La Kanzlei

Dismissal of an employee in Germany

Arbeitsrecht

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[1] Is it difficult and/or expensive to dismiss employees in Germany?

NO (for small structures)

The German Law on Protection Against Dismissal (Kündigungsschutzgesetz) does not apply to companies with 10 or less employees (except in cases of special protection such as pregnancy, etc.), the only constraint being the payment of salary to the employee during the notice period.

According to German case law, this privileged status accorded to small businesses regarding the right of termination under German law also applies to foreign companies even if they employ more than 10 employees in their country as long as their headcount in Germany is less than 10.

[2] Are there certain categories of employees who enjoy special protection against dismissal?

YES

In Germany there are categories of "protected" employees whose employment relationships can only be terminated under particularly strict conditions. This protection applies to the following categories of employees:

- Pregnant women

- Employees on parental leave
- Severely disabled persons (dismissal subject to the prior authorisation by the competent authority)
- Members of the works council (Betriebsrat)
- Apprentices (Auszubildende)
- Data Protection Officers (Datenschutzbeauftragte)

3 What are the grounds for dismissal under German law?

Where the Law on Protection Against Dismissal applies (headcount of more than 10 employees in Germany), any employer must be able to justify the dismissal of an employee by one of the following reasons:

- Reasons relating to the employee's behaviour ("verhaltensbedingte Kündigung"): for example, in the event of unjustified absences, repeated delay or delayed submission of a medical certificate. Such dismissal must always be preceded by a written warning to the employee, as it constitutes a disciplinary measure.
- Person-related reasons ("personenbedingte Kündigung"): the reason for dismissal must be related to the employee's personal characteristics and/or abilities, for example illness, alcoholism as a medical condition, or the prohibition on working in the absence of a special permit.
- Economic reasons ("betriebsbedingte Kündigung"): for example, in the event of restructuring, rationalization or outsourcing of certain departments.
- Genuine and serious grounds/grievous misconduct ("wichtiger Grund"): this type of termination puts an end to the employment relationship without notice. The termination has an immediate effect, provided the employee's misconduct is so serious that it cannot be reasonably expected of the Company to further maintain the employment relationship.

4 What are the rules regarding the dismissal for economic reasons in Germany?

German law does not require the company dismissing employees for economic reasons to have any actual knowledge of the financial difficulties, or even to have carried out an analysis of the financial situation at group level. It is rather sufficient that the company is able to provide a restructuring and reorganization plan in order to prove that there is an economic reason for the dismissal.

Furthermore, in order to be able to justify the dismissal of an employee for economic reasons, the employer must have carried out a comparison of the employee's social characteristics (age, seniority, dependent child support obligations, severe handicap) with those of employees performing a similar or comparable activity.

5 Does the company have to pay a severance payment?

YES and No

German law does not provide for a severance payment in the strict sense of the term in the context of termination. However, in practice, the parties often agree by mutual consent - usually as part of a settlement approved by the court - that the employment contract will be effectively terminated and that the employer has to pay a severance payment to the concerned employee in compensation for the loss of the employment. For the determination of the amount of this severance payment, courts usually apply the following formula: for 1 year seniority, payment of 1/2 gross monthly salary.

However, it is important to emphasize that the employer will only pay such compensation if he fears that the court may declare the termination ineffective for lack of grounds. Since the dismissal of employees does not have to be justified in companies with no more than 10 employees, apart from exceptional cases (cf. above), the payment of such severance pay is very rare in smaller companies. Consequently, in such case the employer is only obligated to pay the employee's salary during the notice period without any additional compensation.

6 Does German law provide for a specific procedure to be followed in the context of terminations?

NO

German law does not provide for a specific procedure to be followed in the context of a termination. It is usually sufficient to hand over to the employee the letter of termination in original, i. e., showing the original signature of the authorized signatory. Furthermore, the employer must always ensure that he is able to prove that the employee has received the letter of termination and this in due time.

7 Must the reason for dismissal be stated in the letter of termination?

NO

German law does not require the employer to state the reason for dismissal in the letter of termination. In fact, this is even strongly discouraged from doing so in order to not limit the potential argumentation in the event of a legal dispute to a single reason regarding the termination.

8 Must the works council (Betriebsrat) be consulted during the dismissal procedure?

YES

If there is a works council in the company (which is possible in companies with 5 or more employees), it must be consulted before any dismissals are carried out. In lack of such prior

consultation any dismissal is invalid. The employer must inform the works council of the reasons for the dismissal. In cases of termination for economic reasons the employer must also inform the works council of the social criteria taken into account by the employer in the course of his decision to dismiss the employee concerned.

However, for the validity of the termination it is not necessary that the works council expresses its consent as its right is limited to the information of the respective termination but does not include a right of objection.

9 Which notice period must the company observe?

Unless otherwise stipulated in the employment contract or in an applicable collective agreement, the employer must respect the following legal notice periods:

Employee seniority	Legal notice
< 2 years	Four weeks to the 15th or to the end of a calendar month
≥ 2 years	One month to the end of a calendar month
≥ 5 years	Two months to the end of a calendar month
≥ 8 years	Three months to the end of a calendar month
≥ 10 years	Four months to the end of a calendar month
≥ 12 years	Five months to end of calendar month
≥ 15 years	Six months to end of calendar month
≥ 20 years	Seven months to end of calendar month

When the employee wishes to terminate the employment contract, he/she must observe a statutory notice period of four weeks (unless otherwise agreed in the employment contract). Employers are therefore strongly advised to stipulate within the employment contract that the notice period applicable to the employee is equivalent to the notice period applicable to the employer. Since the employee's notice periods during the first few years of service are particularly short and can therefore lead to difficulties regarding their respective replacement, it is recommended that a minimum notice period of 3 months be provided for both parties.

10 In what period of time must an employee file a court action against the dismissal if he/she wishes to do so?

The period for challenging the validity of a termination before the court is quite short and is three weeks from the date of the receipt of the termination letter. After this period, the termination is considered effective and can no longer be challenged.

11 How do the legal proceedings for protection against dismissal look like?

In the event that a dismissed employee files an action for protection against dismissal (Kündigungsschutzklage) within 3 weeks of receiving the letter of termination, the legal proceedings for protection against dismissal consist of two stages.

1. The first hearing (the so-called conciliation hearing) takes place before a single professional judge. The aim of this hearing is to reach an agreement between the employee and the employer in order to end the legal dispute. The judge, who is familiar with the case, will encourage the parties to reach a settlement and often make a concrete proposal for a consensual solution.
2. If the parties fail to reach such agreement during the first hearing, a second hearing (the so-called chamber hearing) is held before the chamber, consisting of three judges (one professional judge and two lay judges).

With his action for protection against dismissal, the employee can only request that the dismissal be declared ineffective and that he be reinstated. It is therefore not possible for an employee in Germany to file a claim for severance payment or compensation for damages.

12 Do employees have to be reinstated if their dismissal is found to be ineffective by the court?

YES

In principle, the employer is obliged to reinstate the employee if the court finds that the dismissal is unjustified and therefore ineffective. Reinstating the employee represents a major risk for the employer. If for example, after a year of proceedings, the court finds that the dismissal was unjustified, in addition to the reintegration of the employee the employer will have to pay the salary owed throughout the time of the legal proceedings, even though the employee did not work during this period.

This outcome generates considerable costs and internal organizational difficulties for the employer, which should be avoided. To this end, the parties often agree on a settlement, approved by the judge, putting an end to the employment contract and granting the employee a severance payment, the amount of which mainly depending on the respective prospects of success of each party and therefore also on the reasons for the dismissal.

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Qivive
Rechtsanwalts GmbH

qivive.com

Köln[D]
Konrad-Adenauer-Ufer 71
D – 50668 Köln
T + 49 (0) 221 139 96 96 - 0
F + 49 (0) 221 139 96 96 - 69
koeln@qivive.com

Paris[F]
50 avenue Marceau
F – 75008 Paris
T + 33 (0) 1 81 51 65 58
F + 33 (0) 1 81 51 65 59
paris@qivive.com

Lyon[F]
4 Pl. Amédée Bonnet
F – 69002 Lyon
T + 33 (0) 4 27 46 51 50
F + 33 (0) 4 27 46 51 51
lyon@qivive.com

Strasbourg[F]
10 Pl. Gutenberg
F – 67000 Straßburg
T + 33 (0) 3 92 12 02 20
F + 33 (0) 3 92 12 02 21
strasbourg@qivive.com