

# 10 Pitfalls

## when negotiating fixed term contracts under German law



Companies are always hoping to maintain a flexible workforce and to have the right solution for any increase or decrease in workload. Assuming the Act Against Unfair Dismissal is applicable, the termination process under German law is complex and time consuming. A common and well accepted approach to respond to the business' needs is to hire employees for a fixed-term period. However, there are quite a few elements to keep in mind in order to be compliant with German law and policy makers intend to restrict the possibilities in the future.

### 1 Beware of the written form requirement

Under the German Part-Time and Fixed-Term Employment Act (*Teilzeit- und Befristungsgesetz – "TzBfG"*), the employer and the employee can only enter into contracts which are effective for a specified period of time. This type of contract must be in written form (DocuSign, e-mail, fax or scan do not suffice), even though the written form requirement has been abolished for many other employment related docs.. If the limitation period agreed is invalid (e.g. not in written form), an indefinite employment relationship is established, but the contract may be ordinarily terminated under observance of general termination rules.

### 2 Have documents in place and signed before commencement

The contract has to be executed in written form before the employee's first day at work. Agreeing on a fixed term after the employment has commenced is not permitted and would automatically result in an indefinite employment relationship. Therefore, particular care must be taken when drafting the contract to ensure the company is protected from this legal risk.

### 3 Keep the two types of fixed term contracts separate

There are two main types of contract:

1. The most common type is the limitation to a certain date. In this case, the contract ends when a specific date is reached; or
2. If an employee has been employed with the company before (e.g. seasonal work), or it is intended that the duration shall exceed two years, e.g. for the substitution of employees in parental or maternity leave, it is necessary that the limitation of term is justified by objective reasons. Such a contract ends as soon as the purpose of, or the objective reason for, the contract has been achieved but not earlier than two weeks after the employee has been informed by the employer about it.

### 4 Check if the candidate has not been employed with the company previously

A term of up to two years can only be agreed without any justifying the term (up to four years in a newly founded start-up during the first four years after its establishment), if the employee has not been employed by the same employer previously (which should be checked first).

If the candidate has been employed with the company previously, an objective reason is required. Employees should confirm this before signing the contract and such a confirmation should be a contractual obligation by the employee. This can be achieved by drafting the contract properly.

## 5 Be careful when extending limited contracts

If a shorter term than two years is agreed without an objective reason, it is possible to extend the duration up to three times, although the maximum overall duration still being limited to two years. Every extension has to be in writing and finalised on or before the day on which the original contract would end. It is important to note that the written extension only changes the duration of the employment relationship. If the parties change anything else (e.g. remuneration, right to terminate the employment relationship) this is seen as conclusion of a new fixed term contract, despite the previous employment relationship. Therefore, an improper extension may lead to an indefinite employment relationship.

## 6 Don't forget to agree on the possibility of ordinary termination

Ordinary termination is only possible if the employer and the employee agreed on this within the fixed term contract. This is a requirement for every fixed term contract. It is also worth noting that a probationary period is common and a good way to safe-guard the company's interest from the start. Otherwise the contract can only be terminated without notice by an extraordinary termination (i.e. if a severe breach of the contract has occurred).

## 7 Familiarise yourself with possible objective reasons

The most common objective reasons to limit a contract are the following:

- Hiring someone to fill in for an absent employee,

e.g. due to long-term sickness, maternity or parental leave,

- temporary increase in workload which requires additional staff,
- the type of work itself justifies a fixed-term contract (mainly for professional sportspeople or artists), or
- a fixed term is agreed during a court settlement.

## 8 Treat all employees equally

Employees on a fixed term contract have to be treated equally as colleagues on permanent contracts, unless there is a justifiable reason to treat them less favourably. Especially when it comes to vacation, remuneration and bonuses, there may be no discriminatory difference between fixed term employees and employees with permanent contracts.

## 9 Keep track of the end of the fixed term contract

The employment relationship ends automatically without written notice being necessary either at the end of its term, or because of the purpose achievement of the limitation itself after the employer informed the employee.

However, if the employment relationship exceeds the duration of the fixed term, it will be extended for an indefinite period if the employer does not state otherwise without delay. Keeping track of the end of the contract is therefore essential.

## 10 Probationary period

A "proportionate reduction" of the probationary period in relation to the expected duration of the fixed term is required by statute. When concluding fixed-term contracts, one has to determine the probationary period for each individual case depending on the duration of the respective fixed term. A special situation may also exist for fixed-term employees who perform very simple tasks that do not require a long preparation and/or training period (e.g. assistants) and hence a very short probationary period is considered proportionate.

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Dr. Christian Maron, a leading international labor and employment lawyer at Taylor Wessing Germany, has been advising global companies expanding into the German market for more than fifteen years. Alongside his dedicated team, they help businesses align their global operations with German labor and employment law, providing strategic guidance on HR matters, employment

contracts, terminations, and litigation, while ensuring compliance and risk mitigation. With deep expertise in restructuring, corporate transactions, and works constitution law, Christian and his team support smooth workforce transitions and offer strong legal protection—both in and out of court.

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