

10 Pitfalls

Absence Management



Managing sickness-related absences in Germany is highly regulated and involves numerous legal and practical pitfalls for employers. From notification duties and continued remuneration to reintegration, BEM and sickness-related dismissal, missteps can quickly become costly. This flyer highlights ten common pitfalls that HR and in-house counsel should be aware of when dealing with sickness-related absences under German law.

1 Failure to define clear notification rules

A common mistake is leaving notification duties and proof requirements to "common sense" instead of clearly regulating them. Employers should specify in contracts or policies when and how sickness must be reported, and from which day a medical certificate is required, taking into account statutory minimum requirements and collective agreements. Standard practice is to require employees to present a medical certificate on the third or fourth day of continued sickness. If frequent short-term absences become a pattern in individual cases, employers should consider requiring a medical certificate from the first day of sickness instead of relying on the standard rule. Internal processes must reflect the electronic certificate of incapacity for work (eAU), ensuring that HR or payroll reliably retrieve, review and archive the data from health insurers and align it with the time-recording system. Vague rules or inconsistent enforcement regularly lead to disputes over unexcused absences, warnings and pay entitlements.

2 Misjudging sick notes

German courts attribute significant evidentiary weight to medical sick notes, so mere suspicion is insufficient to disregard them. To challenge a certificate, employers typically need concrete indications such as striking temporal coincidence (e.g. sickness immediately after rejected vacation, notice of termination or refusal of a request-

ed transfer), contradictory conduct during incapacity (e.g. publicly visible strenuous activities inconsistent with the diagnosis) or conspicuous patterns of recurrent short-term absences. Particular caution is required where certificates are issued exclusively on the basis of remote consultations, as their evidentiary value may depend on the specific circumstances under which they were issued. In practice, employers should proceed in stages: first clarify the situation with the employee, then consider involving the medical service of the health insurance or seeking expert medical input, and only as a last resort initiate labor court proceedings. Relying on gut feeling alone and unilaterally denying sickness can backfire in litigation and seriously damage trust.

3 Misjudging continued pay and recurrence of sickness

Mistakes in calculating continued remuneration are frequent and costly. In any case, entitlement to continued remuneration only arises after four consecutive weeks of employment. After that, employers must observe the six-week continued pay entitlement per case of incapacity, while carefully distinguishing between a genuinely new sickness and a continuation of the same underlying condition. Where diagnoses or medical histories overlap, the concept of a "unitary inability to work" may apply, meaning no new six-week period is triggered; where the new sickness is independent, a fresh entitlement arises. Misjudging this distinction can lead either to overpayments

or to underpayments that later result in claims for arrears, interest and sometimes allegations of systematic under-remuneration. Robust documentation, clear payroll guidelines and, in cases of doubt, seeking clarification from the treating physician or health insurance (within data protection limits) are essential. Reliable absence statistics are equally important, as they often form the factual basis for recurrence assessments, BEM decisions and, ultimately, sickness-related dismissals.

4 Withholding pay too early or without a strategy

Withholding salary due to doubts about sickness is legally sensitive and should remain the exception, not the rule. A lawful withholding generally requires substantial, well-founded doubts about the incapacity, carefully documented and communicated, and ideally preceded by clarification attempts and a request for further medical substantiation. Before taking this step, employers should weigh the evidential position, the amounts at stake and the potential impact on the employment relationship, as an unjustified refusal to pay can constitute delayed payment, trigger default interest and, in serious cases, may give rise to claims for damages or provide grounds for the employee to terminate the employment relationship with immediate effect. Structured escalation models – from conversation to written warning to involving the medical service and only then to a possible temporary withholding – help manage risk and demonstrate proportionality in any subsequent litigation.

5 Underestimating BEM

Company integration management (*“Betriebliches Eingliederungsmanagement”* – BEM) is often initiated too late, handled informally or documented inadequately, which significantly weakens the employer’s position in dismissal disputes. Employers should monitor absence thresholds (typically six weeks of sickness within twelve months) and issue a timely, clear and written BEM invitation explaining its purpose, voluntary nature, data handling and potential participants. Meetings should follow a structured agenda focusing on work-related causes of sickness and poten-

tial adjustments, with outcomes and agreed measures carefully documented and regularly reviewed. Courts increasingly expect employers not only to offer BEM, but also to demonstrate that the process was conducted in a meaningful way and that identified measures were genuinely considered and, where appropriate, implemented. Failing to offer BEM or conducting it only pro forma can be construed by courts as evidence that the employer has not seriously explored less severe measures than dismissal, substantially increasing the risk that a sickness-related termination will be found invalid. Where a works council exists, its involvement should be considered at an early stage and documented appropriately.

6 Overlooking disability-related obligations

Where employees are severely disabled or formally treated as such, the legal framework around sickness and absence management becomes considerably stricter. In practice, prolonged or recurrent sickness absences are often the point at which employers must first clarify whether a (potential) severe disability is involved, as this can fundamentally change the legal assessment of how to proceed. Employers must therefore consider additional leave entitlements, reasonable workplace accommodations and, in the context of dismissals, the involvement and prior approval of the competent integration authorities, often alongside any works council. A frequent pitfall is that HR is unaware of a recognised or pending disability status because communication channels are unclear or employees are reluctant to disclose; systematic, confidential procedures for disclosure and for involving internal stakeholders are therefore key. Overlooking these protections can render dismissals void and expose the company to claims for reinstatement, back pay and discrimination, as well as reputational damage.

7 Allowing a “cold” return to work

After long or repeated absences, an unstructured “full return from day one” is often neither medically advisable nor legally prudent. Employers should

assess at an early stage whether gradual reintegration (*Hamburger Modell*) or other stepwise return-to-work schemes are appropriate, in close coordination with the employee, the treating physicians and, where applicable, the health insurance. Adjustments to working hours, duties, workplace equipment or reporting lines should be carefully assessed and documented, including clear expectations and review dates. If an employee appears to be permanently unfit for their original role, exploring alternative positions and documenting why they are or are not suitable becomes crucial evidence in any subsequent dismissal proceedings. Poorly planned returns increase the risk of relapse, operational disruption and allegations that the employer failed to take reasonable steps to maintain the employment relationship.

8 Under-preparing sickness-related dismissals

Terminating employment on health grounds is one of the most demanding exercises under German unfair dismissal law. Employers must establish a negative medical prognosis – i.e. a strong likelihood of continued or repeated incapacity – based on robust medical information rather than assumptions. They must also show that past and expected future absences significantly impair operations or generate disproportionate costs, and demonstrate that all reasonable alternatives – such as BEM, adjustments or reassignment – have been meaningfully explored. Courts further require a thorough balancing of interests, weighing seniority, family responsibilities, labor market prospects and the severity of the sickness against the employer's operational burden. Incomplete medical documentation, superficial BEM efforts or a merely schematic interest-balancing exercise are typical reasons why sickness-related dismissals fail in litigation.

9 Ignoring discrimination risks

Sickness-related measures increasingly intersect with anti-discrimination law, especially where chronic, long-term or mental health conditions

are involved. Many such conditions may qualify as disabilities, triggering a duty to avoid unfavourable treatment and, in some cases, to provide reasonable accommodations. Pitfalls arise where employers apply attendance or performance rules in a formally equal manner but with a disproportionate impact on disabled employees, or where ill-considered comments and documentation suggest that sickness or disability influenced negative HR decisions. To mitigate these risks, HR and managers should receive training on disability and mental health, ensure that absence-related decisions are based on objective, well-reasoned criteria, and coordinate closely with legal and, where relevant, works council representatives before imposing sanctions or pursuing dismissals.

10 Poorly designed attendance incentives

Employers are understandably keen to reduce absenteeism, and well-designed incentive schemes can support that goal. Such schemes, however, can create legal and cultural issues if not carefully structured. Attendance bonuses that penalise unavoidable sickness or do not provide adequate exceptions for severe disabilities, chronic conditions or statutory protections risk being struck down or considered discriminatory. When introducing such schemes, employers should define transparent criteria, consider carve-outs or pro rating mechanisms, and ensure consistent application, while also involving the works council where co-determination rights exist. Combining balanced incentives with structured return-to-work interviews, occupational health support, prevention programs and clear communication is typically more sustainable and legally robust than a purely bonus-driven approach that implicitly discourages employees from taking necessary sick leave.

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