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10 pitfalls when terminating employees under German law

Under German law, there are various ways to terminate an employment relationship. However, German law sets a high threshold for the employer to terminate an employment relationship. The employment relationship can end by a mutual agreement of the employee and the employer (i.e termination agreement or compromise agreement), by expiration of a fixed-term contract or when one of the parties gives notice (without or with notice period).

1 Strict form requirements for a notice letter

The notice letter must bear the company's information (i.e. legal entity, street, place). If the text exceeds one page, the first page should be initialled in the bottom corner of the page and stapled afterwards. The printout of the notice letter has to be signed by a person who is authorized to represent the company by its sole signature (e.g. President, CEO). Under German law, the employee would be entitled to reject the notice letter if only someone who is not entitled to represent the company signs it, unless a valid original power of attorney is handed over to the employee together with the notice letter.

The representative must sign the printout (hardcopy) of the notice letter (**wet-signature,** no scanned signature, no stamp, no copy or DocuSign, etc.). There is absolutely **no exception** to this requirement. If the employee does not receive the original termination letter with a wet-signature affixed, the termination is null and void.

2 Probationary Period

The parties may initially agree to a probationary period of up to six months during which both parties may terminate the employment relationship on two weeks' notice. During this time, it is nearly an employment at will. As long as the termination is not discriminatory, arbitrary, immoral or disciplinary, no requirements for a reason to dismiss the employees are necessary at all. It is rare for an employee to file a lawsuit against such a termination.

3 General Notice Period

Ordinary dismissals (i.e. after the probationary period has expired) are subject to certain periods of notice. Notice periods are stipulated by law. The minimum statutory notice period for both the employer and the employee is four weeks counting back from the 15th or the last day of a calendar month (sec. 622 BGB). However, the notice period the employer needs to give gradually increases with the job tenure of the employee:

Years of service	Statutory Notice Period	Termination is effective to…
During first 2 years of service	4 weeks	the 15th or to the end of a calendar month
After 2 years of service	1 month	the end of the calendar month
After 5 years of service	2 months	the end of the calendar month
After 8 years of service	3 months	the end of the calendar month
After 10 years of service	4 months	the end of the calendar month
After 12 years of service	5 months	the end of the calendar month
After 15 years of service	6 months	the end of the calendar month
After 20 years of service	7 months	the end of the calendar month

Individual contracts of employment may only specify longer notice periods. Irrespective of the contractual notice period, the statutory notice period prevails if it is longer (due to job tenure) than the contractual notice period. Collective bargaining agreements, on the other hand, may deviate from the statutory notice periods in the employees' favor as well as to their detriment.

4 Act against Unfair Dismissal

The most important protection for employees is the Act against Unfair Dismissal *(Kün-digungsschutzgesetz – **"KSchG")***. The Act applies if the plant, shop or company regularly employs more than 10 individuals (part-time workers count, depending on the individual working time with 0.5 or 0.75 towards this threshold) and the individual employee has been employed for more than six months.

To the extent to which the Act against Unfair Dismissal is applicable, all employees, including part-time workers, are protected. Besides the requirement to observe the applicable notice period, any termination additionally requires a social justification. The principle of the Act is that giving notice to an employee is only legally possible if it is **socially justified.**

The social justification can solely be based on one of three arguments provided in the Act:

- Termination related to "the person" of the employee, particularly physical or mental impairments, extensive absence times due to illness and reduced working capacity.
- Termination related to "performance and conduct" of the employee, particularly because of a wilful or negligent breach of contract, e.g. theft and fraud. A dismissal based on such reasons usually requires a warning letter in advance.
- Termination based on "operational reasons and business reasons", e.g. closure of operations, loss of employment due to a downturn in sales, orders or outsourcing and Transfer of Business.

5 Special Protection against Dismissal

Special protection is provided to employees who generally face a greater risk of dismissal such as handicapped or pregnant employees and members of the works council. Disabled or pregnant employees as well as employees on parental leave, enjoy special protection against dismissal. In such cases, the permission of relevant government authorities is required prior to issuing a dismissal. Furthermore, members of the works council can only be dismissed where there has been prior approval of the works council.

6 Severance Payments

German employment law does not provide for the termination of the employment relationship in return for the payment of severance. Hence, there is absolutely no statutory severance entitlement. However, more than 85% of the lawsuits against dismissals are settled with severance payments. The amount of such severance is usually calculated as half of the gross monthly salary per year of employment, as a rule of thumb, but can be lower or higher, depending on the employee's chances of success in a possible lawsuit.

7 No payment in lieu of notice

German employment law also does not recognize the concept of *"pay in lieu of notice"*. The employer must instead abide by the statutory or contractually agreed notice period. The employee receives their regular salary during this time.

8 Hearing of the Works Council

In case of an existing works council, the works council must be consulted before the dismissal. It cannot prevent a dismissal. However, if the employer does not inform the works council in detail prior to the dismissal, the dismissal is invalid, see Sec. 102 German Works Constitution Act *(Betriebsverfassungsgesetz – **"BetrVG"**)*.

9 Court Proceedings

If the employee believes that a dismissal is invalid, they are entitled to file a claim at the employment court and apply for a declaration that the employment relationship has not ended (Kündigungsschutzklage) within a three-week period after having received the termination letter. Even if the termination is valid, many employees make use of such a claim in order to apply pressure on the employer to pay severance in order to avoid time consuming and costly litigation. This is especially relevant as many employees have an insurance provision that covers their legal fees.

10 Termination Agreement/Compromise Agreement

Due to the high standard of protection against dismissal, it is not uncommon for the employment relationship to be terminated by contract between the employer and employee, i.e. a termination agreement or compromise agreement. This may occur at any time with or without a severance payment. The provisions on protection against dismissal do not apply in such cases. Even employees enjoying special protection against dismissal may conclude a termination agreement without requiring the permission of the authorities. The employer will generally offer a severance payment or prolonged notice period to encourage employees to accept a termination by mutual agreement. A wet-signature is also a requirement for a valid termination agreement.

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