of Employees & Customers

Agreements of non-solicitation are in general enforceable in Germany. However, they are often considered to be covenants not to compete with respective prerequisites to be enforceable, as listed above (› see page 67 above). Legal restrictions can apply to agreements between two (or more) employers, stipulating non-solicitation or no-hire clauses for employees.

07
Personnel Administration

A
Required Postings

B
Required Training

C
Personnel Records

D
Meals and Rest Periods

E

Payment Upon Discharge or Resignation

F

Giving Employment References

G

Recordkeeping

07
Personnel Administration | A

Required Postings

Under the Documentation Act, within the first month of employment, the employer is required to provide an employee with a written document that includes at least the information as discussed above (› see page 20 above).

In addition, employers are required to post the following notices:

- A copy of the Hours of Employment Act.
- A copy of the Closing Time Act (*Ladenschlußgesetz*) if the employer's business is sales or retail.
- A copy of the General Equal Treatment Act and § 61 b Labor Court Act (*Arbeitsgerichtsgesetz*).
- A copy of the Young Individuals' Protection in Employment Act if any minors are employed.
- A copy of the Maternity Protection Act if there are more than three female employees;
- Any applicable collective bargaining agreements; and
- if a Works Council is established, any shop agreements between the Works Council and the employer.

Concerning other specific posting requirements, employers should seek legal advice for their businesses. It is important to note that a violation of applicable laws regarding required postings can result in fines up to € 2,500.00.

07
Personnel Administration | B

Required Training

In Germany, employment-related training for management staff is generally not required. However, as in other countries, training can reduce legal claims arising from the employment relationship and can make existing claims much more cost-effective to defend. German anti-discrimination law (› see page 15 above) requires employers to take effective steps to ban discrimination from the work place. Such steps can be training of employees and management in anti-discrimination laws.

We recommend that management staff in Germany be trained in the areas of hiring and wrongful dismissal, where the Protection Against Dismissal Act is applicable. Training in the basics of labor and employment law is mandatory for employees who are members of Works Councils.

07
Personnel Administration | C

Personnel Records

Under § 83 Works Constitution Act, all employees have the right to inspect her or his personnel file. She or he may also include a member of the Works Council in this inspection. An employee may also request that any written statements concerning her or his employment relationship be kept in the file.

07
Personnel Administration | D

Meals and Rest Periods

Under the Hours of Employment Act, employers must provide their employees with rest periods. Specifically, employees who have worked more than six but fewer than nine hours in a workday must be given a break of at least 30 minutes; those who work longer than nine hours must be granted a 45-minute break. › See page 35 above.

07
Personnel Administration | E

Payment Upon Discharge or Resignation

An employee whose employment terminates must be paid all wages due and owing, including all accrued and unused vacation time. If the employer terminates the employee with notice, she or he is often asked to take unused vacation time during the notice period.

In case of termination, the employer has to settle and balance the employment as agreed to in the employment contract or, in case of termination without notice, without unreasonable delay.

07
Personnel Administration | F

Giving Employment References

Under § 109 Industrial Code, employees are entitled to a written reference. The law distinguishes between a simple (*einfach*) and a qualified (*qualifiziert*) reference. The former includes statements concerning only the duration of employment and a description of job duties. The latter includes that same information, as well as additional statements concerning the employee's conduct and performance.

Labor courts in Germany have ruled that employers have to meet certain high standards when giving a reference. In particular, the reference has to be favorable for the employee and must not hinder her or his future professional career.

07
Personnel Administration | G

Recordkeeping

German Labor and Employment Law has various recordkeeping requirements, many of which are dependent on the employer's business. Specifically:

- Under § 16 para. 2 Hours of Employment Act, the employer must record any overtime work and keep the records for at least two years.
- Under § 17 part. 1 Act on Minimum Wages, the employer must record any work by employees in minor employment and in those economic sectors or branches of industries mentioned in § 2a of the Act to Combat Undeclared Work and Unlawful Employment (› see page 30 above) and keep the records for at least two years.
- Under § 7 para. 2 sentence 4 Personnel Leasing Act, employers who leases out employees must keep their personnel files ready for inspection by government agencies for three years.

- Under § 19 Posted Workers Act (*Arbeitnehmerentsendegesetz*), under certain circumstances, the employer must keep employee files regarding working time ready and available for inspection for at least two years.
- In addition, due to recent case law from the Court of Justice of the European Union, the employer must set up a system to measure the duration of time worked each day by each worker. This system must ensure an objective, reliable and accessible recording of working time. Specifications on the content of working time documentation have not yet been made. There is currently no formal requirement for recording, it can also be done manually or electronically.

Employers should seek legal advice concerning other recordkeeping requirements for their businesses.

BUSE

08
Privacy

A
Drug Testing

B
Personnel Records and Information

C
Off-Duty Conduct

D
Medical Information

E
Searches

F

Lie Detector Test

G

Social Security Numbers

H

Finger-prints

I

Surveillance and Monitoring

BUSE

08
Privacy

Legal Framework

Much like other countries of the European Union, Germany has high standards for protecting privacy and data of its citizens, especially with respect to the employment relationship.

The German Constitution guarantees the right of informational self-determination (*Recht auf informationelle Selbstbestimmung*), which refers to restrictions on the collection, storage, and use of information and data related to individuals (*personenbezogene Daten*).

The collection, storage, and use of personal data are restricted by the EU General Data Protection Regulation, the Federal Data Protection Act and the State Data Protection Acts (*Landesdatenschutzgesetze*).

The Federal Data Protection Act grants employers the right to collect, process and use employee data for employment-related purposes, in particular recruiting and hiring, carrying out or terminating the employment. § 26 para. 1 sentence 2 Federal Data Protection Act is the legal basis for corporate investigations, where an employer wants to investigate misconduct or even illegal behavior at the work place. The legal basis to collect, process and use employee data for employment-related purposes is § 26 para. 1 sentence 1 Federal Data Protection Act.

Where a Works Council is established, the use of personal data by the employer can be subject to co-determination under the Works Constitution Act.

08 Privacy | A

Drug Testing

German employers may conduct drug tests on applicants for employment and on current employees if they give their consent. There is no general obligation for employees to agree to a drug test, unless a reasonable suspicion is raised that could affect their ability to work. In this case, refusing to give consent can lead to disciplinary action against the employee.

Where a Works Council is established, drug testing can be subject to co-determination rights of the Works Council under the Works Constitution Act.

08 Privacy | B

Personnel Records and Information

German employers are required to protect the personnel files of their employees from disclosure. Under the Works Constitution Act, however, employees have the right to inspect their own files. › See page 75 above. According to Art. 15 GDPR, an employee has the right to know whether or not personal data concerning him or her is being processed, and the right to access to this personal data. Additionally, even after termination of the employment relationship, the employee can request his or her former employer to delete unwarranted warnings from his or her personnel file based on Art. 17 para. 1 GDPR.

If the employer does not fulfil a respective request of the employee, the employer can be liable to pay damages under Art. 82 para. 1 GDPR.

08 Privacy | C

Off-Duty Conduct

Employers can only take disciplinary action against employees for off-duty conduct if the conduct has an impact on the employment relationship. The **Federal Labor Court** (*Bundesarbeitsgericht*) has ruled, for example, that a professional driver who loses her or his driving license because of alcohol abuse can be dismissed for cause. However, off-duty political or social activity does not, in general, give sufficient basis for any kind of disciplinary action by the employer.

08 Privacy | D

Medical Information

Medical information is personal data and therefore is protected under the EU General Data Protection Regulation, the Federal Data Protection Act and the **State Data Protection Acts**. Employers are required to comply with the requirements of these acts.

08 Privacy | E

Searches

Generally, German Labor and Employment Law views searching employee property or even searching the employee personally as grievous encroachment of the employee's right to privacy. Searches are only permissible if there is reasonable suspicion of gross misconduct or criminal activity to justify them.

08 Privacy | F

Lie Detector Test

German employers cannot require employees to take a polygraph test as a condition of continued employment.

08 Privacy | G

Social Security Numbers

Social security information – as with other personal data – is subject to protection under the EU General Data Protection Regulation, the Federal Data Protection Act and the **State Data Protection Acts** . Employers have to comply with the requirements of these acts.

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08 Privacy | H

Fingerprints

German employers cannot require employees to furnish their fingerprints as a condition of continued employment. According to the Federal Data Protection Act, the employer may only process biometric data if this is necessary for the establishment, implementation or termination of the employment relationship. This is why the recording of working time via fingerprint is only admissible in exceptional cases, i.e. with the explicit consent of the employee or when there is a collective bargaining agreement.

08
Privacy

Surveillance and Monitoring

In Germany, surveillance and monitoring at the workplace can be regarded as a grievous encroachment on the employee's right to privacy. Such action is permissible only if there is reasonable suspicion of inappropriate behavior or criminal activity. German law prohibits 24/7 surveillance and monitoring at the workplace.

It is, however, permissible for employers to supervise the job-related conduct and performance of their employees.

Where a Works Council is established, surveillance and monitoring can be subject to co-determination under the Works Constitution Act.

09
Employee Injuries/Workers' Compensation

Employee injuries in Germany are covered by statutory employee accident insurance under the Social Code No. VII.

See page 45 above.

10
Unemployment

In case of unemployment, employees can receive payments from unemployment insurance under the Social Code No. III (*Sozialgesetzbuch Drittes Buch*).

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11

Health & Safety

Laws of particular importance for health & safety at work in Germany are, for example, the **Employee Protection at Work Act** (*Arbeitsschutzgesetz*), the **Act on Works Physicians, Safety Engineers and Other Specialists for Employee Safety** (*Gesetz über Betriebsärzte, Sicherheitsingenieure und andere Fachkräfte für Arbeitssicherheit*), and the **Federal Act on Immissions Protection** (*Bundesimmissionsschutzgesetz*).

An employer's compliance with these laws and other health & safety regulations is monitored and enforced by government agencies. Failure to comply can result in fines.

12

Unions & Industrial Relations

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In Germany, Industrial Relations cover on one hand the employee's co-determination under e.g., the Works Constitution Act or the Co-determination Act (*Mitbestimmungsgesetz*), and on the other hand relations between employers, employers' associations and unions.

Article 9 of the German Constitution protects the right to be and to become a member of an employers' association or a union, and also not to participate in these organizations. The right to perform industrial action, such as strikes, is also protected.

The Works Constitution Act is of great practical importance for employers in Germany. It stipulates that in any works or office with at least five employees over the age of 16, employees have the right to elect a Works Council. The Works Council represents the employees of its branch or office, and exercises various information, consultation, and co-determination rights against the employer. For example, the employer may not implement workplace monitoring or bonus schemes without prior consent of the Works Council. If the employer and the Works Council

cannot reach agreement regarding their disputes, they will need to institute proceedings in front of the Conciliation Committee (*Einigungsstelle*). Rulings and decisions made by the *Einigungsstelle* replace the consent of the parties and are binding.

It is furthermore important to know that the Works Council must be informed before issuing notice of termination of an employee's employment contract. › See page 52 above.

According to § 30 para. 2 Works Constitution Act, the meetings of the Works Council can now be held by video and telephone conference. Employers are obliged to provide the Works Council with the necessary material resources in order for the Works Council be able to exercise this right.

It is strongly recommended that employers seek the advice of legal counsel when dealing with Works Councils or unions; failure to comply with the Works Constitution Act can be regarded as a criminal offense.

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Dr. Jan Tibor Lelley, 3rd Ed. January 2024

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References

Who's Who Legal Germany 2023 - Labour & Employment

WWL says: »Jan Tibor Lelley is "a well-known entity" in the German market and has over 20 years of experience advising employers and executives on a range of legal issues.«

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