

# 10 pitfalls when negotiating mutual termination agreements

German law sets high standards for employers to unilaterally terminate an employment relationship if the employer employs more than ten (10) full-time employees on the ground in Germany and as soon as the employee has finished the probationary period. A mutual termination agreement between employer and employee is often a reasonable and fair approach for both parties to end the employment relationship. When entering into negotiations about the termination of an employment relationship, employers should be aware of and keep in mind the following ten (10) pitfalls.

## 1 Strict form requirements for a termination agreement

Any termination agreement to an employment relationship is subject to a strict written form requirement. Both, the employee and a legal representative of the employer have to sign a printout (hardcopy) of the termination agreement with a **wet-ink-signature** (there is absolutely no exception and any of the following will not be sufficient: scanned signature, stamp, copy or DocuSign, etc.). If the form requirement is not observed, the termination agreement is null and void.

## 2 Difference between termination agreement/settlement agreement

Under German law, technically, one must differ between two types of mutual agreements, when ending an employment relationship. An agreement solely providing for the ending of the employment relationship is a so-called termination agreement (*Aufhebungsvertrag*). Additionally, a so-called settlement agreement (*Abwicklungsvertrag*) is necessary in case one of the parties has already given notice and both parties afterwards want to wind down the employment relationship and for example clarify any outstanding entitlements, provide severance and have the employee waive their right to file a lawsuit.

## 3 Content of a termination agreement

A termination agreement usually contains provisions regarding the termination date, the garden leave period, the remuneration package, the return of company property, proper balancing of any open entitlements, confidentiality and sometimes non-disparagement rules as well as non-compete and IP regulations. However, the most important clauses are around the severance payment. Despite the fact that there is no statutory entitlement to a severance payment when mutually ending an employment relationship, it goes without saying that an agreement on a severance payment can speed things up and may increase the employee's willingness to leave. The exact amount always depends on the individual case, taking into account the former salary of the employee, reasons for the conclusion of the termination as well as job tenure etc.

## 4 Consideration period/imperative of fair negotiation

When starting negotiations regarding the termination of the employment relationship, it is crucial that the employer does not take the employee by surprise or pressures the employee to sign the termination agreement. Otherwise, the termination agreement could be contested against by the employee notwithstanding the fact that the employee has signed it. Although the burdens for such contest are relatively high, it is always recommendable to take some time to prepare the termination negotiations and offer the employee a fair amount of time to consider the employer's offer.

## 5 Acceptance period

A fair amount of time regarding the consideration of a termination and settlement offer can be ensured by contractually including an acceptance period in the termination agreement. This guarantees a fairly time-efficient process and ensures transparency to the respective employee insofar that it is rather clear until when the offer will need to be accepted or otherwise will cease to exist.

## 6 Reference letter

Under German law, employees are entitled to receive a reference letter which shall contain a detailed evaluation and assessment of the employee's conduct and performance during the employment relationship, usually ended with an overall grade. As such reference letter will be frequently required within the application process for new job enquiries by potential new employers, such reference letters and their content are not rarely subject to contentions, or even litigation. We, therefore, recommend to already include a clause covering this topic and at least agreeing on a grade beforehand in order to avoid any unpleasant surprises.

## 7 Return of company belongings, company car

We often experience disputes and uncertainty about the usage and return of company belongings and property, in particular, but not limited to company cars and mobile devices. The parties should exactly define what items need to be returned to whom and when, in order to obviate any uncertainties for the time between the decision to part ways and the final working day/garden leave period.

## 8 Waiver of legal actions

Especially when parties conclude a settlement agreement after the employer has given notice to the employee, it is highly advisable to clarify in the settlement agreement that the employee will not file a claim against the dismissal. For a waiver of action clause to be effective, it is imperative that the agreement contains a compensatory consideration (for the employee) for the waiver of action. As a rule, a severance payment is conceivable as such. It is also possible to extend the notice period or even waive any claims for damages against the employee.

## 9 Settlement clause

A proper termination agreement should always contain a settlement clause under which (except for the claims explicitly mentioned in the termination agreement) all mutual claims between the parties arising out and pertaining to the employment relationship and its cessation shall be settled. This serves the purpose to have a clear cut and no open claims after the termination date.

## 10 Post contractual obligations

Last but not least, the parties should always clarify what is necessary after the end of the employment relationship and if there are any obligations of the employee which remain binding for the employee. Especially confidentiality, non-disparagement and non-compete issues should be considered and stipulated where necessary.

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