

White Paper

Termination of Employment under German Law

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Berlin, 20.05.2011**

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Termination of employment under German Law

In the following we give a summary of the legal conditions for the dismissal of an employee under German law. Please note that this legal opinion only gives a general survey; if a termination is planned, individual legal advice is indispensable to avoid the risk of an ineffective dismissal.

I. Relevant legal provisions

The Termination of Employment is mainly ruled by the Civil Code (Bürgerliches Gesetzbuch – BGB) and the Protection against Unfair Dismissals Act (Kündigungsschutzgesetz – KSchG). Dismissals are severely restricted by the Protection against Unfair Dismissals Act.

For certain groups of employees (handicapped persons, pregnant employees or employees in maternity leave, works council members), other special acts provide an additional protection against dismissals (“Mutterschutzgesetz” - Maternity Protection Law, “Bundeselterngeld- und Elternzeitgesetz” – Parental Allowance and Parental Leave Act, “Sozialgesetzbuch IX” – Social Security Code No. 9).

II. Written Form

A dismissal has to be issued in writing (§ 623 Civil Code).

It has to be signed by the employer. The notice has to be signed by the employer. If notice is given by an authorized person, the original power of attorney has to be presented to the employee.

The original drawing of the signed termination note has to be handed out to the employee; an email, a fax or a photocopy is not sufficient.

Please note that the period of notice (see below) only starts the day the employee receives the termination note. As the employer is under the obligation to produce evidence that the employee received the termination note, we would strongly recommend to hand out the termination note in person or by messenger.

With a termination note by regular mail, there is always the risk that the employee claims that he did not receive the letter or that he only received it delayed.

III. Periods of notice

German Labour Law differs between ordinary termination (with notice), whereby the employment relationship is ended when the period of notice expires (§ 622 Civil Code), and extraordinary termination (without notice). The extraordinary termination effects the immediate cancellation of the employment relationship (§ 626 Civil Code). Periods of notice are stipulated by para. 622 BGB and depend on the duration of the employment.

During a probationary period (max. 6 months), the period of notice is 2 weeks. After this probationary period, the regular period of notice will be after

less than 2 years of service:	4 weeks to the 15th or the end of a calendar month
2 years of service:	1 month to the end of a calendar month
5 years of service:	2 months to the end of a calendar month
8 years of service:	3 months to the end of a calendar month
10 years of service:	4 months to the end of a calendar month
12 years of service:	5 months to the end of a calendar month
15 years of service:	6 months to the end of a calendar month
20 years of service:	7 months to the end of a calendar month

unless the individual contracts of employment specify longer periods of notice. Extraordinary dismissals without a period of notice are only possible in few exceptional cases where there is an important reason which makes it unacceptable for the employer to continue the employment relationship even until the end of the notice period, e.g. after serious offences against colleagues, theft or unacceptable breach of trust against the employer. In these cases, the termination must be made latest within 2 weeks after the employer learns about the facts that are decisive to terminate the employment relationship.

IV. Protection against unfair dismissal

In most cases, a dismissal can only become effective when a specific reason stipulated in the Protection against Unfair Dismissal Act exists. The Protection against Unfair Dismissal Act applies to all companies with more than 10 employees.

The act only applies to employees who have completed a qualifying period of six months work without interruption. Within the first six months, a dismissal is possible without a specific reason. Still, the periods of notice (see above) have to be kept even for these short time employments.

After six months, a dismissal can only be based on

- I. personal,
- II. conduct-related or
- III. operational reasons.

IV.I Person-related dismissal

The most common reason for a person-related dismissal is illness. A dismissal can be justified in case of a long-term illness. Also, repeated short-term illness might justify a dismissal. In both cases, a negative prognosis of the employee's future state of health is necessary.

In any case, before terminating a contract for health reasons the employer is obliged to take measures for rehabilitation latest after six weeks of permanent or repeated illness ("betriebliches Eingliederungsmanagement", § 84 SGB IX).

According to German labour courts, a negative health prognosis can usually not be assumed and a dismissal for health reason will usually not be effective if the employee has not been ill for more than six weeks p.a. over the last years. Before terminating a contract, the employer is always bound to examine whether there are any, even costly, actions possible to save the employee's job, e.g. proposing treatments at a health resort, changing positions with another employee to give the person a job fit for his health situation, taking pressure or certain difficult responsibilities from the employee etc.

IV.II Conduct-related dismissal

If the employee violates against his obligations, a dismissal might be considered. Conducts that may lead to a dismissal include, among others:

- criminal actions or serious misbehaviour against employer/colleagues/customers, e.g. abuse, theft or fraud, (sexual) harassment, assault
- repeated late arrival at work
- repeated refusal to fulfil obligations from work contract
- breach of confidentiality
- feigning illness.

In most cases, at the first incident a written warning (Abmahnung) is sufficient. Only if the employee repeats his misbehaviour, a dismissal may be considered.

A former written warning can only lead to a dismissal if the employee repeats the same or the same kind of misbehaviour. In case of minor incidents (e.g. late arrival at work), several warnings might be necessary before a dismissal is justified. On the other hand, in exceptional cases serious incidents can justify a dismissal without a previous warning.

Before giving notice, the employer has to examine all other alternatives to save the job.

IV.III Dismissal for urgent operational reasons

The most common operational reason for a dismissal is the permanent elimination of a specific position, especially after closing down a company or part of a company, economisation or rationalisation.

The reasons for eliminating a position are only subject to limited court control. Even decisions that are not economically reasonable have to be accepted by court. The court review will mainly be limited on the question whether there has been a loss of job which has rendered the employment obsolete.

The employer has to prove that the duties and responsibilities connected with the job are either permanently cancelled or that these duties are dealt by other employees within their regular working time.

A dismissal for operational reasons demands that no other vacant jobs for the employee exist within the company. Even positions with lower wages or jobs that take a longer period of vocational adjustment have to be offered to the employee before a dismissal may be considered. All positions within the company have to be

considered that are vacant either at the time of the dismissal or that will become vacant within the period of notice or even shortly after that. The alternative position has to be offered before giving notice. If the employee refuses, it might even be necessary to combine the termination notice with a repeated alternative job offer with an "Änderungskündigung" (dismissal with the option of altered conditions of employment).

Next, a social selection (Sozialauswahl) is required. The intention is to protect employees who are less likely to find a new employment or who have social obligations to fulfil. Not the employee that held the eliminated job may automatically be dismissed; instead, all employees that are comparable to each other (those persons with similar work contracts and duties who are able to take over each other's job after a training period) must be examined to determine who deserves the least social protection. Criteria for the social selection include:

- duration of employment
- age
- number of maintenance obligations (children, husband)
- severe disability

Only the person at the bottom of the list (youngest, no family etc) may be dismissed first.

In exceptional cases, employees whose employment is crucial for the establishment do not have to be considered in the course of this selection process, e.g. persons with unique personal contacts to important business partners.

V. Termination by mutual agreement

The termination by mutual agreement is possible and quite usual. The termination agreement must be in writing and has to be signed by both employer and employee. Usually the agreement contains provisions about the date of the end of the employment, pay leave, severance payments, return of company property, job reference, etc.

The contents of these agreements may differ strongly depending on the negotiations. In order to avoid costly errors for both sides even if the termination is mutual, written agreements should only be drafted with legal advice.

VI. Protection for special groups of employees

Some groups of employees benefit from particular protection against ordinary and extraordinary dismissal due to certain individual circumstances. These specially protected groups include disabled workers, pregnant women, employees in maternity leave and works council members.

These persons may only be dismissed after the relevant public authority has given its consent. In Berlin, the relevant authority for pregnant employees or employees on maternity leave is the "Landesamt für Arbeitsschutz, Gesundheitsschutz und technische Sicherheit" (authority for work security, health protection and technical

security). For severely handicapped employees, the “Integrationsamt” (rehabilitation agency) has to give its consent.

The consent for the dismissal of a handicapped employee will be given as long as the dismissal is not based on the fact that the person is handicapped. With pregnant persons or people on maternity leave, consent is given only in exceptional cases. In most cases, the authority will rule that the dismissal has to be postponed until the end of the maternity leave.

VII. Severance pay

German labour law does not provide regulations for a termination against severance pay. If a court case leads to a decision, this will either rule that the dismissal was correct and that the employment ends, or the dismissal will be found ineffective and the work contract will be continued.

However, most of the law suits against dismissals are settled against payment of a severance. Although there are no legal regulations for the calculation of the severance, usually the negotiations start with half of a gross monthly salary per year of employment as compensation. Depending on the chances of winning or losing the case and the financial consequences arising from the expected court decision (e.g. salary payments for the previous months) the final severance sum can be much higher or lower than this.

As the regulations for dismissals are very strict in Germany, compared to other countries, a thorough legal preparation is indispensable before notice is given. Otherwise, chances are that a dismissal is ineffective and that the employee can only be prevented from returning to his job by paying him very high compensations.