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Breaking New Ground in Germany: Work Visa and Labour Law Aspects

Baker & McKenzie

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Abstract
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Keywords
Germany, labor law, work visa, employment, immigration, working conditions, discrimination

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Breaking New Ground in Germany

Work Visa and Labour Law Aspects | 2006 Edition

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General Introduction

The purpose of this booklet is to provide a summary of the laws and procedures applicable to anyone who enters Germany and takes up employment. It does not explore all issues in detail. The law is correct as of April 1, 2006.

1 GOVERNING RULES

1.1 Employment Related Immigration to Germany

The German Residence Act ("Aufenthaltsgesetz") sets forth the preconditions under which foreigners who intend to live in Germany have to obtain a residence permit. The Act also contains the requirements foreigners must satisfy when applying for a work permit necessary to start employment in Germany. Citizens of EU member states are subject to privileged treatment with respect to immigration requirements due to EU Legislation and implementing national regulation.

1.2 German Labour Law

Traditionally, the labour law in Germany is divided into two parts: individual labour law and collective labour law. Individual labour law covers rights and obligations of employers and employees as provided for by law or by contract. Collective labour law deals with the representation and organisation of employees through trade unions and works councils and with the co-determination of employees on company boards.

The labour law of Germany covers all legal rules concerning the relationships between (i) employers and employees and their respective organisations, and (ii) employees working in the same firm and their employers, other employees (and their organisations) and the State. The main sources of labour law in Germany are:

- the Constitution ("Grundgesetz"),
- the Civil Code ("Bürgerliches Gesetzbuch"),
- the Commercial Code ("Handelsgesetzbuch"),
- the Trade Act ("Gewerbeordnung"),
- the Termination Protection Act ("Kündigungsschutzgesetz")
- the Works Constitutions Act ("Betriebsverfassungsgesetz")
- various acts covering specific fields of labour law,
- collective bargaining agreements,
- agreements between a works council and an employer,
- the workplace practices,
- the employer's right of direction,
- the individual employment contract.

1.3 German Social Security System

The social security laws of Germany can also be divided into two categories:

- the laws on social insurance covering, for example, health insurance, workplace accident insurance, retirement insurance, occupational disability insurance and unemployment insurance;
- the laws on social welfare providing for an economic minimum standard of living to everybody residing in Germany.

2 IMMIGRATION REQUIREMENTS

2.1 General Rules

In principle, any foreigner who intends to live and work in Germany needs, apart from his national passport, a combined residence and work permit before he takes up employment in Germany ("Aufenthaltserlaubnis," Section 7 Residence Act) This permit will be issued by the competent Office for Foreigners ("Ausländerbehörde") upon approval for employment by the Employment Office ("Agentur für Arbeit"). The latter approval will be obtained internally by the Office for Foreigners, no separate application with the Employment Office is necessary.

Generally, the combined residence and work permit will be granted for a limited period of time only. As an exception, so-called "highly qualified foreign specialists" will obtain permission for unlimited settlement if they meet the requirements of special occupational experience and a minimum annual salary of EUR 85,500.00.

Special rules apply to citizens of EU member states as well as to citizens of countries pertaining to the European Economic Area and to Swiss citizens ("equally treated citizens"). All these citizens are not subject to the restrictive requirements for residence and work permits pursuant to the Residence Act. According to the Act on Free Movement within the European Union ("Freizügigkeitsgesetz/EU"), such citizens are free to enter Germany for residence and employment purposes without prior formal requirements. They have to register with the competent Residence Office ("Meldebehörde"), which will issue a Certificate of the right to reside and work in Germany as a EU, EEA or Swiss citizen ("Freizügigkeitsberechtigung"). Such citizens who have continuously resided in Germany for more than five years obtain an unlimited right of residence irrespective of their continued compliance with the requirements of the Act. The right of any EU and EEA citizen to reside in any other member state is derived automatically from Article 39 Treaty of Rome and has been transformed into German national law by the above-mentioned Act. Swiss citizens are treated equally based on a bilateral treaty between Switzerland and Germany.

With respect to the new EU member states that entered the European Union in 2004, only Cypres and Malta are subject to the above-mentioned privilege of free access to the labour market within the European Union. Due to special rules, citizens of the following countries are required to obtain a special EU work permit ("Arbeitserlaubnis-EU") with the local Employment Office: Estonia, Latvia, Lithuania, Poland, Slovakia, Slovenia, Czech Republic and Hungary. However, no visa is required for citizens of these countries when entering Germany. The application for the EU work permit can be made from

Apart from the special rules for EU citizens, EEA citizens and Swiss citizens, the Residence Act also contains various other exemptions from the requirement for foreigners to obtain a residence and work permit:

- Stateless persons; and
- Those persons who are discharged from the requirement to obtain a residence permit according to international treaties (e.g., diplomats, related personnel or members of NATO Troops and their dependants stationed in Germany).

2.2 Administrative Steps to Obtain a Residence and Work Permit

As a general rule, non-EU citizens and citizens not equally treated as EU citizens need to apply for a residence permit before entering Germany for any purpose. If the purpose is employment, they will need to apply for the combined residence and work permit. Such persons will need to obtain the permit as a visa from the respective German Embassy. The requirement to obtain a visa for Germany has the purpose to guarantee that foreigners only enter into Germany after it has been officially approved that they meet the requirements for permissible residence and work in Germany. If employment is intended in Germany, the Embassy will consult with the Office for Foreigners as well as the Employment Office before a visa is issued. The applicant will have to state the purpose of the residence at the time the visa is applied for in order to obtain the necessary combined residence and work permit for Germany.

Special visa rules apply to citizens of privileged countries such as Australia, Israel, Japan, Canada, Republic of Korea, New Zealand as well as the United Stated of America. Citizens of these countries do not have to obtain a visa prior to their entry into Germany pursuant to bilateral treaties between these countries and Germany. However, these

citizens need to obtain the combined residence and work permit within three months after entering into Germany. Applications must be made with the competent local Office of Foreigners. Notwithstanding the visa exemptions, citizens of these countries must not take up employment before they have obtained the residence and work permit. Alternatively, citizens of these privileged countries are free to apply for a visa to reside and work in Germany before leaving their home country.

As already mentioned, no visa or other formal requirements exist for EU, EEA and Swiss citizens besides the requirement of registering with the competent Registration Office. Also, the EU Directive 539/2001 provides for a list of countries citizens of which are exempt from visa requirements if their stay is not for work purposes and will not exceed a three months period. Those countries include, inter alia, Argentina, Brasilia, Chile, Costa Rica, Malaysia, Mexico, Paraguay, Singapore, Uruguay, Venezuela. Citizens of these countries will need a visa if they intend to work in Germany or if they intend to reside in Germany for more than three months.

If a visa is needed, the application has to be prepared and submitted in the prescribed form in the foreign country, i.e., at the German Embassy or Consulate nearest the residence of the applicant in his home country. Application forms can be obtained from the German Embassy or Consulate. For persons who intend to work in Germany, the application for the residence permit must be accompanied by information regarding the intended employment, the intended place of residence in Germany (e.g. rental agreement). The Embassy or Consulate will issue the visa upon internal approval by the Office of Foreigners, competent for granting the integrated work permit.

The process of obtaining a work-related visa depends on the individual circumstances of each case, but may take up several months until a final decision is made. It is, therefore, advisable to apply for both permits as early as possible. The initial work-related visa is usually granted for a fixed term only. In determining the length of this period, the authorities have a rather wide discretion. Normally, the initial work visa is given for a period of one or two years.

2.3 Requirements to Obtain a Residence and Work Permit

The local Employment Office contacted by the Office of Foreigners will only approve the application for employment in Germany if the following requirements are met:

- No adequately trained or qualified German or EU citizens (including equally treated EEA citizens and Swiss citizens) are available for the vacant job position. Before granting approval, the Employment Office may insist on a four-weeks waiting period during which they try to find suitable German or EU personnel that can fill the vacancy;
- The salary is comparable to the one offered to comparable resident employees in the same position; and
- The intended assignment (vacancy) is allowed for non German and non EU citizens in accordance with the Employment Directive ("Beschäftigungsverordnung"); which provides for a detailed catalogue of possible qualifiying professions.

2.4 Foreigners Already Established in Germany

A foreigner who wants to live and work in Germany for a period exceeding the period stated in his initial work-visa or combined residence and work permit, has to apply for an extension with the local Office of Foreigners, which will get into contact with the local Employment Office..

Foreigners who have lived in Germany for more than 5 years and who satisfy certain requirements such as sufficient knowledge of the German language and sufficient means to provide for living may apply for an unlimited combined residence and work permit ("Niederlassungserlaubnis").

3 TERMS OF EMPLOYMENT

3.1 Form of the Employment Agreement

Traditionally, German law did not require employment agreements to be in written form. This has changed. Based on a European Directive, German law now requires that employment agreements be entered in writing only, or at least that within one month after having concluded the agreement its terms be summarized in writing. Such written agreement must contain the major components of the employment agreement.

3.2 Language Requirements

As yet, there are no specific language requirements with respect to the employment contract. It can be drawn up in the language both parties agree upon. However, to avoid future disputes on the construction of its wording - in particular in the event of a litigation before a German court - it is advisable to enter into an employment contract in the German language or, at least, in a bilingual version that clarifies which language prevails for interpretation purposes.

3.3 Standard Employment Terms

Most employment agreements in Germany are entered into for an indefinite period of time. Thus, the contractual relationship continues until the contract either ends by mutual agreement or is terminated by one party observing the contractual or statutory notice period. Most employment agreements provide that the employment shall automatically end once the employee attains retirement age. It should be noted, however, that where this would result in the employment expiring before the employee attains age 65, these provisions are not fully enforceable unless they are reconfirmed by the employee within three years prior to the eligibility for retirement; without a reconfirmation, the employment contract would expire automatically only once the employee attained age 65. The German Government currently is discussing the extension of the statutory retirement age to 67.

It is standard German practice that the parties to indefinite employment contracts provide for an initial probationary period. Within this period, provided it does not exceed six months of service, either party may terminate the employment relationship by observing the minimum statutory notice period of two weeks unless the contract provides for a different notice period during probation. As a rule, no specific reason is required for the termination to be effective, as long as the notice is given before the expiry of the probationary period.

After six months of service, the statutory minimum notice period increases to four weeks effective to the 15th or the end of a calendar month. Moreover, an employee who is employed in a business unit with regularly more than 10 employees automatically enjoys termination protection once his or her employment has lasted for more than 6 months. In that case the employer is able to terminate the employment only by proving a valid cause. If no such valid reason exists, the employer may not terminate the employment.

Before January 1, 2004, however, the German termination protection already applied to business units with more than 5 employees. Thus, employees whose employment relationship started in a business unit of more than 5 employees prior to January 1, 2004 and who enjoyed termination protection at that time have not lost their protection through the legislative changes effective on January 1, 2004.

3.4 Fixed Term Employment Contracts

In principle, employment contracts may also be entered into for a fixed term. However, to avoid an unreasonable deviation of the Termination Protection Rules to the disadvantage of employees, the German Part-Time and Fixed Term Act ("Teilzeit- und Befristungsgesetz, TzBfG") establishes substantial restrictions for fixed term employment contracts. Any fixed term employment contract needs to specify in writing the exact term of the contract or, if the exact term cannot be determined yet, the detailed conditions upon which the contract shall terminate. The contract has to be signed by both parties. Otherwise, it will be deemed to be entered into for an unlimited period of time.

Fixed term contracts may, as a general rule, not be entered into if the employer is not able to prove valid reasons for the necessity of a specific time limitation. Without such valid reason for the time limitation, fixed term employment

contracts can be entered into for a maximum duration of two years. Within the two-year period, the contract can be renewed for a maximum of three times, whereas the total employment period must not exceed the limit of two years. Furthermore, a fixed term contract must not be entered into if it was preceded by any kind of employment between the same parties, regardless of the period of time between the termination or expiry of the previous employment relationship and the effective start date of the new fixed-term contract. Failure to observe these requirement will result in the contract automatically being considered indefinite.

The two-year maximum restriction does not apply either during the first four years following the founding of a company provided that the company is not founded in connection with a legal restructuring of a company or group of companies, and provided that a previous fixed-term or permanent employment relationship with the same employer has never been in existence. If these pre-requisites are met, a fixed-term employment contract will exceptionally be effective for a maximum period of four years, even if there is no valid reason available for the time limitation. The same also applies to such fixed-term employment contracts following the founding of a company that are repeatedly extended up to a total duration of four years.

3.5 Part-Time Employment

Under the Part-Time and Fixed Term Act, all employees including managerial employees can request to work part-time, provided they have been employed for more than six months and provided that their employer employs more than 15 employees.

The employee must submit the request for a part-time arrangement three months in advance. The employer can refuse the request only for so-called business reasons. Such reasons are deemed to exist if, for example, the part-time arrangement negatively affects the organization, operative structures or the security of the employer's plant, or would lead to unreasonable costs.

The details of the part-time arrangement must be agreed between the employee and the employer. The employer must accept the employee's wishes regarding the number and distribution of the working hours, unless this is not possible for business reasons.

If the employer refuses an employee's request for a part-time arrangement or proposal for a specific distribution of the working hours within the framework of a part-time arrangement, the employer has to notify the employee one month prior to the requested beginning of the part-time arrangement at the latest. In the event the employer does not observe the one-month period, the working hours of the employee will be reduced automatically as requested by him or her. The same applies to the distribution of the working hours.

Employees on parental leave can request a part-time arrangement pursuant to the Federal Educational Allowance Act ("Bundeserziehungsgeldgesetz", BErzGG)). Under this Act, the employee is entitled to a part-time arrangement between 15 and 30 hours per week for at least three months' duration during official parental leave. An appropriate request can be refused only for compelling business reasons. The maximum period of part-time work during parental leave is three years, counted from the date of birth of the child. Under the Act, female and male employees are entitled to apply for parental leave with part-time employment.

In any case, an employee's request for part-time employment must be answered in writing within one month, otherwise it is deemed to have been granted.

4 WORKING CONDITIONS

4.1 Working Hours

Unless the contract provides for specific working hours, the employee has to follow the usual working time in the firm. Most firms have an eight-hour workday Monday through Friday, i.e., a 40-hour week. However, in several industries the weekly working hours have already been lowered to 37.5 hours or even less, according to applicable collective bargaining agreements. In the metal working industry, a 35-hour week was introduced in 1995.

According to the Working Time Act ("Arbeitszeitgesetz", ArbZG), the regular workday generally must not exceed 8 hours. The employer may extend the daily working time to 10 hours if, within a period of 6 calendar months or 24 weeks, the average daily working time does not exceed 8 hours (Section 3 Working Time Act). According to Section 7 Working Time Act, extensions of the daily working time may be provided for by collective bargaining agreements. Any further extension requires the approval of the competent supervisory authority ("Aufsichtsbehörde").

The above maximum hours include overtime work. It often happens that employees who work overtime exceed these time limits. In such cases, the responsible supervisor may be held liable for fines (Section 22 Working Time Act).

In recent years, a considerable number of firms adopted systems for flexible work. Within certain time limits, each employee may determine on a daily basis the times when he or she starts and stops working. More flexibility is in discussion but rarely found in practice.

In determining the daily working hours, the works council has a statutory right of co-determination (Section 87 (l) No. 2 Works Constitution Act, .confer Section 9 below).

4.2 Remuneration and Salary

Remuneration may be determined in different ways and frequently consists of various items. As it is not possible to discuss all kinds of remuneration, the following will outline the most common ones only.

4.2.1 Salary

The employment contract will normally provide for a certain sum to be paid as basic salary or wage. It has become more and more common for blue-collar employees to calculate this sum on a monthly basis. However, the payment of wages on a weekly, daily or hourly basis is also admissible.

German statutory law itself does not yet provide for minimum salaries and wages, although there are current discussions to introduce minimum hourly wages for certain professions and industries. However, parties to a collective bargaining agreement are free to establish such minimum standards. Many collective bargaining agreements have made use of this possibility. The amounts vary from industry to industry. If the employment contract is subject to a collective bargaining agreement, the salary must not be lower than the amount specified in the collective bargaining agreement for the kind of job in question.

4.2.2 l3th Monthly Salary

It is also very common to agree an additional l3th monthly salary. This salary is often paid before Christmas with the November salary. If an employee leaves his or her employment during the year, he or she will be entitled to the prorated portion of the 13th monthly salary.

4.2.3 Bonus

A bonus is a payment for a special occasion (Christmas, vacation, certain anniversaries of service, etc.). The Christmas bonus is frequently paid instead of a 13th monthly salary. Normally, the Christmas bonus – in contrast to the 13th monthly salary - will not have to be prorated if an employee leaves the firm during the year. If employees

have been absent for parental leave (see below "Maternity Pay and Parental Leave"), however, the Labour Courts usually recognize - in contrast to the 13th monthly salary - the employee's right to be paid the full Christmas bonus for the respective year.

4.2.4 Overtime Pay

Statutory law does not require overtime payment. Collective bargaining agreements, however, usually provide for overtime compensation of 25% above the normal salary for work exceeding the firm's regular working hours. The overtime compensation will normally be paid together with the salary for the month following the overtime work. Other payment plans are also permissible. According to recent precedent case law, contractual provisions generally stipulating that no overtime compensation will be paid are not enforceable. As a result, employees will be entitled to overtime compensation at the average salary unless a collective bargaining agreement applies.

4.3 Commission

Many employees receive a substantial part of their remuneration as a commission. This is the typical remuneration for sales representatives, but it is also used for employed sales agents. It is normally calculated as a certain percentage of the turnover generated by the employee.

Unless provided otherwise in the employment contract, the sales agent is entitled to a commission for sales contracts concluded as a result of his or her promotional efforts (Section 87 (1) Commercial Code). However, commission cannot be claimed if the third party does not fulfill the sales contract (Section 87a (2) Commercial Code).

The employment contract can also provide for a commission to be paid for all sales generated within a certain sales territory, resulting not necessarily from the promotional efforts of the employee himself, but also from those of his or her fellow employees working in the territory (Section 87 (2) Commercial Code).

As a general rule, the commission is due only for those sales contracts, which are concluded during the time of the employment contract. If a sales contract is concluded after the employment terminates, the employee will, nevertheless, be entitled to the commission, provided that the sales contract was due mainly to his or her promotional efforts (Section 87 (3) Commercial Code).

Meanwhile, the courts have placed substantive restrictions on unilateral changes in commission plans. Usually, an employer cannot unilaterally implement changes resulting in a decrease of income exceeding 15 percent of the overall remuneration.

4.4 Company Car

Managerial employees, employed sales agents and service technicians will frequently be provided with a company car. If, under the employment contract, the employee is also entitled to private use of the company car, the monetary benefit is deemed to be part of the employee's remuneration. He or she will have to pay income tax on the share of the private use while the employer will have to make the necessary tax deductions. If the company car is claimed back by the company during a release period, the employee will be entitled to compensation in terms of the value of the private use unless such compensation is explicitly excluded in the employment agreement.

4.5 Pensions from the Employer

By law, all employees are members of the public old age insurance scheme established and operated by the State. In addition, many firms have voluntarily established a private pension plan for their employees. These firm pension schemes either consist of an insurance policy maintained by the employer in favour of the employees, or they are organised as a particular firm pension fund, often under a separate legal entity. Moreover, as of January 1, 2002, the German Company Pension Act ("Gesetz über die betriebliche Altersversorgung") provides that all employees can require their employer to convert a portion of their salary into contributions towards a private pension plan ("Gehaltsumwandlung"). The type of pension plan must be agreed upon between the employer and employees, the employees being able to require the employer at least to conclude a direct life insurance policy for them. The

employees may claim tax privileges for their pension contributions. Under Section 1b) Company Pension Act, an employee who leaves his or her firm before reaching pension age will keep the rights acquired under the firm's pension plan if he or she is more than 30 years old and has been subject to the pension plan for at least 5 years. The employee's contributions to a pension plan by means of salary conversion vest immediately.

Section 16 Company Pension Act provides that every three years the employer must consider an adjustment of the pension payments to reflect the changed economic situation, taking into account both the employees' interests and the firm's economic strength.

The Company Pension Act also established a national insolvency fund which will pay the pension to employees whose firm becomes insolvent or is unable to meet its pension obligations. Contributions to this insolvency fund are to be paid by all firms which operate a pension scheme.

According to the rulings of the European Court of Justice, pension plans may not, as a general rule, contain sex discrimination features. Companies who fail to eliminate such sex-discriminatory parameters in pension and benefit plans may face enormous costs (see below Section 6.).

4.6 Capital Participation

In recent years, the participation of employees in production capital (e.g., "share schemes") has been gaining increasing importance. More and more employers have developed systems of capital participation for their employees. This development has been promoted by the Second Capital Participation Act of December 19, 1986, providing the legal conditions for employees to participate in the productive capital. Furthermore, recent changes in corporate law now allow for easier distribution of shares and share options among employees.

4.7 Reimbursement of Expenses

If, in the course of performing his or her work, the employee incurs expenses which he or she could reasonably consider as necessary, he or she may claim reimbursement from the employer. Reimbursement of expenses is not part of the employee's remuneration, but is an independent legal claim under Section 670 Civil Code, which can be invoked even if it is not mentioned in the employment contract. Unless the parties agree on a fixed lump sum to cover all reimbursable expenses during a specified time period, it is advisable to specify in the employment contract the formal preconditions under which reimbursement of expenses can be claimed.

4.8 Legal Holidays

On Sundays and legal (public) holidays, work is normally not permitted, although there are certain statutory exceptions. However, if an employee works unlawfully on Sundays or legal holidays, the manager who is responsible may be subject to fines.

There are a considerable number of legal holidays, some on a national, and some on a regional basis.

4.9 Paid Vacations

4.9.1 Vacation Period

Any employee is entitled to an annual vacation of at least 20 working days based on a five-day week of work (minimum vacation of four weeks). As a general rule, employers grant more than the legal minimum, and vacation periods between 4 and 6 weeks are usual. The trade unions aim for 6 weeks vacation per year, and frequently attain it.

An employee is entitled to his or her first vacation after he or she has worked for six months. As a rule, the employee may then claim his or her full annual vacation without regard to the date when his or her employment started or will be terminated.

4.9.2 Determination of Vacation Time

It is the employer who determines the time when the vacation is taken. In practice, the employee will normally request his or her vacation at a specific time and the employer will not deny his or her request except for a good reason. As a rule, the annual vacation has to be taken during the current calendar year. An extension to the next year is possible and, in practice, remaining vacation days are frequently transferred to the following calendar year. By law, such transferred vacation has to be granted and taken within the first three months of the following calendar year (Section 7 (3) Federal Vacation Act).

4.9.3 Remuneration During Vacation

During his or her vacation, the employee will receive his or her normal salary on the basis of the average remuneration received during the thirteen-week period preceding the vacation. Payments for overtime work are not to be taken into consideration in calculating this average remuneration. An employee who works on a commission basis will receive the average commission of the last three months (Section 11 Federal Vacation Act).

In addition to the normal remuneration, employers often grant a special vacation payment. Frequently, this vacation payment forms part of the 13th monthly salary.

4.9.4 No Work During Vacation

During his or her vacation the employee must not undertake any work which is inconsistent with the purpose of vacation (Section 8 Federal Vacation Act). The employer may prevent the employee from working for other companies during the vacation by way of a preliminary court injunction.

4.10 Company Rules and Disciplinary Sanctions

In principle, an employer is free to establish any type of company rules as long as these comply with the applicable laws and do not infringe individual employment contracts or any applicable collective bargaining agreements. There is, however, one important exception. In business units having a works council, the employer needs to obtain the consent of the works council if it wants to establish company rules relating to social matters (Section 87 Works Constitution Act). Social matters cover, inter alia, plant regulations, the behaviour of employees, work hours, terms of payment of remuneration, vacation, monitoring devices, safety and health, social facilities, employer-owned homes, wages and salaries, systems for operational suggestions and promotion of investment by employees.

General disciplinary sanction schemes are not governed by statute, but may be contained in some collective bargaining agreements. In companies which are not bound by collective bargaining agreements, the employer is certainly free to establish appropriate schemes. However, if a works council exists, the employer needs its consent. The establishment of a general disciplinary sanction scheme is considered a matter relating to the running of the business unit and is, therefore, subject to co-determination under Section 87 Works Constitution Act.

Apart from establishing a general disciplinary sanction scheme, the employer is certainly free to individually penalise a breach of contract by an employee on the basis of individually agreed penalty clauses. Statutory requirements for those sanctions do not exist. However, the Federal Labour Court established certain restrictions on such individual sanctions. If the sanction exceeds those restrictions, the employee is free to challenge the sanction before the competent Labour Court.

4.11 Sick Pay

An employee who is unable to work due to sickness will receive sick pay. The Act on Payment of Wages during Sickness ("Entgeltfortzahlungsgesetz", EntgeltFZG) was amended several times and now provides for an amount of 100% of the employee's regular salary to be paid in case of sickness for a maximum period of six weeks (Sections 3, 4 Act on Payment of Wages during Sickness).

Employees with not more than four weeks' length of service are not entitled to any sick pay by the employer. The

same applies to employees who have caused their sickness by their own fault. Such fault will normally be assumed only if an employee acts in an obviously unreasonable or dangerous manner, for example, driving while drunk or engaging in an extremely dangerous sport. If an accident occurs under such circumstances and the employee is unable to work, he or she may not claim his or her salary. Recently, it was held that this applies also if an employee drives a car without using the safety belt and is injured in a car accident.

The "regular salary" to be paid during sickness means the remuneration which the employee would have earned had he or she not been sick. The calculation is easy for employees who work with fixed working hours for a fixed salary. If an employee regularly works overtime and receives overtime compensation, he or she will be entitled to the respective payments also during the sick period. An employee who works on a commission basis is entitled to the amounts which would have been earned based on his or her regular working time, if he or she had not become sick. Obviously, this calculation will often be difficult. Therefore, the employment contract should provide that, in case of sickness, the average commission of the last three, six or twelve months will be paid.

Unless otherwise provided for in the employment contract, after the first six weeks of sickness, the employee will no longer receive any regular salary from the employer. Instead, he or she will be entitled to receive sick pay (so-called "Krankengeld") from the public health insurance.

4.12 Maternity Protection Leave and Parental Leave

Pregnant employees enjoy special termination protection. Furthermore, they are prohibited from working within the last 6 weeks of pregnancy and within 8 weeks afterwards ("Maternity Leave", Sec. 3 (2) and Sec. 6 Maternity Protection Act ("Mutterschutzgesetz", MuSchG)). During this protection period, the mother's salary is partly paid by the Government (Sec. 13 Maternity Protection Act).

After Maternity Leave, according to Section 15 Federal Educational Allowance Act ("Bundeserziehungsgeldgesetz", BErzGG), either parent is entitled to a special leave ("Parental Leave"). Parental Leave may extend up to 36 months until the child has reached the age of three. It may be taken in several periods by either parent or combined by both parents. Upon prior consent by the employer, a maximum period of 12 months can be taken as parental leave until the child has reached the age of 8. During Parental Leave, the employment must not be terminated (Sec. 18 (l) Federal Educational Allowance Act).

During Parental Leave, under certain conditions a specific parental allowance is paid by the Government (Sections 1 to 11 Federal Educational Allowance Act). Moreover, the employees can request the employer to enter into a part-time arrangement to work between 15 and 30 hours per week (see Section 3 above "Part-Time Employment").

4.13 Social Security Contributions

As already outlined, the German social security system is, inter alia, comprised of various kinds of insurance, which, to a certain extent, are mandatory. The different kinds of insurance may be summarised as follows:

- Every employer has to insure its employees against accidents in connection with their work. The carriers of these kinds of insurance are certain employers' liability insurance associations ("Berufsgenossenschaften"). Each sector of industry and business is attributed to a certain association. These associations individually fix the amount of contributions which are to be made by the employers only.
- Every employee is subject to the mandatory public old age and unemployment insurance. Contributions to both types of insurance are computed on the basis of the employee's accountable income. The exact amount of contributions and of the accountable income are reviewed annually by the Federal Parliament.
- In 2006, the contribution to the old age pension system amounts to 19.5% of the employee's accountable income and the contribution to the unemployment insurance amounts to 6.5% of his or her accountable income. Accountable income is presently the salary of each employee up to a maximum of € 5,250 per month or € 63,000 per year for West Germany and € 4,400 per month or

€ 52,800 per year for Eastern Germany. The mandatory old age insurance amounts only to a lump sum of 12%, provided that the employee's monthly remuneration does not exceed € 400.

- The above contributions are borne equally by the employer as well as the employee. The employer deducts the employee's portion from his or her salary and is liable for the transfer of the deducted amount to the competent institution.
- Furthermore, health insurance and care insurance are mandatory. The carriers of these types of insurance are semi-public institutions. The health insurance and care insurance contributions are also borne in equal shares by employer and employee. The employee's portion is withheld and also paid by the employer. Employees who are privately insured (i.e., who earn more than the accountable income threshold) have to pay their health insurance and care insurance contributions in full out of their salary. However, they are entitled to a special allowance from the employer on top of the salary. This allowance is equal to the employer's share which would be due if the employee was publicly insured, but not exceeding, though, monthly amounts of € 236.91 for private health insurance and € 30.28 for private care insurance. The mandatory health insurance amounts only to a lump sum of 11%, provided that the employee's monthly remuneration does not exceed € 400.
- The exact level of contribution is determined by the respective insurance scheme. As of January 1, 2006, the contributions for health insurance in average amounted to 13.3% of the accountable income. The level of contributions for care insurance has been determined at 1.7% of the accountable income. Accountable income is the salary of each employee up to a maximum of € 3,562.50 per month or € 42,750 per year (West Germany and Eastern Germany) in 2006.

The accountable income with respect to the public old age, unemployment, mandatory health and care insurance comprises not only cash payments but also those benefits which form a part of the salary and which are thus subject to regular income tax.

4.14 Confidentiality and Restraints Against Competition

4.14.1 Confidentiality

The employee's duty of confidentiality is part of the general duty of loyalty owed to his or her employer. The duty extends to all the firm's business secrets, such as technical know-how, customer and supplier lists, prices etc; but anything that is known to the public cannot be a business secret.

If an employee breaches the obligation of confidentiality, the employer may often be allowed to terminate the employment contract. In really serious cases, a termination without notice is permitted.

It is disputed whether the employee's general obligation to secrecy applies after he or she has left the employment and, if so, to which extent. Generally, the employee is free to use his or her experience gained through his or her personal efforts and achievements. However, information and production techniques unique to the firm, or any information owned by the employer (e.g., a chemical formula), must not be used by the employee after he or she has left the employment.

The employment contract can provide for a stricter duty of confidentiality. During the period of employment, the employee's duty of confidentiality can, for example, be extended to items that are not business secrets as such, e.g., the employee's salary. Frequently, managers' contracts (in particular) contain an express term extending the duty of confidentiality to cover the time after the manager has left the firm. Such post-contractual duty can make it difficult for the employee to find new employment; it may often have the effect of a non-competition covenant. Therefore, the German Labour Courts interpret such clauses restrictively. For example, the Federal Labour Court held that a sales manager's obligation not to use the customer list after having left the employment is, in fact, equal to a non-competition covenant.

If a confidentiality clause has the effect of a post-contractual non-competition covenant, it will be valid only if it meets the requirements for the validity of such a clause.

4.14.2 Non-Competition

4.14.2.1 Non-Competition During Employment

Under German law, commercial employees owe a non-compete duty to their employer throughout the term of their employment. The Federal Labour Court has held that technical employees are also subject to a general non-competition duty, which is based on the employee's duty of loyalty. During the employment, the employee must not carry out or be involved in a competitive business. The employee may, however, during his or her employment, prepare his or her own competing business, which he or she intends to run after the current employment. Thus, he or she may, for example, rent the necessary business premises, purchase goods, hire employees, establish a company, etc., but he or she may not solicit customers, start production or sell competitive products.

The employment contract may contain further restrictions for the employee. It may, for example, disallow the employee from becoming involved in any other kind of business or professional activity - not only those in competition with the employer. Such clauses are, however, enforceable only if the particular activity in which the employee is engaged (in addition to his or her main employment) adversely affects the employer's business and/or adversely affects his or her own ability to perform his or her contractual duties.

If an employee infringes his or her non-competition obligation, his or her employer will be entitled to terminate the employment contract, usually without notice. If the employer expects further breaches of that duty, it can apply for a preliminary injunction. The employer can also claim damages.

4.14.2.2 Non-Competition after Employment

There is no general post-contractual duty implied by statute law prohibiting employees from competing against a former employer once the employment has ceased to exist. However, the parties are free to expressly agree upon a post-contractual non-competition covenant in the employment agreement or in a separate agreement. According to Section 74 of the Commercial Code, such post-contractual non-compete covenant is subject to various legal restrictions:

- A post-contractual non-competition covenant is valid only if executed in writing. A copy of the contract signed by the employer needs to be given to the employee.
- The period of the covenant must not exceed a period of two years after the effective termination date of the employment. Under no circumstances must a post-contractual non-competition covenant (considering its duration, geographical extent and professional scope) result in unreasonable difficulties for the employee's professional future. It will normally be considered unreasonable if a non-competition obligation is extended to cover a region exceeding by far the region the employer's activities are limited to.
- A post-contractual non-competition covenant will be valid only if in turn it provides for a compensation to the employee. This compensation must amount to at least 50% of the employee's last remuneration including base salary, bonus, commissions and any other benefits the employee may have received in the past. The compensation is payable each month for the entire period covered by the non-competition clause. If the employee earns other income during this time, and the total of the non-compete compensation and the other income exceeds 110% of the employee's last remuneration, the excess can be set off against the non-compete compensation. If the employee had to move to another region because of the local restrictions of the non-competition covenant, the total income must exceed 125% of his or her last salary before any new earnings can be set off.

The Federal Civil Supreme Court ruled that legal representatives of companies do not generally fall within the scope of Sections 74 et seq. Commercial Code. Exceptions may, however, apply. In addition, an unreasonable non-competition covenant, even for legal representatives of companies, may be invalidated by the courts. Frequently, the courts apply the two-year maximum period as well as the minimum 50% compensation rules to legal representatives, too.

If the former employee breaks his or her non-competition obligation, the employer may obtain a court injunction, claim damages, and be entitled to stop paying the compensation.

The employee's non-competition obligation can be enhanced by a penalty clause which provides for specified flat-rate damages to be paid if the employee is in breach of contract. As it is normally difficult to specify and prove damages, this penalty clause can be helpful to the employer, but must be carefully worded in order to be valid.

4.14.3 Non-Solicitation of Customers, Employees and Suppliers

Solicitation of customers, employees or suppliers of a former employer is prohibited in cases where the employee is bound by a post-contractual non-competition covenant. Solicitation constituting an act of unfair competition is also prohibited. Unfair competition may exist if, for example, the employee solicits customers or suppliers by advertisements in which his or her former employer is disparaged, or where employees of the former employer are enticed away as part of a general plan to undermine the former employer's business.

4.15 "Gardening Leave"/Relief/Suspension from Work

Gardening leave refers to a situation that may occur when an employee is being released from his duties to work but still be paid full salary for the duration of his or her notice period. Unless the contract provides to the contrary, the German Labour Courts will assume that an employer is entitled to relieve an employee from work only if it is considered reasonable. According to case law, it is deemed to be unreasonable for an employer to have the employee continue work when it is likely that the employee will be in breach of his or her duties after having received notice.

5 BUSINESS TRANSFERS

At the time the European Commission issued EC Business Transfer Directive 2001/23 (formerly EEC Directive No. 77/187), most of its provisions were already part of German statutory law within Section 613a of the Civil Code and various sections of the Works Constitution Act. The Civil Code already provided that, if a business (or a part of it) was transferred by contract to another person, the latter was bound to enter into the same rights and obligations provided under an employment contract existing at the time of the transfer. To implement the remainder of the Directive, Section 613a Civil Code was supplemented effective April 1, 2002, with new provisions.

5.1 Transfer of Rights and Obligations

The law provides that if the rights and obligations of transferring employees were governed by a collective bargaining agreement or by a works agreement between the employer and the works council, the provisions of those agreements must not be modified to the employees' detriment during the first year after the date of the transfer of business. There are certain exceptions to this rule. One exception applies where the business transferred is integrated into an existing business of another company that is already subject to a different collective bargaining agreement or to a different works agreement between the employer and its works council..In such case, the provisions of the collective bargaining agreement in force at the transferee company prevail. As a consequence, employees transferred are not protected against disadvantages arising from the application of the collective bargaining agreements already in force at the transferee company.

The Civil Code also states that the transferor and the transferee are jointly liable for the obligations towards the transferring employees, provided that these obligations had existed prior to the effective transfer date and provided that they become due either prior to or within a 12 months period following the effective transfer date. If such obligations become due after the transfer, the transferor is liable for only a pro rata amount of the obligations, calculated by the ration of the employee's period of service prior to the transfer.

Given that Section 613a Civil Code is a labour law, not a social security law provision, in the context of a business transfer the transferee is not liable for outstanding social security contributions owed by the transferor. However, the transferee is liable for any pension rights of active employees - regardless of whether or not they are vested at the time of the transfer - even if these pension rights are supposed to be fulfilled by a separate pension fund of the company which may or may not have transferred to the transferee.

5.2 Termination of Employment

Sectrion 613a Para. 4 Civil Code stipulates that any dismissal based only on the grounds of the business transfer is deemed to be invalid. However, the same provision also clarifies that this does not affect an employer's right to dismiss the employee for other valid reasons (e.g., redundancies) subject to the existing requirements of German law. Therefore, in the context of a business transfer, not only dismissals for cause (e.g., gross misconduct) or due to the personal behaviour or performance of the employee remain possible. Additionally, dismissals for compelling business reasons will still be possible. In particular, apart from a business transfer, dismissals caused by reorganisation or rationalisation measures may be valid provided that:

- the dismissals are justified by compelling business needs (not based on the business transfer);
- the employer has no possibility of engaging the dismissed employees elsewhere in the business; and
- the employer followed the procedure for appropriate social selection.

5.3 Consultation

A business transfer does not as such constitute a "change of operation" within the meaning of Section 111 Works Constitution Act (see Section 10 "Works Council" below). Thus, the business transfer itself is not subject to any co-determination rights of the works council. If the transfer, however, is accompanied by other measures which constitute "changes of operation" within the statutory meaning (e.g., redundancies, reorganisation of work), co-determination rights of the works council have to be observed.

5.4 Applicability of Section 613a of the Civil Code

The provisions of Section 613a of the Civil Code apply only to transfers of businesses or parts of businesses, not to company share deals. A transfer of business within the scope of Section 613a Civil Code exists if a legal entity transfers to another legal entity all relevant assets necessary for the transferred business to remain in function as before. A transfer of a part of a business will occur if the relevant assets of a separate unit of the company necessary to keep this unit functioning are transferred from one legal entity to another. To constitute a business transfer within the scope of Section 613a Civil Code, it is not necessary that the transfer be executed by a single legal transaction. It is sufficient if the transfer is achieved by several legal transactions (of whatever kind), even by agreements between the purchaser and a third party, provided that all the legal transactions are destined to achieve the transfer of a business (or a part thereof). Therefore, the surrender of a business operating lease and the grant of a new lease by the lessor to a third party can constitute a business transfer.

However, in principle, a transfer of licences or concessions is unlikely to constitute a business transfer unless the transfer of these rights enables the new licensee to use the enterprise as such, i.e., the licence or concession is a business in its own right. It should also be noted that Section 613a Civil Code applies in the context of bankruptcy proceedings, although there are certain limits on its full application.

Court rulings have not always been consistent as to what will constitute a transfer of business.

In its "Christel Schmidt" judgement, the European Court of Justice held that Section 613a of the Civil Code could even apply without any transfer of assets in case only the relevant functions are transferred to a third party. In the subsequent "Ayse Süzen" ruling, it appeared that the European Court of Justice tended to restrict the general rule previously set out in its "Christel Schmidt" decision. The court stipulated the requirement that, if a transfer were to qualify as a business transfer, at least an "economic unit" of the business would need to be transferred. However, there remains a dispute amongst the legal commentators as to whether the European Court of Justice hereby

intended to change its position. Until this unclear situation is finally clarified by the court or, respectively, until the EC Business Transfer Directive has been changed accordingly, there is a possibility that also the simple outsourcing of a function may trigger the rights and obligations following a business transfer pursuant to Section 613a of the Civil Code.

Following the European Court of Justice, the German Federal Labour Court held that in case of the transfer of a service rendering business also the mere transfer of employees can qualify as a business transfer in the sense of Section 613a Civil Code if both the knowledge and experience of the transferred employees constitute the substantial assets for the purchaser to keep the business functioning.

5.5 Notification Requirements and Employee's Right to Refuse the Transfer

Section 613a of the Civil Code provides for very strict notification requirements for the employer towards all employees affected by a transfer of business. Accordingly, either the transferor or the transferee of the business in Germany – or frequently both parties in a joint information – are obliged to inform each employee affected by the transfer about each of the following topics:

- the date or purported date of the transfer;
- the reasons for the transfer;
- the legal, economic and "social" consequences of the transfer for the employee; and
- the measures envisioned towards the employee.

A mere oral notification is not sufficient. Instead, notification has to be given in writing in order to be valid. It does not necessarily have to contain the original signature; also a notification by way of fax or e-mail can suffice if the employee generally consents to be notified about legally relevant issues in this form.

Furthermore, all affected employees have a right to object to the transfer of their employment. However, such objection can be raised only in writing within a period of one month after the employees' notification of the transfer of business. An exception applies if the transferor or transferee of the business fails to comply with the existing requirements as to the form and the contents of the notification. In this event, the notification will be deemed to be invalid and, thus, the employees affected have an unlimited right to object to their employment being transferred to the transferee..

If the employees object to the transfer of their employment, the employment relationship with the transferor will remain in existence even if the whole enterprise is transferred. However, as a consequence, employees who object to the transfer of business are substantially at risk of being lawfully made redundant by the transferor following the effective transfer of business.

6 SEX DISCRIMINATION

6.1 Equal Treatment

The basic contents of the EC Equal Treatment Directive No. 76/207, amended by EC Directive 2002/73/EG, as well as the EC Directive No. 97/80 on the burden of proof in cases of discrimination based on sex are reflected in Sections 611a and 612a of the Civil Code. However, as of today, Germany has not in full implemented the guidelines established by EC law as to the avoidance of sex discrimination and discrimination for race, ethnical background, religion, disability and age. The German Government is presently discussing draft legislation on anti-discrimination that is expected to be implemented on August 1, 2006. This Act would considerably change German labour law and employment relations.

These provisions of the EC Directives on sex discrimination declare as illegal for an employer to refuse the employment of a person on the grounds of sex discrimination, or to discriminate employees on the grounds of their sex during the employment relationship, e.g., regarding promotion, etc. It is also unlawful for an employer to discriminate an employee, e.g. by dismissal or other unfavourable treatment, due to the fact that the employee has exercised his or her legal rights. If there are facts from which it may be presumed that there has been direct or indirect discrimination, the employer has the burden of proof that there has been no sex discrimination.

Where an employee applying for a job has been discriminated on the grounds of sex, the affected person may claim indemnity from the discriminating company of up to three monthly salaries (meaning the salary offered for the position the employee had applied for), Section 611a (2) Civil Code. In addition, the employee can claim damages for losses suffered from the discrimination. The same applies if the employee has not been promoted as a result of sex discrimination. The law does not, however, provide employees with the right to be employed. Similarly, employees do not have a right to be promoted where they have been denied promotion on grounds of their sex. However, the European Court of Justice held that these sanctions were too weak to comply with the requirements of the EEC Equal Treatment Directive. According to the European Court of Justice, the damages which an employee may claim because of sex discrimination should not be of mere symbolic value, but have to represent an effective and real sanction.

To comply with the requirements set out by the European Court of Justice, some courts in Germany have held that the complainants can base a tort law claim on Section 823 Civil Code. It should be noted, however, that it is highly controversial whether or not Section 823 of the Civil Code provides an effective remedy for violations of Section 61la Civil Code. The German Federal Government and numerous legal scholars deny its applicability with the argument that Section 611a Civil Code provides for its own exclusive sanctions in cases of sex discrimination..

However, this view has not been accepted by some German courts. For example, the Labour Court in Hamm granted a female employee (who was unlawfully discriminated in contravention of Section 611a Civil Code) damages in accordance with Section 823 Civil Code. The Court held that Section 611a of the Civil Code was "a statute intended for protection of others within the meaning of Section 823 Civil Code". Similarly, the Labour Court in Oberhausen also accepted a claim for damages under Section 823 Civil Code from an employee bringing a claim of unlawful sex discrimination. The Court considered that unlawful sex discrimination constitutes a violation of an employee's right to personality according to the first part of Section 823 Civil Code. In cases where the courts allowed complainants to seek damages pursuant to Section 823 Civil Code, the damages have been limited to six months' salary. However, the precise amount of damages awarded will depend on the severity of the violation of Section 611a Civil Code and on the basis of their losses had they not been discriminated against.

German law does not distinguish between direct and indirect discrimination. It is generally agreed that both forms of discrimination contravene Section 611a Civil Code. German courts tend to infer discrimination from cases, for example, in which part-time workers are excluded from various benefits schemes without the employer being able to prove good reasons for such differential treatment.

Moreover, the European Court of Justice, as well as German courts, have given substantial consideration to sex discriminatory features in pension and benefit plans. These rulings affect pension plans in Germany. For example, the European Court of Justice recently ordered "Deutsche Post" (a former public entity converted into a private stock corporation) to include its (mostly female) part-time employees in its company pension scheme. German law permits, however, unequal treatment related to sex under limited circumstances. German courts accept unequal treatment on "substantial grounds" such as qualifications, job experience, health reasons, etc. In addition, under Section 611a Civil Code, different treatment on grounds of sex is permitted where being a member of a particular sex is an "unwaivable condition" of the job. Examples of this might include actors, models, supervising staff in prisons etc.

6.2 Equal Pay

The basic contents of the EEC Equal Pay Directive No. 75/117 are implemented in Section 612 (3) Civil Code. This provision expressly prohibits agreements between employers and employees by which employees of one sex are paid less than comparable employees of the opposite sex performing work of equal value, and where such difference in pay is based on that person's sex.

An employee who sues his or her employer under the equal pay legislation has the burden of proof to show both that he or she is paid lower remuneration compared with at least one employee of the opposite sex in the same company and that the other employee is performing equal or equally valued work. Furthermore, he or she must then produce evidence that causes the presumption that the reason for the differences in remuneration is due to his or her sex. Once a complainant has produced this evidence, the employer then has the burden of proof to show that the difference in pay is due to substantive grounds not related to the complainant's sex.

German legislation does not set out how jobs are to be assessed as being equal or of equal value. This is left to the courts to decide. So far, there are no authoritative decisions yet reported on this issue. To date, the only existing guideline can be found in a statement made by the Federal Government (when it introduced the Labour Law EC Amendment Act in 1980) indicating that whether or not jobs are of equal value has to be determined by "objective measures of job evaluation". A complainant will have to produce some expert evidence that the two jobs in question are of equal value. This may incur substantial costs, which are to be borne by the party losing the case.

The law does not, however, provide for the consequences if an employee successfully establishes that his or her remuneration amount violates Section 612 (3) Civil Code. It also appears that the courts have not yet adopted a consistent approach to this issue, which is a matter of some legal controversy. Whereas any act or provision violating the equal pay legislation is generally regarded by the courts as void, some courts only grant the same amount of remuneration comparable employees would receive. Other German courts as well as the European Court of Justice have even granted further compensation even though the individual provision or collective bargaining agreement was held invalid.

German law also recognizes the concept of indirect discrimination, as stated above. In one case, the employer excluded part-time workers from its occupational pension scheme. The complainant was a female part-time worker who successfully argued that this indirectly discriminated against women since most part-time workers were women. The court held that she was entitled to a pension based on both her past and future employment.

6.3 Sexual Harassment

The employer is obliged to protect the employees against any measure of sexual harassment from other employees (Section 2 of the Act on Protection of Employees against Sexual Harassment at the Work Place ("Beschäftigtenschutzgesetz")). If the employer or the employee's superior does not prevent sexual harassment, the employee is entitled to be paid time off until the matter is resolved.

7 RACE DISCRIMINATION

It is a basic principle of German Labour Law that an employer must not discriminate against certain employees without good and valid reason. Thus, discrimination on racial grounds is also unlawful. In daily practice, this principle is also overwhelmingly accepted.

An employee who was unlawfully racially discriminated may claim damages. As there are no relevant court cases on racial discrimination issues available, details as to how to calculate these damages are not yet finally established. It has to be assumed that courts would fix the damages according to the principles outlined above for violations of the principles of equal treatment and equal pay.

8 DISCRIMINATION ON GROUNDS OF DISABILITY

German law prohibits discrimination on grounds of disability. Moreover, under German law, disabled employees have extensive rights to ensure their integration into the working environment as well as to diminish indirect discrimination.

8.1 Discrimination Claims

In cases of discrimination against severely disabled employees applying for a job, such applicants may file a damage compensation claim pursuant to Section 81 (2) of the Social Security Code IX ("Sozialgesetzbuch IX", SGB IX). The law does not specify the amount of damage compensation to be paid, but states that it must be appropriate. If the employer can prove that the disabled person would not have been hired for objective reasons even without the discrimination, the compensation is limited to three months' salary at the most. Similarly, disabled employees who are discriminated in the context of other employment law measures, such as promotion or termination, can claim an appropriate compensation as well. It should be noted that discrimination claims can be brought by the person who allegedly was discriminated or by accredited disabled persons' associations.

8.2 Hiring Requirements

Moreover, Section 81 of the Social Security Code IX imposes a legal obligation on any employer to determine if there are job vacancies that could be filled by disabled employees, e.g., by checking with the local job office. This obligation is matched by a requirement for companies with 20 or more employees to have the number of severely disabled employees amounting to at least 5% of its overall workforce. For every job position an employer falls short of its quota, it must pay an equalization levy ("Ausgleichsabgabe") of between 105 and 260 Euro per month, depending on the company's size and the number of disabled employees.

8.3 Obligation to Accommodate Disabled Employees

Moreover, according to Section 87 (4) of the Social Security Code IX, employers must accommodate to the specific needs of disabled employees concerning working environment, training measures, and working equipment. Severely disabled employees are also entitled to work part-time if their disability requires a reduction in their working hours, provided such a request does not impose an unreasonable hardship on the employer or infringe upon other statutory requirements.

8.4 Representation of Disabled Employees

Disabled employees working in business entities with five or more severely disabled employees may elect a representative body which cooperates with the company's works council and must be informed and heard by the employer on all measures concerning disabled employees. Moreover, any employer is required to appoint an authorized representative responsible for matters concerning disabled persons. The representative shall ensure that the employer complies with the requirements under the Social Security Code IX.

8.5 Termination Protection

In addition, disabled employees enjoy special termination protection (see below Section 9. "Termination of Employment" below).

9 TERMINATION OF EMPLOYMENT

9.1 Separation Agreement

An employment contract may be terminated by mutual agreement between the employer and the employee. Such separation agreement must be entered into in writing to be valid and enforceable. The agreement may provide for the termination to become effective immediately or at a later date. A separation agreement is not subject to the restrictions which have to be considered in case of a unilateral termination by the employer, and, as a general rule, no approval of a third party or of any authority has to be obtained.

9.2 Unilateral Termination

An employment contract can be terminated by either party by way of unilateral notice of termination. Whereas an employer who terminates an employment contract is subject to numerous statutory restrictions, an employee has to obey only the applicable notice period and any contractual restrictions.

9.3 Notice Period

Statutory notice periods for both white collar employees and blue collar workers are as follows:

- The basic notice period is now four weeks to the 15th or to the end of a calendar month.
- For employment relationships of a certain duration, the following extended notice periods apply (times of employment prior to having attained age 25 shall not be taken into account):
  - After two years of service, the notice period is one month to the end of a calendar month;
  - after five years of service, the notice period is two months to the end of a calendar month;
  - after eight years of service, the notice period is three months to the end of a calendar month;
  - after ten years of service, the notice period is four months to the end of a calendar month;
  - after twelve years of service, the notice period is five months to the end of a calendar month;
  - after fifteen years of service, the notice period is six months to the end of a calendar month;
  - after twenty years of service, the notice period is seven months to the end of a calendar month.
- During a probationary period, which may not exceed the first six months of the employment, the notice period is two weeks.
- Collective bargaining agreements may contain deviating rules.
- For short term temporary employments up to three months, the parties may even fix a shorter notice period.
- In companies with no more than 20 employees, parties may agree upon a notice period of four weeks.

The extended notice periods listed above do not oblige the employee. If they are intended to apply to both parties, this has to be contractually agreed upon.

Collective bargaining agreements may provide for shorter or longer notice periods and for different periods to be observed by employer and employee.

In individual employment contracts it is not permitted to provide for shorter notice periods than the minimum periods required by statute or collective bargaining agreements.

If individually agreed notice periods in employment contracts are more favourable to the employee than the notice periods that would apply by statute, i.e., if they are longer, those individually agreed periods will prevail.

9.4 Termination Without Notice Period

No notice period will need to be observed if there is an "important reason" for an extraordinary termination. Such termination may take immediate effect (Section 626 Civil Code). The legal expression "important reason" requires that there are facts on the basis of which the terminating party cannot reasonably be expected to continue the employment until the effective termination date following ordinary notice of termination. All the circumstances of the individual case and the interest of both parties have to be taken into consideration. Usually it is not easy to establish the requirements for an extraordinary termination with immediate effect. Some examples may illustrate the concept behind it:

- Unsatisfactory work performance will justify an extraordinary termination only in very serious cases and if the employee was explicitly warned to improve his or her performance but failed to do so.
- An employee who accepts bribe money can normally be terminated immediately.
- Deliberate incorrect calculation of an expense claim will justify an extraordinary termination since this would amount to fraudulent behaviour.
- Criminal acts on the part of the employee directed against or to the detriment of the employer (e.g., fraud, falsification of documents) will normally justify an immediate termination. Often, however, it is difficult for the employer to prove the criminal act. Therefore, the Labour Courts usually allow an extraordinary termination if there is a strong suspicion that the employee committed the act.
- Competitive work during the time of employment normally allows a termination without notice.
- Shutting down a firm or business usually does not give a reason for an extraordinary termination.

An extraordinary termination can be based only upon those facts that have been discovered within the last two weeks (Section 626 (2) Civil Code). In practice, this rule may lead to difficulties, for example, if the personnel manager has to obtain the general manager's approval before giving notice, or if there is a works council, which has to be consulted prior to the termination.

9.5 Form and Contents of Notice of Termination

In order to be valid, a notice of termination,must be in writing and signed in the original by the competent person. Frequently, employment contracts or collective bargaining agreements provide for notice to be given in writing anyway.

A notice of termination has to express clearly the intention to terminate and whether the termination is intended to be an ordinary (with a regular notice period) or an extraordinary termination (without notice period for an important reason).

The notice letter does not have to specify any reasons for the dismissal. However, in case of a termination without notice, the employee may ask for a letter specifying the reasons (Section 626 (2) Civil Code). Furthermore, for both ordinary and extraordinary terminations, the works council has to be informed and heard about the termination and its reasons (Section 102 Works Constitution Act).

9.6 Notice Restrictions According to the Termination Protection Act

The Termination Protection Act ("Kündigungsschutzgesetz", KSchG) has been amended a number of times. In particular, the size of business (in terms of work force) falling under the Act has been repeatedly changed. Under Sections 1, 23 Termination Protection Act, an employee working in a business unit which regularly employs more than 10 employees and who has more than 6 months' consecutive service is subject to termination protection. Before January 1, 2004, however, this termination protection already applied to business units with more than 5 employees. Employees whose employment relationship started in a business unit of more than 5 employees prior to January 1, 2004 and who enjoyed termination protection at that time have not lost their termination protection by the legislative changes in 2004.

When determining the number of regularly employed employees, part-time workers are taken into account as follows:

- Part-time workers working not more than twenty hours per week are counted as 0.50 employees;
- Part-time workers working not more than thirty hours per week are counted as 0.75 employees.

Termination protection means that the employer can terminate the employment contract with ordinary notice only if the termination is "socially justified". The reasons for the termination must be based on the person, on his or her conduct, or on compelling business requirements.

As a rule, the notice restrictions of the Termination Protection Act do not apply to members of the corporate body of the company, such as the managing director of a limited liability company ("Geschäftsführer" of a GmbH) or to the members of the managing board of a stock corporation ("Vorstandsmitglied" of an AG) (Section 14 (1) Termination Protection Act). However, under certain circumstances, this class of employees may also be protected by the Termination Protection Act.

9.7 Reasons Based on the Employee's Person

Personal qualities of the employee, e.g. his or her physical or mental inability, can "socially justify" the termination of an employee with ordinary notice. The most common case for a termination under this category is a termination due to lengthy or frequent illness.

A termination for lengthy illness is justified if the employee has been ill for a significant period of time, his or her recovery cannot be expected in the near future and the process of work is considerably disrupted by the constant absence of the employee. A termination for frequent illness is justified if the employee has been frequently ill in the past, similar illness periods are to be expected in the future and thereby the process of work is considerably disrupted. It is difficult to specify general rules as to how long and how frequent an illness has to be in order to justify a termination. The German labour courts always consider an equitable balance between the interests of the parties in the individual case. However, the courts generally do not allow a termination for frequent illness if the illness periods do not cover at least 14% of the total annual working time.

9.8 Reasons Based on the Employee's Conduct

Severe misconduct on the employee's part will often justify a termination for cause without notice. Less serious cases of misconduct will allow only a termination with ordinary notice. "Misconduct" is a violation of any obligation which the employee has vis-à–vis his or her employer. One of the main reasons for a termination based on misconduct is unsatisfactory work performance.

A single case of misconduct will often not be sufficient to allow the termination. The labour courts normally require that the employee has been formally warned not to repeat his or her misconduct again. Therefore, it is necessary for the employer to express a warning to the employee if it considers a certain type of behaviour to be blameworthy. For reasons of evidence, this warning should be in writing.

9.9 Compelling Business Requirements

A termination will often become necessary because of certain business requirements such as the introduction of new technology, a change of production methods, or the shutting down of a division, reduced sales etc.

Generally, an employer is free to make its economic plans and decisions as to general business strategy. The labour courts normally allow an employer a certain margin of flexibility, but it will have to explain and prove the facts on which its general business decision is based. Furthermore, the employer must prove that this decision really requires the termination of a certain employee's contract. The labour courts have established a rather high standard for the employer's burden of proof, and many employers are reluctant to make public all relevant facts on which their economic decisions are based. Therefore, in cases of termination due to compelling business requirements, it is even more common than in other termination disputes that the employer pays generous compensation as an incentive for the employee to accept the termination, thus avoiding further court proceedings and discussions about the business situation.

If business considerations require the dismissal of one employee of a certain group, the termination may still be invalid if, amongst several employees whose contracts could also have been terminated, the employer did not make the proper "social" choice according to Section 1 (3) Termination Protection Act. The employer has to select for redundancy the employee who, of a group of comparable employees, is least severely affected by the termination. The following "social" criteria are relevant by law: (i) years of service in the firm, (ii) age, (iii) maintenance obligations and (/iv) disability (Section 1 (3) Sentence 1 Termination Protection Act).

The employer may, however, exclude from the "social" choice those employees whose continued employment is in the legitimate interest of the company, due to their knowledge, skills and performance or for the maintenance of a balanced personnel structure in the company. This means that the employer can keep these employees even if, based on a comparison on the grounds of the social criteria set out above, these employees would be less severely affected by a termination than their fellow employees. However, there is not yet sufficient case law to determine precisely what type of knowledge, skills and performance or what other reasons German labour courts will generally consider sufficient to exclude employees from the comparison with their fellow employees. Generally, however, the criteria applied by the courts are quite strict.

9.10 Pregnant Women

The employer cannot terminate the employment of a pregnant woman during the pregnancy and until four months after birth (Section 9 Maternity Protection Act). If the mother opts for an additional special vacation (see Section 4 "Maternity Leave and Parental Leave" above), the protection is extended until the end of the special vacation period. The critical date for evaluating whether a special protection exists is the date on which the notice is given, not the effective date of the termination. As a rule, it is necessary that the pregnant woman informs her employer about the pregnancy within two weeks after she receives notice of termination. If the woman fails to meet this deadline, she may no longer invoke her special protection status.

During the protected period, even a termination without notice for important reasons is not valid. In exceptional cases, upon the employer's application, the competent authority may allow the termination of a pregnant woman (Section 9 (3) Maternity Protection Act), but the authorities are generally very reluctant to use this option.

9.11 Disabled Employees

An employer may, with few exceptions, terminate the employment of a disabled person only upon the prior approval by the competent authority for the integration of disabled employees. However, this rule applies only if the disabled person has been employed for more than six months without interruption as at the time of receipt of notice (Sections 85 seq. Social Security Code IX). This rule applies even if the employer did not know the employee's disability. However, at the time notice is given, the employee's disability must be officially recognized or he or she must at least have filed an application for the recognition of his or her disability.

9.12 Works Council Members

Members of the works council or similar representative bodies, e.g. the representation of young employees (Section 15 Termination Protection Act) are subject to special termination protection. Contracts with these employees can only be terminated for important reasons. Even a termination for an important reason can be put into effect only with the works council's consent. If the works council does not allow the termination, the employer must apply to the labour court for permission to terminate (Section 103 (2) Works Constitution Act). The permission may be granted by the court if a legally valid reason exists for termination without notice.

Exceptionally, if the firm is shutting down its business, the employment of a member of the works council may be terminated without an important reason with ordinary notice period (Section 15 (4) Termination Protection Act). If only a division is shut down, the employment with a works council member can be terminated only if the affected person cannot be transferred to another division (Section 15 (5) Termination Protection Act).

The special protection commences for works council members at the time their names are included in the list of candidates for the election of the works council. The special termination protection lasts for 12 months following the

expiry of their membership with the works council (Section 15 (1) Termination Protection Act). The same protection which is given to works council members is also granted to members of the electoral board which supervises the works council's elections.

9.13 Mass Dismissal

Terminations are considered to be a mass dismissal if they become effective within a period of 30 days (Section 17 Termination Protection Act) and include

- more than 5 employees in a business unit with more than 20 and less than 60 employees; or
- 10% of all, or more than 25 employees in a business unit with at least 60 and less than 500 employees; or
- at least 30 employees in a business unit with at least 500 employees.

Before the notice letters for mass dismissals can be issued, the employer must discuss its intention to dismiss the number of employees with the works council. In addition, the employer must inform the local Employment Office ("Agentur für Arbeit").

As a rule, the terminations cannot become effective earlier than one month after the information is filed with the local Employment Office. Additionally, according to the "Junk" decision of the European Court of Justice, notice letters may only be issued and served after the local Employment Office has been informed of the contemplated mass dismissal.

9.14 Works Council's Rights with Regard to Termination

In all business units represented by a works council, it is absolutely necessary that the works council is notified in advance of an intended termination, be it an ordinary termination with notice period or an extraordinary termination for cause wiith immediate effect (Section 102 Works Constitution Act).

Additionally, the employer must notify the works council about all relevant reasons for the termination in each specific case. As a rule, in a dispute before a labour court concerning the validity of the termination, an employer cannot justify the termination by stating reasons that were not revealed to the works council before notice was served. The employer can notify the works council orally, but, for the purpose of evidence, such notification should normally be in writing.

If notified of a contemplated ordinary termination, the works council will have to grant consent or object to the termination within a period of one week after the notification. When notified of an extraordinary termination, the period for the works council to react is three days after the notification. If, within the applicable period, the works council does not react to the intended termination, its consent to the contemplated termination shall be deemed by law to have been granted. (Section 102 (2) Works Constitution Act).

If notice of termination is issued by the employer without prior notification of the works council or before the applicable reaction period has lapsed without any reaction by the works council, the termination will be invalid. In such cases, the works council has no right to approve the termination retroactively. On the other hand, the fact that the works council objects to an anticipated termination does not prevent the employer from serving notice of termination. However, if the employee challenges the validity of the termination, the labour court will take into consideration the works council's objections to the termination..

Whereas the notice restrictions under the Termination Protection Act only apply to employees who have served the employer for more than six months, the works council's rights to be notified of any termination have to be observed from the very beginning of any employment relationship.

In cases of highly ranked managerial employees (as defined by Section 5 (3) Works Constitution Act), the employer simply has to inform the works council reasonably in advance of the anticipated termination (Section 105 Works Constitution Act). However, even if this information is not given, the validity of the termination will not be affected.

If a special representative body for highly ranked managerial employees exists within the company, this body will have to be notified prior to any terminating of such highly ranked employees. In this respect, the same disclosure requirements and time periods as described above for terminations of regular employees have to be observed. If the employer fails to comply with these formal requirements, the labour court will declare invalid the termination of a highly ranked managerial employee irrespective of its potential material validity.

9.15 Termination Disputes

9.15.1 Legal Procedure

The employee is entitled to dispute the validity of a termination before the labour court. Invalidity can be invoked only if the terminated employee files a lawsuit for unlawful dismissal within three weeks from the time the original notice of termination was served to him. If the lawsuit is filed later than three weeks from that date, the lawsuit will only be exceptionally admitted if the employee shows that he had been unable to observe the three-weeks period due to circumstances beyond his or her control (Sections 4 and 5 Termination Protection Act). These rules also apply to a notice for change of contract. In general, the three-weeks period applies to any lawsuit filed against a termination, irrespective of the reasons the lawsuit is based on. In other words, the foreclosure period also applies to lawsuits against terminations the validity of which is challenged for other reasons than the lack of social justification.

Approximately one month after the lawsuit for unfair dismissal has been filed, a first conciliatory court hearing will take place before the competent labour court in order to settle the dispute by mutual agreement officially approved by the court (Section 54 Labour Court Act ("Arbeitsgerichtsgesetz", ArbGG)). In the past, the majority of unfair dismissal lawsuits could be settled in the conciliatory hearing. In practice, settlement is usually concluded upon a severance payment by the employer in exchange for the employee accepting the termination.

If no agreement is reached in the conciliatory hearing, one or maybe more further court hearings will be held before the court finally renders its judgement. If the termination is held to be valid, the lawsuit will be dismissed. As a result, the employer will be liable for reinstatement of the employee. If, as usually considering the lengh of the complete court proceedings, the effective termination date has already passed at the time the jugdement is rendered, the employer will also be held liable for payment of outstanding salaries.

9.15.2 Severance Payments

In the alternative the employment is intended to be terminated for compelling business reasons, the employer has the option to serve written notice of termination together with a severance offer, payment of which is based on the condition that the employee does not file a lawsuit for unlawful dismissal within the statutory period of three weeks following the notice. This condition must explicitly be stated in the written notice letter. As to the severance amount, statutory termination protection law provides for an amount that equals half of the monthly gross salary per year of service (Section 1a Termination Protection Act). However, if the employer does not choose to invoke this alternative, it will not be obliged by statute law to offer any severance payment to the employee.

If a termination is declared invalid by a labour court, the circumstances may nevertheless be such that the employee cannot reasonably be expected to return to his or her job. This may occur, for example, when the employer had expressed unfounded defamatory allegations against the employee. Under these circumstances, the labour court may, upon application by the employee, dissolve the employment relationship and at the same time order a compensation to be paid by the employee (Section 9 Termination Protection Act).

The same applies if, under the given circumstances, reasonable co-operation between employer and employee cannot be expected in the future. In this case, the employer may apply to the court for the dissolution of the employment relationship against a severance payment to be determined by the court. The labour courts normally grant a severance amount of 50 to 100% of the employee's monthly salary per year of employment. In total, the severance payment must generally not exceed the amount of 12 monthly salaries (Sec 10 (1) Termination Protection Act). As an exception, older employees with a longer seniority may be granted 15 or even 18 monthly salaries. Since the legal obstacles for dissolution upon request are rather high, applications for dissolution by the employer are rarely successful.

10 EMPLOYEE REPRESENTATION AND WORKS CONSTITUTION

10.1 Works Council

The establishment of a works council requires:

- a business unit;
- the business unit having at least five permanent employees, each of whom being at least 18 years old and eligible to vote in works council elections (Sections 1, 7 Works Constitution Act);
- the business unit having at least three permanent employees who are eligible as candidates for the works council, i.e. basically employees who are at least 18 years old and who have been employed for not less than six months (Section 8 Works Constitution Act).

The Works Constitution Act does not allow employees to exercise collective rights if they do not satisfy the legal requirements necessary for the establishment of a works council. There is, however, no legal obligation, either on the employer's part or on the employees' part to set up a works council. The only obligation of the employer is to refrain from any action that could impede or interfere with the election of a works council (Section 20 (1) and (2) Works Constitution Act).

10.2 The Relationship Between Employer and Works Council

The Works Constitution Act does not supersede the constitutional right of entrepreneurial freedom. Fundamental business decisions are reserved for the employer who has control over the property and facilities and the right to decide who may enter the premises.

Both the employer and the works council shall meet at least monthly to discuss problems with the purpose to reach mutually acceptable solutions (Section 74 (1) Works Constitution Act). Employer and works council must neither obstruct each other in the performance of their duties nor disturb the operations or peace in the workplace. The works council must not express its dissatisfaction with employer's decisions in which the works council does not have a legal standing of active participation. Therefore, the works council must not agitate against the employer or distribute provocative pamphlets. Labour disputes (strikes, etc.) are not permitted on the works council level (Section 74 (2) Works Constitution Act). Works council members have to keep confidential any secret information they receive from the employer.

The employer has, inter alia, the following rights under the Works Constitution Act: appeal against validity of works council elections (Section 19 (2)); application to dissolve the works council (Section 23 (1)); concluding works agreements with the works council (Sections 77 (2), 87, 88), and initiating the formation of a conciliation board (Sec 76).

On the other hand, the employer must not interfere with any lawful activities of the works council, may not hinder or impede works council elections, must refrain from any political activities at the workplace, observe and safeguard the principle of non-discrimination, and fully inform the works council in a timely manner to enable it to duly and properly exercise its functions (Section 80 Works Constitution Act).

10.3 Election of Works Council

Works council elections are organised by an electoral board which, in turn, is elected by the general assembly of employees.

As a general rule, the electoral board consists of three employees eligible to vote (Section 16 (1) Works Constitution Act). The electoral board must in an expeditious and timely manner organize works council elections and count the votes. Electoral board members are entitled to paid release from work in order to perform their duties and are protected against termination of employment (Section 15 (3) Termination Protection Act).

The size of the works council varies with the number of employees or employees entitled to vote (Section 9 Works Constitution Act).

10.4 Term of Office for Works Council Members and their Legal Position

Regular works council elections are held at four-year-intervals (Section 21 Works Constitution Act). When a works council is first elected in a business, the next elections will be on May 31 of a full four-year-interval, provided that the works council has existed less than one year on May 31 of the following year.

The members of the works council perform their functions and services as works council without extra compensation. On the other hand, works council members are entitled to paid release from work for a period of time sufficient to exercise the rights and duties as works council without loss of any contractual remuneration normally earned as employee (Section 37 Works Constitution Act).

In larger business units one or more members of the works council must be completely released from all work duties upon continued payment of salary (Section 38 Works Constitution Act).

Each works council member is entitled to attend educational or training seminars not exceeding a total of three weeks per year. Such training sessions must be officially acknowledged by the competent Supreme State Employment Office ("Bundesagentur für Arbeit") as being useful for the works council's activities (Section 37 (7) Works Constitution Act).

10.5 Functions of Works Council

Under the Works Constitution Act, the works council's participation in the decision-making process can be summarized as follows:

- Rights of information;
- Rights of consultation and co-operation;
- Veto-rights and rights of consent; and
- Rights of co-determination.

Rights of information mean that the works council should be given the opportunity to comment on the information to be provided by the employer. In some cases, the right of information under the Works Constitution Act is the first step to further rights of participation by the works council.

Rights of consultation and co-operation are wider and grant the works council the right to consult with the management. This requires the management to hear any arguments put forward by the works council. The works council must co-operate with the management, the latter being obliged not only to hear the works council but also to discuss and develop the particular topic involved.

Veto-rights are of particular importance in personnel matters. They may be exercised by the works council to block management decisions.

Rights of co-determination require the management to reach agreement with the works council in certain matters. If management and works council fail to agree, the conciliation board will be called upon to decide. In matters subject to co-determination by the works council, the management cannot make or enforce any decisions without the work council's consent or a favourable decision of the conciliation board. The works council may either consent informally by a verbal or written declaration concerning temporary measures or may conclude a written works agreement with the employer.

As follows from the above, the works council has substantial power. An effective works council will use that power to promote the interests of the employees without obstructing the business.

Under Section 80 of the Works ConstitutionAct, the works council has the following general duties

- To ensure that the statutory, contractual and other legal provisions are enforced for the benefit of all employees;

- To propose to the employer measures which benefit the business and the workforce;
- To mediate between employees and employer;
- To promote the integration of disabled persons, foreign employees; senior persons and other employees deserving special attention; and
- To co-operate with youth representatives.

Of particular importance among a works council's duties is work safety and protection against accidents. The works council generally finds ample opportunity to propose safety measures and to enforce safety regulations for employer and employees alike (Sections 88 and 89 Works Constitution Act).

As already outlined above, one of the most important areas of co-determination rights of the works council is covered by Section 87 of the Works ConstitutionAct dealing with social matters. Social matters cover, inter alia, plant regulations and behaviour of employees, work hours, terms of payment of remuneration, vacation, monitoring devices, safety and health, social facilities, employer-owned homes, wages and salaries, systems for operational suggestions and promotion of investment by employees.

According to Section 90 of the Works ConstitutionAct, the works council has a right to consultation and information regarding the following issues:

- Construction, alterations and additions to manufacturing, administration and other plant facilities;
- Technical installations;
- Work processes and work methods;
- Workplaces.

Sections 92 to 105 of the Works ConstitutionAct cover the whole scope of rights in personnel matters from information to co-determination, i.e. personnel planning, job posting, questionnaires and appraisals, personnel selection guidelines and vocational training, hiring, grouping, transferring employees and, especially important, participation in any dismissal of employees to which the Works Constitution Act applies.

In business units where more than 20 persons are employed, the works council enjoys co-determination rights in the event of operational changes (Section 111 Works Constitution Act). Before carrying out an operational change within the meaning of Section 111 Works Constitution Act, the employer must attempt to obtain the works council's consent. If the change involves material hardship for a substantial number of employees, the employer must discuss and negotiate with the works council, explain the reasons that necessitates the change of operation, listen to comments or suggestions put forward by the works council and try to conclude a so-called "conciliation of interests agreement" with the works council. However, neither the works council nor the conciliation board has the power to force an agreement upon the employer.

If the employer does not agree to alternative solutions offered by the works council or the conciliation board, it may proceed with an operational change as planned. However, the works council does have the power to obtain from the employer (through a final and binding decision of the conciliation board) a package of compensation and social benefits designed to alleviate possible or actual hardship to the work force resulting from the operational change (Sections 112 (1) to (4) and (112a) Works Constitution Act). This package is called "social plan". Common features are commuting allowances, rehabilitation subsidies, incentive payments, transfer of accrued pension rights, payment of the difference between unemployment benefits under the government plan and the regular net income and, most important of all, severance payments to dismissed personnel.

10.6 Other Institutions Within the Works Constitution

10.6.1 Economic Committee

Where more than 100 persons are permanently employed, the works council enjoys rights of information through an economic committee (Section 106 Works Constitution Act), usually comprised of works council members.

10.6.2 The Works Assembly

The works assembly is the mechanism by which the works council regularly or on special occasions reports to all employees on its activities (Section 43 (1) and (3) Works Constitution Act). The employer must inform the works assembly once a year about the social and personnel status of the business as well as about its financial condition and development. The works assembly must meet every three months.

The employer has the right to attend and speak at general assemblies and it may bring representatives of the employers' association (Section 43(2) and 46 Works Constitution Act). Union representatives may also attend a general assembly (Section 46 Works ConstitutionAct).

10.6.3 Joint Works Council

The Works Constitution Act provides that all works councils existing within a particular enterprise must establish a joint works council ("Gesamtbetriebsrat") (Section 47 Works ConstitutionAct). The joint works council has exclusive authority in those matters which concern the enterprise as a whole and which cannot be handled by the local works councils in their respective plants. However, the joint works council is not an appellate authority or in any way superior to the individual local works councils.

10.6.4 Group Works Council

Section 54 of the Works Constitution Act provides that a group works council ("Konzernbetriebsrat") composed of members of the various joint works councils may be established. Unlike for joint works councils, the Works ConstitutionAct does not require the creation of a group works council but leaves this decision to the joint works councils. The group works council is concerned with matters regarding the whole group of companies.

10.6.5 Youth Representatives

Employees under the age of 18 are represented by the works council as well as by a representative body for young workers and trainees (Section 60 Works Constitution Act). Its functions are to ensure that the interests of young employees are properly protected and to consult with the works council (Section 70 Works Constitution Act). The Works Constitution Act does not provide any veto rights or rights of co-determination for youth representatives.

10.7 Trade Unions, Employee Representation in Supervisory Boards

Furthermore, apart from their representation by the works council, employees are also represented by trade unions as well as through employee representation in the supervisory board of a company.

10.7.1 Trade Unions

A trade union represents the employees of a whole industry. For example, "IG Metall" - still the largest single industry union in the world - claims to represent the employees working in the metal industry.

In contrast, the works council is the elected representative of the employees of a specific business unit with the duty to represent the rights and interests only of the employees of that business unit. The works council does not represent executive employees. Even though many works council members are also members of a union, there is not necessarily a link between a union and the works council. The works council has to perform its duties independently from trade unions. Obviously, the works council may request union assistance. If there are disputes with the employer, the works council is often assisted by the trade unions although they are not obliged to render such assistance.

It is the function of trade unions to conclude collective bargaining agreements with the employer's associations or with a single employer. These collective bargaining agreements are the regulatory instruments for remuneration, working conditions, work safety and similar matters. In a company's day-to-day business, the employer does not deal with the trade union´s representative, but rather with its works council.

Collective bargaining agreements are binding only upon the parties or the members of the parties who concluded the agreement. In principle, no collective bargaining agreement is applicable if the employer neither concluded such an agreement itself nor is a member of the respective employer's association.

However, in some industries, the Federal Minister for Labour and Welfare has declared collective bargaining agreements generally binding by decree. As a result, all employers or employees are bound thereby if they come within the scope of the agreement.

10.7.2 Employee Representation in Supervisory Boards

Under certain conditions, the employees of a company are entitled to be represented on the supervisory board of the company. Some companies have supervisory boards by law (e.g., a stock corporation ("Aktiengesellschaft/AG")), other legal entities may have to install a supervisory board for the purpose of employee representation (e.g., a limited liability company ("Gesellschaft mit beschränkter Haftung/GmbH")). In case the company has more than 500 employees, one third of the seats in its supervisory board have to be reserved for employee representatives. Such representatives are to be elected by the employees of the company (cf. Sections 76 et seq. Works Constitution Act 1952).

In case a corporation has more than 2000 employees, on average half of the seats in its supervisory board are reserved for representatives of the employees. The representatives are elected directly or indirectly through delegates of the employees. Some of the employee representatives have to represent a labour union. Although the numbers of the employee representatives and the shareholder representatives in the supervisory board are equal, eventually the chairman of the supervisory board will be a shareholder representative having two votes. Consequently, if an understanding cannot be reached, the shareholders still remain with a (thin) majority in the supervisory board (cf. Co-Determination Act ("Mitbestimmungsgesetz")).

In the metal and coal industry, the situation is different; neither the shareholders nor the employees or labour union representatives have a majority as such. The supervisory board consists of an even number of shareholder and employee representatives who have to agree upon one further independent board member (cf. Act on Co-Determination of Employees in Supervisory Boards of Companies in the Mining, Metal and Steel producing Industry ("Montan-Mitbestimmungsgesetz")).

In any case, the rights and obligations of a supervisory board are governed by German Company Law.

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