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Basics of German Labour Law

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Basics of German Labour Law

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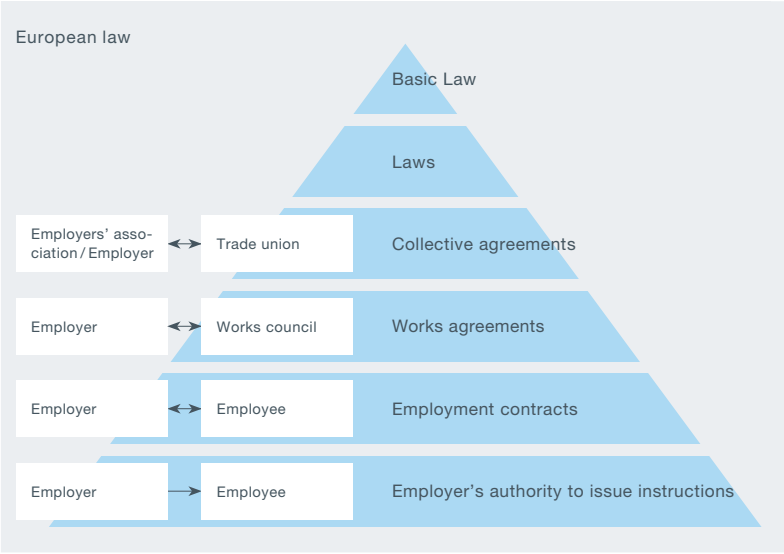
Legal Sources 01

The rights and obligations of employees and employers are not regulated by a uniform labour law in Germany. Rather, they result from a multitude of individual laws, collective agreements, works agreements and employment contracts, as well as from case law and European law. All of this makes German labour law confusing and complicated.

In simplified terms, the legal sources of German labour law can be shown as follows:

Figure 01
The legal sources of German labour law



01.1 The Constitution

The constitution of the Federal Republic of Germany – the Basic Law (Grundgesetz) – is the strongest legal source. It also constitutionally guarantees several general principles of labour law, for example:

- human dignity [Article 1]
- personal freedoms [Article 2(1), Article 1(1)]
- the right to informational self-determination (the individual's right to decide what information on him/herself should be communicated to others and under what circumstances) [Article 2(1), Article 1(1)]
- equality before the law [Article 3(2)]
- freedom of association, autonomy in collective bargaining [Article 9(3)]
- the right to freely choose a profession, place of work and place of training [Article 12]
- the right to form a company, the right to divide or to close a company or a business establishment

01.2 Laws and Case Law

There is no uniform labour code that brings all labour-law provisions together in Germany. Rather, labour-law provisions are dispersed over many different individual laws. For example, there are laws that concentrate on regulating the legal relationship between the employer and the individual employee (individual labour law). These include laws regulating the development, content and termination of an employment relationship. These include, for example

- Civil Code [BGB]
- Protection Against Dismissal Act [KSchG]
- Working Hours Act [ArbZG]
- Continued Payment of Wages and Salaries Act [EntgeltfortzahlungsG]
- Federal Holiday Entitlement Act [BUrlG]
- Part-Time Work and Fixed-term Employment Contracts Act [TzBfG]

There are other laws that concentrate on regulating the legal relations between unions, employers' associations and works councils on the one hand, and their members and respective antagonists on the other (collective labour law). These include, for example

- Works Constitution Act [BetrVG]
- Collective Agreements Act [TVG]

– Executive Staff Committee Act [SprAuG]
– Co-determination Act [MitbestG]

Labour law in Germany is also case law to a large degree. Wherever there is no specific law for solving a labour-law problem, or if the applicable law contains loopholes, the labour courts decide according to general principles on the basis of existing legal provisions. The highest national labour-law court in Germany is the Federal Labour Court [BAG].

Without knowledge of case law it is not possible, for example, to decide whether a fixed-term employment contract is legally effective, whether the dismissal of an employee is legally effective, whether the employer needs the approval of the works council for a project, or how other facts in an establishment (see the excursus in chapter A section 02.3 on the difference between the terms 'company' and 'establishment') are to be judged according to labour law. However, even with knowledge of past case law it is often difficult to make a confident assessment because it always depends on the special circumstances of each individual case. In practice, therefore, it is also impossible to predict the outcome of a legal dispute (e.g. in the case of a dismissal).

01.3 Collective Agreements

Collective agreements are written contracts concluded between a trade union and an employers' association or individual employer. They contain provisions about the conclusion, content and termination of an employment relationship, operational issues and questions relating to the Works Constitution Act. Collective agreements are among the most important foundations for claims in labour law. Their legal foundation is the Collective Agreements Act [TVG].

There are various types of collective agreements:

– General working conditions are regulated in industry-wide collective agreements (Manteltarifvertrag, Rahmentarifvertrag).

Example

The industry-wide collective agreement for the employees of the Bavarian metal and electrical industry contains, for example, provisions on:

– *the number of regular weekly working hours*
– *overtime, work on Sundays, public holidays and at night*
– *holiday*
– *leave of absence*
– *notice periods and cut-off periods*

Most industry-wide collective agreements are long-term agreements. For example, the industry-wide collective agreement for the employees of the Bavarian metal and electrical industry applies indefinitely. However, it can be terminated by giving a certain period of notice.

– Other special collective agreements are only concerned with individual benefits or areas.

Example

Collective wage and salary agreements, collective agreements on capital-forming benefits, job security, partial retirement, deferred compensation.

Collective wage and salary agreements are usually concluded for a short period. For example, the collective agreement on wages, salary and apprentices' pay for industrial and salaried employees of the Bavarian metal and electrical industry, dated 10 May 2007, was concluded for a fixed term of 19 months.

– Furthermore, a distinction is made between regional / national collective agreements and company collective agreements. Regional / national collective agreements are concluded between an employers' association and a union for a certain industry and a certain region.

Example

Industry-wide collective agreement (Manteltarifvertrag) for the employees of the Bavarian metal and electrical industry

Signatories: vbm (employers' association) and IG Metal (union)

Region: Bavaria

Industry: metal and electrical industry

By contrast, company collective agreements are concluded between the union and an individual employer. They then apply only to the establishments (e.g. factories) of this individual employer.

Collective agreements between employees who are members of the signatory union and employers who are members of the signatory employers' association apply directly and with mandatory force, like a law: i.e. the validity of the collective agreement does not have to be expressly agreed. Furthermore, in this case the employer may not deviate from the collective agreement to the detriment of employees.

Example

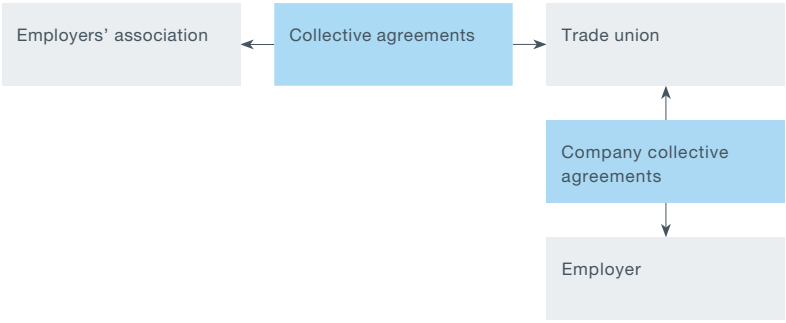
An employee on a five-day week is entitled to 20 days of holiday a year according to the Federal Holiday Entitlement Act [BUrlG]. However, the same employee has 30 days of holiday a year according to the industry-wide collective agreement for the employees of the Bavarian metal and electrical industry. This collective agreement was concluded between the vbm (employers' association) and the IG Metal (union).

Employee M is employed by employer A and claims the 10 days additional holiday on the basis of the collective agreement. She is entitled to this if her employer A is a member of the vbm and employee M is a member of IG Metal.

If an employee is not a member of the union or / and the employer is not a member of the employers' association, the two sides can agree in the contract of employment that the provisions of the collective agreement shall apply to the employment relationship.

In practice, employers who are bound by a collective agreement frequently use this option if they employ both union members and non-members. In the case of employees who are not union members, the applicability of the relevant collective agreements is agreed in the employment contract. This ensures that there is no 'two-class society' in the establishment.

Figure 02
Collective agreements



01.4 Works Agreements

Works agreements are written agreements between the employer and the works council. They lay down binding regulations for all the employees of an establishment. A works agreement applies directly and with mandatory force to all the employees of an establishment, like a law or collective agreement.

These include, for example:

– works agreement on flexible working hours
– works agreement on the use of email and the internet in the establishment
– works agreement banning alcohol consumption and smoking in the establishment

The contents of a works agreement can only cover issues that are within the works council's area of responsibility. In this context, the works agreement is the works council's most important instrument for exercising its co-determination rights (see chapter C section 03 on the individual co-determination rights; see chapter A section 02.1 and chapter C for more detailed information on the works council).

01.5 Employment Contracts

Every employment relationship is based on a contract of employment that has been concluded between the employer and the employee and regulates the detailed conditions of employment. These include, for example:

– The date on which employment begins and provisions on the probationary period, e.g.: "The employment relationship shall begin on 01 May 2007. The first six months shall be deemed a probationary period."
– Any limitation of the term of the employment relationship, e.g.: "The employment relationship shall begin on 01 May 2007 and end on 30 April 2008."
– The work to be carried out by the employee, e.g.: "The employee shall be employed as an accountant."
– Whether the employee works full-time or part-time
– Basic pay

01.6 The General Principle of Equal Treatment under Labour Law

The general principle of equal treatment under labour law prohibits the employer from distinguishing between his/her employees in an arbitrary or subjective manner. This means that the employer may not arbitrarily treat some employees worse than others in a comparable situation. It also means that individual employees may not be arbitrarily excluded from general agreements involving benefits. A distinction is always deemed subjective if the employer cannot justify it with factual, equitable, acceptable or other objectively plausible reasons.

Example

Employer A grants a holiday allowance to all employees except women who are employed part-time. Employer A is of the opinion that these women only work for the fun of it and most of them have husbands who earn enough money for a holiday.

Such a distinction would be unobjective; it violates the principle of equal treatment under labour law (quite apart from further violations of the Part-Time Work and Fixed-term Employment Contracts Act and the General Equal Treatment Act).

01.7 A Company's Established Practice

Employees' rights can also be created if the employer regularly repeats certain modes of behaviour without issuing any express declaration on the fact. If an employer grants a certain payment or benefit at least three times, employees can in principle conclude from this behaviour that they are permanently entitled to it. They thus gain a claim to the benefit solely on the basis of the employer's actual regular actions. This is known as a claim based on the company's established practice.

Example

In 2006 employer A voluntarily pays her employees a Christmas bonus for the first time. She pays the Christmas bonus again in 2007 and 2008. Business is not as good in 2009 as in the previous years, so employer A does not want to pay a Christmas bonus this time. But employee B demands the Christmas bonus nevertheless; is he right?

Solution: Yes, the employees have a claim to payment of the Christmas bonus based on established company practice. Employer A has paid a Christmas bonus for three consecutive years. The employees may now expect to be paid the Christmas bonus in the future as well.

The employer can prevent the development of established company practice by expressly declaring – ideally in writing – that the employees have no permanent entitlement to it each time s/he grants the benefit or payment.

01.8 Authority of the Employer to Issue Instructions

An employment contract only describes the work to be performed by the employee in general terms, e.g. "Mr XY shall be employed as an accountant." The employer or an individual supervisor may therefore define the employee's duties in more detail in terms of time, type and location and assign certain jobs to the employee. S/He may direct in detail what the employee is to do each day and how the employee is to perform this work (= right to issue directions or instructions).

Example

Ms Maier has been hired by her employer A as a secretary, and this is stated in her employment contract. Her supervisor, Mr Müller, within the scope of his right to issue directions, instructs her to revise his set of slides for his upcoming presentation to the board of management, to make an appointment for a meeting with a business associate, and to book a flight for his business trip next month. Ms Maier is instructed to book the flight on the internet because this is cheaper.

01.9 European Law

EU regulations and directives are also becoming increasingly important for German labour law. Regulations apply directly and with mandatory force to all employees in the European Union, like a national law. By contrast, directives are only a binding objective set by the European Union for the member states. A directive must be transformed by the respective member state into national law by a further legal act. These include, for example

– The German General Equal Treatment Act [AGG] implements four European anti-discrimination directives as German laws.

– The German Part-Time Work and Fixed-term Employment Contracts Act [TzBfG] is based on two European directives on part-time working and fixed-term employment.
– The European Works Councils Act transforms the corresponding EU directive into German law.
– Section 613a of the German Civil Code on rights and obligations in the event of the transfer of a company's operations is based on the European Directive on the Transfer of Undertakings.

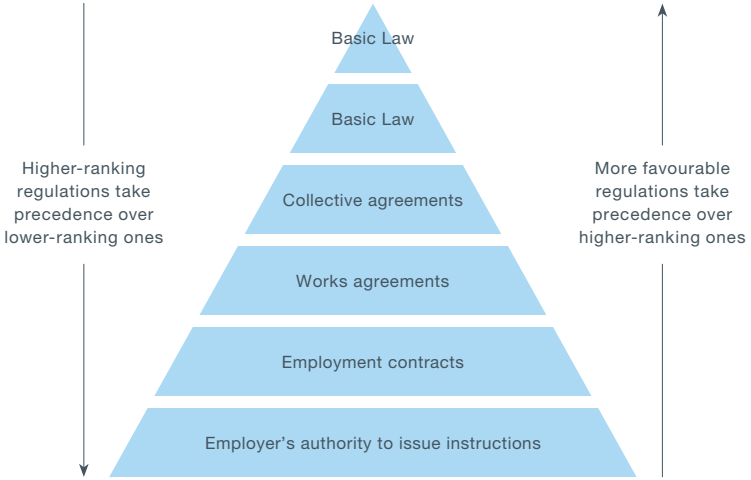
The interpretation of European law is the responsibility of the European Court of Justice (ECJ). National labour courts are bound by judgements of the ECJ, which flesh out European directives and regulations.

01.10 Order of Precedence of Legal Sources

It is quite possible for several legal sources to contain provisions on one and the same topic. For example, the question of how many days of holiday an employee is entitled to may be covered not only in the collective agreement, but also by a clause in the employment contract; there is also the Federal Holiday Entitlement Act which lays down a statutory minimum number of days of holiday. The question that then arises is which provision ultimately applies.

As a matter of principle, competition between several legal sources should be handled as follows: the higher-ranking legal source takes precedence over the lower-ranking legal source (precedence principle) unless the lower-priority legal source is more favourable to the employee (principle of deviation for the employee's benefit).

Figure 03
Order of precedence of the individual legal sources



The relations between a collective agreement and a works agreement are an exception in this context: here, the collective agreement takes precedence.

Pay and other working conditions which have been – or are usually – regulated by a collective agreement cannot be the subject of a works agreement. If a works agreement nevertheless contains such a provision, it is null and void – even if it would have been more favourable for the employee. There are essentially two exceptions to this principle:

1. if the collective agreement expressly permits the conclusion of supplementary works agreements, or

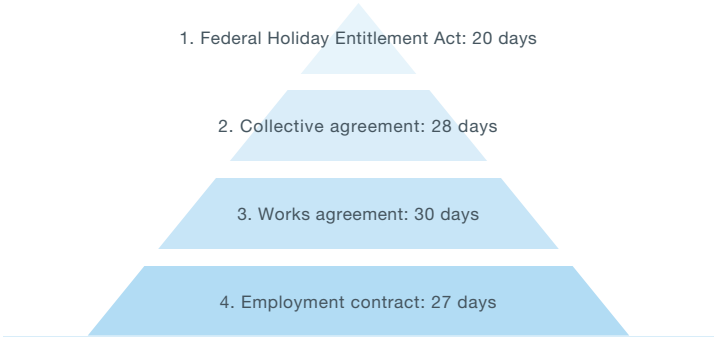
2. if the works agreement relates to issues that require the mandatory co-determination of the works council pursuant to section 87 of the Works Constitution Act. In this case, the ban on regulation (by works agreement) only applies if a provision on the issue actually exists in the collective agreement – the fact that such a issue is customary covered by collective agreements is not sufficient (see chapter C section 03 for details on issues requiring co-determination).

Example

Example case on the order of precedence of legal sources: Employee A is employed by employer B. The applicable collective agreement provides for 28 days of holiday a year. Employer B has concluded a works agreement with the works council granting the employees at the establishment 30 days of holiday. A's employment contract states that he has 27 days of holiday; according to the Federal Holiday Entitlement Act, A is only entitled to 20 days of holiday a year because he works a five-day week. How many days of holiday should employee A have?

Solution:

Figure 04
Example: Order of precedence of the individual legal sources



According to the principle of deviation for the employee's benefit, the more favourable provision takes precedence over the higher-ranking one. This would mean in this case that employee A could claim 30 days of holiday, because the works agreement would be the most favourable provision.

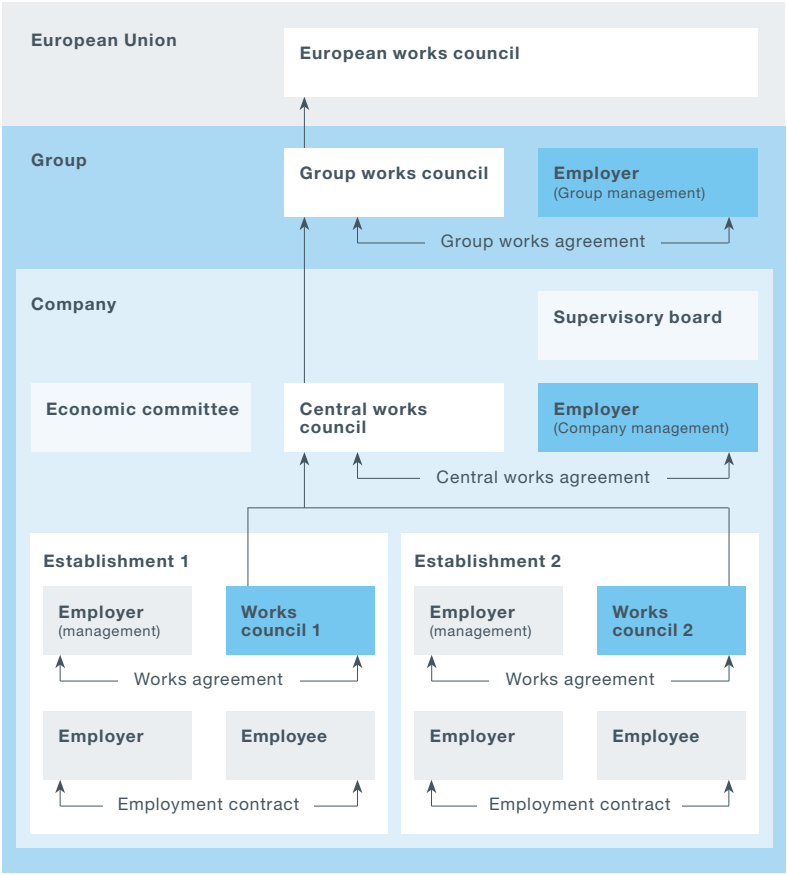
However, the number of days of holiday is normally regulated by collective agreements, and in this case there really is a provision on this in the collective agreement, namely 28 days. The provision in the works agreement thus violates the principle of the precedence of the collective agreement and is invalid.

Result: Employee A is entitled to 28 days of holiday per year as stated in the collective agreement.

Parties Involved in the Employment Relationship 02

02.1 Overview

Figure 05
Overview of the parties involved in the employment relationship



02.2 Works Council

The employer manages the establishment. It is in the nature of managing an establishment that the employer make decisions that also affect the situation of his/her employees at their workplace.
The employer makes decisions

- on the workflow in the establishment and on how the employees are to work together
- on when the employees start work in the mornings and when they finish work
- on shift plans
- on hiring and firing employees and whether employees are to be transferred to another job
- on whether and how the employees are to be given in-service training
- on how the establishment should be organized.

The employer determines the fate of the entire establishment. S/He decides whether the establishment is to be closed or sold, or whether individual parts of the establishment are to be spun off.

In the Federal Republic of Germany, the employees participate in such decisions made by the employer. For this purpose, they elect people from among their own ranks – the individual members of the works council – to represent their interests. These representatives then form a body – the works council. The works council represents the employees in the establishment.

Cooperation between the employer and the works council is regulated in the Works Constitution Act [BetrVG], according to which the employer and the works council are to work together on a basis of trust for the benefit of the employees in the establishment (section 2(1) of the BetrVG). The works council and the employer are thus supposed to cooperate – they are not opponents.

How intensively the works council gets involved in decision-making in the establishment varies considerably depending on the specific situation. For example, the employer only needs to inform the works council about some plans. S/He must consult with the works council on certain plans, i.e. s/he must discuss his/her plan with the works council and consider its arguments. However, the employer needs the express approval of the works council for many decisions. S/He cannot implement his/her plans (or at least not easily) without this approval. These are referred to as cases of full works-council co-determination. An overview of the works council's participation rights and

details on its individual co-determination rights is given in chapter C sections 02.6 and 03. Details on the special legal position of the individual works council members and the works council's tasks are given in chapter C sections 01.3 and 02.

02.3 Central Works Council

If a company has several establishments with works councils, a central works council must be formed.

Excursus – the difference between an establishment and a company

The terms 'establishment' (Betrieb) and 'company' (Unternehmen) both designate organizational units: however, they differ with respect to their purpose: a company is a legal, economic unit. It is with the company that the employer pursues what is usually an economic objective, e.g. making a profit, gaining market share.

An establishment is a company's individual production facility, workplace or sales outlet. Here, the employer pursues not an economic, but a work-related objective. In an establishment, goods are produced or sold and services provided. 'Establishment' is therefore a more narrowly defined concept than 'company'. A large company can have several establishments.

Example

XY AG builds and sells high-quality cars. XY AG is the company. XY AG has a plant in Regensburg where it produces off-road vehicles and a plant in Augsburg that makes sports cars. XY AG has its head office in Ingolstadt. There are no production facilities there, only a large building where the company's management and administration have their offices. XY AG has two shops in Munich and Nuremberg where they sell their cars.

The plants in Regensburg and Augsburg, the head office in Ingolstadt and the two shops are establishments of XY AG.

The local works councils send members to the central works council. The central works council is an independent body and exercises no authority over the individual, local works councils. The central works council is responsible for issues that concern the company as a whole or several establishments and which cannot be regulated by the individual works councils within their establishments.

Example

– *introduction of a company-wide IT system;*
– *negotiation of a reconciliation-of-interests agreement on restructuring measures affecting the entire company (see chapter C section 03.6.2 for a definition of the term 'reconciliation of interests').*

Furthermore, the local works councils can also delegate certain tasks to the central works council.

02.4 Group Works Council

A group works council can be set up for a corporate group. There is no obligation to set up such a council. The members are appointed by the central works councils of the respective group companies. The group works council is responsible for issues affecting the group as a whole or several group companies which cannot be regulated by the individual central works councils within their companies. These include, for example:

– group-wide rules on a retirement pension scheme
– conclusion of a group works agreement on the exchange of employees' data between group companies

Furthermore, the central works council can delegate additional tasks to the group works council.

02.5 European Works Council

A European works council must be set up – or a process installed for notifying and hearing employees – in companies or groups that operate throughout the EU. A company is deemed to operate throughout the EU if it employs at least 1,000 staff in the EU member states, at least 150 of them in at least two member states.

The term European works council is misleading. A European works council is not a works council with a purview and area of responsibility like the German works council pursuant to the Works Constitution Act [BetrVG]. The tasks are more comparable to those of the joint management-employee economic committee (see chapter A section 02.7 on the economic committee).

A European works council (EWC) is a body for cross-border information and consultation, e.g. on the company's economic and financial situation, the employment situation and the relocation, limitation or closure of companies or establishments. However, an EWC has no real rights of co-determination, e.g. in the sense that the employer's plans might be dependent on the approval or some other involvement of the EWC.

The European Works Councils Act (EBRG) is the legal basis. It does not apply on principle to the employees of a European company (SE) or a European co-operative (SCE) because more specific laws on the participation of employees apply in these cases.

02.6 Executive Staff Committee (Sprecherausschuss)

The works council only represents the interests of employees within the meaning of the Works Constitution Act [BetrVG]. Executive staff (leitende Angestellten) are not included here – they are not regarded as employees in this sense. Executive staff are employees who perform important managerial functions in the establishment or company and are therefore closer to the employer.

As a rule, executive staff only make up a small percentage of the total workforce. An executive employee is defined by section 5(3) of the BetrVG. Not every supervisor is an executive employee. The position of an executive em-

ployee is more prominent. Criteria indicating that an employee should be classified as an executive employee might include, for example,

– that s/he is entitled to independently hire and dismiss employees in the establishment; or
– that s/he holds Prokura (general commercial power of attorney) or unlimited power of attorney involving significant power in vis-à-vis the employer; or
– that s/he regularly performs tasks that are essential for the existence and development of the company or establishment, and essentially acts without instructions in this context.

The interests of the executive staff are thus not represented by the works council. In establishments which normally have at least 10 executive employees, the latter elect an executive staff committee – their counterpart to the works council. It represents the executive staff of the establishment and represents their interests vis-à-vis the employer.

As in the case of the works council, cooperation between the employer and the executive staff committee is subject to the precept of cooperation based on trust.

Unlike the works council, however, the executive staff committee has no full rights of co-determination. It only has a right of information, a right of consultation and the right to be heard. Of course, the employer and the executive staff committee can conclude written agreements on a voluntary basis, which then – like a works agreement – lay down binding requirements and rights for the executive staff of the establishment (‘guidelines’).

02.7 Representative Body for Young Workers and Trainees

The representative body for young workers and trainees represents the interests of young employees and those employed for their vocational training. The body is elected in establishments which normally have at least five employees who are either under the age of eighteen or employed for their vocational training and under the age of twenty-five. The task of the representative body for young workers and trainees is to pursue the special interests of these employees vis-à-vis the works council. It thus supports the works council in protecting the interests of all employees at the establishment vis-à-vis the employer.

The representative body for young workers and trainees is not an independent body with the same rights as the works council. It has no participation rights of its own vis-à-vis the employer.

02.8 Economic Committee

A joint management-employee economic committee must be set up in companies that normally have a permanent workforce of over 100, irrespective of the number of establishments the company has (see the excursus in chapter A section 02.3 on the difference between the terms 'company' and 'establishment').

The three to seven members of the economic committee are appointed by the works council – or by a central works council, if one exists. Only one member must be a member of the works council. The members of the economic committee only need to belong to the company; they should have the technical and personal qualifications suited for this task. Executive staff can therefore also be appointed to the economic committee.

The employer or his/her representative must participate in the meetings of the economic committee. The costs of the economic committee are borne by the employer.

The economic committee is a body for consultation and information on economic matters at the company.

Section 106 of the Works Constitution Act [BetrVG] stipulates what this involves in detail, for example:

- the company's economic and financial situation
- its production and sales situation
- its production and investment programme
- rationalization plans
- the relocation, limitation and closure of establishments or parts of establishments
- the merger or demerger of companies or establishments

The economic committee is a consultative and information body. It has no participation or co-determination rights like those of the works council. Even so, the economic committee also performs a function based on the Works

Constitution Act: it must inform the works council about the information it receives and the results of consultations, so that the works council can take this information into account when exercising its participation rights.

02.9 Supervisory Board

The employees participate in important decisions of the employer on two levels in Germany: the establishment level and the company level (see the excursus in chapter A section 02.3 on the difference between the terms ‘company’ and ‘establishment’).

Co-determination at the establishment level usually concerns operational issues directly affecting the employees at their workplaces. In principle the point of departure is the establishment, as a working and production unit, and not the company as an economic unit. The legal basis for this is the Works Constitution Act [BetrVG], which regulates the rights and duties of the works council as the representative of the employees. The ‘works constitution’ deals with relations between the employer and the workforce; its primarily purpose is to protect the employees.

By contrast, co-determination at the company level enables the employees to participate in the formation of corporate policy. They are involved in economic planning and decisions that are of major importance for companies. Employee co-determination at the company level only exists in larger companies that are organized as joint-stock companies (e.g. AGs (public limited companies) and GmbHs (limited liability companies). Co-determination takes place in the supervisory board – the company’s monitoring body. The employees elect representatives to serve as members with equal rights on the supervisory board, participating in its monitoring functions and corporate decision-making processes.

From the legal perspective, this form of corporate co-determination is not part of labour law but company law. However, employee co-determination via the supervisory board is mentioned here for the sake of completeness.

02.10 Employee Meetings

An employee meeting (Betriebsversammlung) is a meeting of all the employees of an establishment (section 42(1) of the BetrVG). It is convened by the works council and chaired by the works council chairperson.

Pursuant to section 43 of the BetrVG, the works council must convene an employee meeting once a calendar quarter and give a progress report at this meeting (regular employee meeting). The employer must be invited to the employee meeting, having been informed about the agenda, and is entitled to speak at the meeting. At least once a year the employer must report to an employee meeting on human-resources and social-welfare matters – including the situation as regards the equal treatment of women and men and the integration of foreign employees at the establishment – as well as the economic situation and development of the establishment and operational environmental protection, insofar as there is no risk of jeopardising company or trade secrets (section 43(2) sentence 3 of the BetrVG).

In addition to the regular quarterly employee meetings, the works council can convene extraordinary employee meetings if there are special reasons. This is always the case if there are issues to deal with in the establishment that require urgent discussion at an employee meeting (e.g. the threatened closure of the establishment). Case law makes strict demands on the urgency of the issues to be treated. The works council is obliged to convene an extraordinary employee meeting at the request of the employer or a quarter of the employees with voting rights (section 43(3) of the BetrVG).

Regular employee meetings and extraordinary employee meetings convened at the employer's request must on principle be held during working hours. They may only be held outside of working hours if this is unavoidable because of the particular nature of the establishment's operations. The employees must be paid for the time spent participating in the meetings and for any additional home-to-office time in the same way as for hours worked. Travel expenses incurred by employees when they participate in the meetings must be reimbursed by the employer (section 44(1) of the BetrVG).

Extraordinary employee meetings convened on the initiative of the works council or at the request of a quarter of the employees entitled to vote must on principle be held outside of working hours and without any compensation for lost leisure time. However, the works council and the employer can also agree to hold the extraordinary employee meeting during working hours. In this case, the employer is not entitled to cut wages and salaries.

B Individual Labour Law

Hiring 01

'Hiring' is defined as the entire process beginning with the job advertisement until the person concerned actually starts working.

01.1 Job Advertisement

The employer alone defines job specifications. However, s/he must ensure that they are formulated in a gender-neutral manner, unless a certain gender is an indispensable prerequisite for the position to be filled. Furthermore, the job advertisement must not indicate any discrimination based on race, ethnic origin, religion or belief, age, disability and/or sexual identity. Otherwise there is a risk of claims for damages if applicants are rejected.

According to the Part-Time Work and Fixed-term Employment Contracts Act [TzBfG], the employer is required to also advertise a job as a part-time job. However, this only applies if the job is suitable for part-time work and there is no other management concept that might be an obstacle.

The job can be advertised within the establishment and/or outside the establishment. An existing works council can demand that a job be advertised within the establishment before the position is filled.

Practical tip
When filling any vacancy, the employer must also check whether the vacancy can be filled by a person who is severely disabled. The employer must therefore contact the responsible Federal Employment Agency at an early stage. This obligation exists regardless of whether any applications have been received from severely disabled people or not.

01.2 The Employer's Obligations during the Hiring Procedure

When contract negotiations begin, a relationship of trust comes into being between the employer and the applicant which is similar to a contract and imposes a code of conduct on the employer and the applicant – irrespective of whether the two sides ultimately agree on an employment contract or not.

The employer must inform the applicant about the job requirements and any exceptional and unusual demands made by this position, for example if the job involves especially severe strain on health or frequent business trips abroad.

Furthermore, the employer is not allowed to create false expectations among applicants. For example, the employer must not falsely encourage the applicant to believe that s/he will get the advertised job. This is because, under certain circumstances, the employer will be liable for damages if the applicant quits his/her present job on the (unfounded) hope that s/he will be given the job.

01.2.1 Handling application documents

The employer is obliged to treat the applicant's application documents with care and to keep them in a safe place. The employer must maintain silence on the contents of the application documents.

Practical tip
The employer should not write any comments on the application documents, especially nothing that might be construed as discrimination.

Once the decision has been taken that no employment contract will be signed, the application documents must on principle be promptly returned to the applicant. The only exception is if unsolicited application documents are received, in which case the employer does not need to react. They documents only have to be returned if the applicant enclosed a stamped addressed envelope.

01.2.2 Job interview costs

If the employer asks an applicant to come for a job interview in person, the applicant is entitled to reimbursement of travel expenses and any board and lodging costs incurred in order to attend the interview. If the employer is not prepared to pay these costs, s/he must inform the applicant in advance.

Practical tip
In order to avoid from the outset any dispute on the reimbursement of interview costs, the employer should inform the applicant in the invitation to the interview whether and what costs will be reimbursed.

01.3 The Applicant's Obligations during the Hiring Process

The applicant must voluntarily disclose certain facts to the employer if s/he recognizes that these are important for the prospective job. This disclosure obligation on the part of the applicant applies to facts that would make it impossible for the employee to meet the obligations of the employment contract or are of key importance for the job to be filled. In this context, for example, the applicant might be obliged to disclose that s/he is subject to a restraint on competition. On the other hand, she would be under no obligation to mention an existing pregnancy. Similarly, the applicant is not required to disclose a severe disability unless this would prevent him/her from performing the work required.

01.4 The Employer's Right to Ask Questions

The employer is free to hire the applicant of his/her choice. Before hiring an applicant, the employer is entitled to build an accurate picture of the respective applicant's suitability and to ask him/her questions to this purpose. The employer's right to information conflicts with the employee's right not to be exposed to discrimination by certain questions or to have his/her privacy unduly investigated. The employer may therefore only ask questions that are both justified by an objective interest and relevant to the future employment relationship. An applicant does not have to answer questions that do not fit this definition, because the employer is not allowed to base his/her choice on the

answer to such a question. The applicant can even go further: s/he may even lie in reply to an inadmissible question.

It is therefore important for the employer to know what questions s/he may ask:

– Career history
  Questions on the applicant's career history, professional experience and knowledge are permitted and must be answered truthfully by the applicant.

– Marital status, marriage intentions, desire to have children
  These questions are not allowed because of the risk of discrimination.

– State of health
  Questions about the applicant's health are only permitted to the extent that they concern the employee's ability to perform the corresponding work.

– Union membership
  Questions about union membership are not permitted on principle.

– Attachment of wages / salaries
  Questions about ongoing wage and salary attachment proceedings are allowed.

– Religious affiliation / party membership
  Questions about religious affiliation or party membership are not permitted, although exceptions exist in the case of certain denominational or party-political institutions.

– Pregnancy
  Questions about pregnancy are not permitted.

– Severe disability
  Following recent developments in legislation and case law, questions about a severe disability are probably no longer permissible. Questions about a severe disability can be permissible only if the employer has a special interest in the information because of the requirements of the position to be filled.

– Past remuneration
  Questions about the applicant's last wage / salary are supposed to be permitted if the previous earnings are relevant for the desired position or if the applicant has voluntarily demanded this amount as a minimum payment.

– Criminal convictions
  Questions about previous criminal convictions are permitted if this information is of importance for the type of position to be filled (e.g. property offences for cashiers, traffic offences for drivers).

If an employee withholds information on a fact which s/he has a duty to disclose, or knowingly gives a false answer to a permissible question put by the employer, this usually entitles the employer to challenge the employment contract on grounds of fraud. If the employee has already started work, the challenge leads to the termination of the employment relationship for the future.

Case

During a job interview for a cashier's job in a department store, applicant A falsely states that she is not pregnant. She also states that she has no previous criminal convictions, although she was given a suspended sentence by her old employer two months ago for theft.

Solution: According to the above, the applicant may lie in answer to the question as to whether she is pregnant. However, she must tell the truth about her previous convictions if, as in this case, these are property offences (e.g. theft or embezzlement, etc.).

01.5 Personal History Form

The employer can also ask all relevant questions about an applicant's personal relations, performance, knowledge, skills, capabilities, career history and so forth in a personal history form. However, the employer may only use it to ask questions which s/he would also be entitled to ask in a job interview (see chapter B section 01.4). The introduction and contents of the personal history form are subject to works-council co-determination pursuant to section 95 of the Works Constitution Act [BetrVG] (see chapter C section 03.2.3 on this).

01.6 Medical Examinations

In the context of an applicant's health suitability, the question arises as to how far medical examinations and alcohol- and drug-screening tests are permitted. A medical examination is mandatory before young people can be hired; otherwise it is voluntary. Applicants are thus entitled to refuse a medical (or psychological) examination. Furthermore, a medical examination represents a considerable encroachment on the applicant's personal freedom and therefore requires his / her explicit consent. Because the physician is bound by the principle of medical confidentiality, s/he may only communicate the results of the examination to the employer, i.e. only whether the applicant is 'fit', 'partly fit' or 'unfit'. The doctor is not allowed to disclose individual diagnoses or findings to the employer.

01.7 Participation of the Works Council

In a company that normally has more than twenty employees, any works council that exists must be informed and its approval obtained before a person is hired (see chapter C section 03.4.1).

The Employment Contract 02

An employment contract is a private-law contract on dependent employment. It establishes a legal relationship between the individual employee and the individual employer – the employment relationship.

02.1 Conclusion of the Employment Contract

The law does not prescribe any specific form for the conclusion of a contract of employment. An employment contract can be concluded orally or in writing. It can even be established 'tacitly' through a 'passive manifestation of will' – i.e. without the employer and the employee expressly making any statement, e.g. if the employee starts work and the employer does not object.

Important
If the employer only wants to conclude an employment contract for a limited period, the contract must be concluded in writing pursuant to the Part-Time Work and Fixed-term Employment Contracts Act [TzBfG] (see chapter B section 03 on fixed-term employment contracts).

In some cases, collective agreements also lay down certain formalities for establishing employment relationships.

Excursus – Contract and employment bans

Contract ban

If an employment contract violates a contract ban it is null and void. In other words, the contract is treated as though it was not concluded in the first place. Contract bans can result from the law, a collective agreement or a works agreement. For example, employment contracts with children under 14 years of age are null and void.

Employment bans

By contrast, employment bans do not prevent the effective conclusion of the employment contract. They forbid the employment of the employee altogether or cover only certain activities such as physically demanding work. They are frequently only effective for a limited time. They may result from laws, regulations, collective agreements or works agreements. Special employment bans apply, for example, for young people and expectant mothers.

If a person is employed despite an existing employment ban, the employer may be held liable for any damage thus caused – e.g. damage to the health of young people, expectant mothers or newborn children. Violations of individual employment bans are punishable by fines; in some cases they can lead to prosecution.

Furthermore, by invoking an employment ban the employee can refuse to perform work that has been demanded of him/her without violating the employment contract.

02.2 Written Record of the Main Terms of the Employment Contract pursuant to the NachwG

Although the law does not prescribe any specific form for the conclusion of an employment contract, the employer must record the essential contractual conditions in writing, sign the written record in his/her own hand, and hand this written record to the employee no later than one month after the contractually agreed starting date of the employment relationship. This obligation of the employer is laid down in the Law on Notification of Conditions Governing an Employment Relationship [NachwG].

Practical tip
The one-month deadline begins on the agreed starting date of employment, not on the date on which the employee actually starts working. The fact that the employee may perhaps start work later, for example because s/he was sick on the agreed starting date, is irrelevant.

The NachwG lays down which specific terms of work the employer must include in this written record. These include, for example:

– Date on which the employment relationship begins
– Brief description of the work to be performed by the employee
– Components and amount of pay
– Agreed working hours
– Amount of annual holiday
– Periods of notice

If the employer does not duly meet his/her obligation to produce a written record, s/he will be at a disadvantage when it comes to furnishing proof in court in the event of a dispute. Incomplete (or lack of) evidence can force the employer to prove that the agreement differs from what the employee claims. Claims for damages against the employer are also conceivable.

02.3 Contents of the Employment Contract

In principle, the parties to the employment contract can freely determine the contents of the employment contract. However, every employment contract should meet certain minimum requirements on content. For example, the minimum requirements listed by the NachwG should be agreed in writing. The freedom to choose various legal arrangements is limited by mandatory statutory law, collective agreements and works agreements.

An invalid individual clause in a contract does not in principle automatically invalidate the entire agreement. Usually, the contract remains in effect, and thus binding, with the exception of the invalid clause. The only disadvantage is that the employer cannot invoke the invalid clause. If there are doubts as to the contents of clauses, this is to the detriment of the user, i.e. usually the employer who submits a certain model contract.

Fixed-term employment contracts 03

An employee is deemed to be employed for a fixed term if s/he has concluded an employment contract stipulating a certain period. A fixed-term employment contract therefore ends on expiry of a specific term (time limit) or on completion of a certain task (purpose-related limit) without any need for dismissal.

The legal basis for fixed-term employment contracts is initially the Part-Time Work and Fixed-term Employment Contracts Act [TzBfG]. Special statutory provisions must also be observed. Furthermore, in some regions collective agreements contain special provisions on the conclusion of fixed-term employment contracts. Such collective-agreement provisions can expand or limit the basic requirements of the TzBfG.

03.1 Types of Fixed-term Contracts

Fixed-term employment contracts can have a time limit or a purpose-related limit.

An agreement is said to have a time limit if its term can be fixed according to the calendar. This means either that the contract mentions a final date or that the beginning and the term are laid down in terms of weeks, months or years.

If the employment contract has a purpose-related limit, the duration of the employment relationship is determined by the type or the purpose of the work to be performed. If the term has been effectively limited, the employment relationship ends once a certain task has been completed. A typical example of a purpose-related limit is when someone is hired as a substitute for a sick member of staff, and it is unclear when this employee will be able to return to work.

03.2 Written Form

Case

Employee A and employer B agree orally on 20 October that A is to be employed by B for a fixed term: during the months of November and December. A starts work as planned on 01 November. However, the contracting parties do not sign a corresponding written agreement until 10 November. A now declares in January that he is still employed by B and that the employment relationship remains effective. Is A right?

A fixed-term employment contract must be made in writing in order to be effective, pursuant to section 14(4) of the TzBfG. The time limit is invalid if the written-form requirement is not met, with the result that the employment relationship is deemed to be permanent. This permanent employment relationship can, of course, be terminated by routine dismissal (i.e. by giving notice), although in this case the provisions of general and special protection against dismissal must be observed.

The written-form requirement must be met before the contract begins or before the employee starts work; it cannot be met at a later date with retroactive effect. The common practice of a fixed-term employment contract being initially agreed orally and only later formulated in writing is inadmissible.

Solution

The fixed-term employment contract that was only agreed orally in October does not become retroactively effective as a result of A and B formulating it later in writing. Rather, a permanent employment relationship exists.

These principles apply not only to the conclusion of a fixed-term employment contract, but also to the extension of a fixed-term employment contract.

In the case of fixed-term employment with material reason (Sachgrund), the material reason does not have to be recorded in writing. In the event of a dispute, the employer must only prove that the material reason objectively existed when the fixed-term contract was concluded. Similarly, there is also no compelling requirement to include in the contractual document a reference to fixed-term employment without material reason. There is no 'citation requirement' (cf. Article 19(1) of the Basic Law).

The situation is different in the case of fixed-term employment based on a purpose-related limit. Here, the task to be completed must always be agreed in writing for the fixed-term contract to be effective and must be expressly mentioned in the contractual document.

03.3 Fixed-term Employment without Material Reason

Case

Employee A and employer B have agreed a valid fixed-term employment contract for a period of six months up to 30 November. B wants A to work for her for an additional two months. On 01 December, A and B agree in writing that A is to be employed by B on a fixed-term basis for a further two months. On 01 February of the following year, A comes to B and claims that a permanent employment relationship exists between them. Is A right?

Pursuant to section 14(2) of the TzBfG, a fixed-term employment contract without material reason can be agreed if the employment contract does not exceed a total duration of two years, including a maximum of three extensions. However, such a fixed-term employment contract without material reason is only permitted if the employee concerned has not had a fixed-term or permanent employment relationship with the same employer before. The time interval between the previous employment relationship and the present fixed-term employment relationship without material reason is irrelevant.

The term 'same' employer always relates to the contract employer, i.e. the legal entity or natural person concluding the employment contract with the employee.

The fixed-term employment without material reason can be extended up to three times within a total time period of two years. Four fixed terms can thus follow each other consecutively on condition that the extensions follow each other without interruption. Even an interruption of only one day precludes a valid extension. The agreement on an extension must already be legally effective – i.e. concluded in writing – before the expiry of the last fixed term.

Solution

A permanent employment relation has come into existence between A and B. For an additional fixed term, A and B would have had to conclude a written renewal agreement no later than 30 November. The later conclusion of the agreement – on 01 December – precludes a valid extension. A fixed-term contract without material reason up to January 31 of the following year is thus not possible.

A valid extension agreement also requires on principle that the previous working conditions remain unchanged and are certainly not changed with the extension.

Special stipulation for start-up companies: Section 14(2a) of the TzBfG further eases restrictions on fixed-term employment without material reason for start-up companies in their first four years. The exceptions do not apply to start-ups launched in connection with the legal restructuring of groups or companies.

Fixed-term employment of employees aged 52 or older: Section 14(3) of the TzBfG allows the fixed-term employment without material reason of employees aged 52 and over for up to five years. One precondition of such a fixed-term contract is that the person concerned must have been unemployed for at least four months beforehand.

03.4 Fixed-term Employment with Material Reason

If the prerequisites for fixed-term employment without material reason are not met, for example because the employee already worked for the same employer at an earlier date, fixed-term employment is only legally effective if it is justified by a material reason (Sachgrund) pursuant to section 14(1) of the TzBfG, which

names such material reasons. This list of material reasons in the Act is not final, i.e. material reasons other than those listed in section 14(1) of the TzBfG are conceivable.

Several consecutive fixed-term employment contracts with material reason are permitted on principle and are not limited by law. However, the demands on the material reason become increasingly strict, the longer the employment relationship continues.

The material reason must have objectively existed at the time of conclusion of the contract. The duration of the agreed fixed-term contract must relate to – and be consistent with – the material reason for the fixed term in such a way that it does not conflict with the existence of the material reason.
If it turns out at a labour-court hearing that in fact no material reason existed, or that the reason was used as a pretext, the fixed-term employment relationship will be deemed to be permanent.

03.5 End of a Fixed-term Employment Relationship

A fixed-term employment contract with a time limit ends with the expiry of the agreed term, so that no notice needs to be given.

A fixed-term employment contract with a purpose-related limit ends in principle when the purpose has been achieved – but no earlier than two weeks after the employee has received written notification from the employer that the purpose has been achieved. A combination of fixed-term employment with a time limit and purpose-related limit is also permitted.

If the employment relationship is continued with the knowledge of the employer after the end of the fixed term, it is deemed to have been extended indefinitely pursuant to section 15(5) of the TzBfG, unless the employer objects immediately or immediately informs the employee in writing that the purpose has been achieved.

03.6 Termination of a Fixed-term Employment Relationship during its Term

Pursuant to section 15(3) of the TzBfG, a fixed-term employment relationship can on principle only be terminated by giving statutory notice (routine dismissal) if this has been expressly agreed.

Wording example

The fixed-term employment relationship can be terminated by either party during its term by giving the respective statutory period of notice.

If there is no such provision, the fixed-term employment relationship can on principle only be terminated for cause without notice. If the company has a works council, it must be given an opportunity to participate pursuant to section 102 of the Works Constitution Act [BetrVG] before the employment relationship is terminated.

03.7 Right of Fixed-term Employees to Sue

An employee with a fixed-term employment contract is entitled to have the legal effectiveness of his / her employment relationship examined by a court. To do this, s/he must bring a court action at the labour court no later than three weeks after the agreed end of the fixed term. Only the last fixed term is examined on principle – even if there have been several consecutive fixed-term periods. Issues examined can include whether a material reason was necessary and whether it really existed the contract was concluded, or whether a fixed-term employment without material reason was permissible. If the court finds that the fixed-term employment relationship is invalid, the employment relationship is continued as a permanent contract.

Probationary Period / Probationary Employment 04

Probationary periods can occur in two different forms:

– If a probationary period is agreed in the context of an employment relationship that has been ‘permanent’ from the outset
– If a probationary employment relationship is agreed

A strict distinction must be made between a probationary employment relationship and the agreement of a probationary period.
It is often assumed that the agreement of a probationary period lasting several months automatically creates a fixed-term contract (with a time limit). However, this is not the case. Just agreeing a ‘probationary period’ in the contract of employment does not mean that the employment relationship ends after the probationary period.

Rather, a fixed-term probationary employment relationship that automatically ends on the expiry of the probationary period must be unequivocally and expressly agreed in writing. If only a ‘probationary period’ is agreed, this is usually a permanent employment relationship.

The permissible duration of a fixed-term trial period or probationary period primarily depends on the type of work for which the employee was hired. This will be shorter for ‘simple activities’ than, for example, for highly qualified work such as scientific research. As a rule, however, it must not be longer than six months. This is a consequence of the Protection Against Dismissal Act, which grants the employee statutory dismissal protection after six months. So even if a probationary period longer than six months is agreed, it is meaningless because protection against dismissal automatically applies after this period. Furthermore, in some cases special laws expressly stipulate a shorter probationary period. For example, the probationary period for a trainee relationship must not exceed four months. The duration of probationary periods can also be limited to less than six months by collective agreements.

It is permissible to agree on a statutory period of notice of two weeks during the probationary period, but for no longer than a period of six months. This two-week notice period need not be tied to a certain target date; it can expire at any time. If such a shortened notice period has been agreed, notice can even be given on the last day of the probationary period, even if the notice period ends after the probationary period.

Rights and Obligations Ensuing from the Employment Relationship 05

Under an employment relationship the employee is obliged to perform the work owed, and the employer owes the payment that has been agreed for this work. These two obligations are called the main obligations to perform. They are linked in a reciprocal relationship and are directly dependent on each other. The 'no work, no pay' principle applies.

In addition to these main obligations to perform, there are secondary obligations such as the employee's duty of loyalty, duty to inform and duty of disclosure, and the employer's duty to grant holiday and to continue paying wages and salaries in the event of the employee's inability to work.

05.1 Duties of the Employee

05.1.1 Obligation to work

The employee's main obligation to perform within the employment relationship is the obligation to work. The employee must fulfil this obligation in person, i.e. s/he cannot have someone else do the work in his/her place. The employee must work to the best of his/her ability in terms of both the intensity and the quality of the work. First and foremost, the work the employee has to do is defined in the employment contract. Frequently, the employment contract only describes the work very generally by referring to a job title. It might be agreed, for example, that the employee is hired to work as an 'accountant'. Within the scope prescribed by the employment contract, the employer can then exercise his/her right to issue instructions, i.e. to define the employee's obligation to perform in greater detail. The employer or the individual supervisor may assign certain jobs to the employee and give him/her detailed instructions on what work to do and how to do it.

05.1.2 Binding nature of the employer's right to issue instructions

Case

The employment contract contains no provisions on the timing and distribution of the agreed 40 working hours per week.

Variation: The employment contract stipulates that the work must be performed from Monday to Friday from 08 a.m. to 05 p.m.

The right to issue instructions means the employer's right to unilaterally describe the employee's duties in greater detail. This relates both to the content and to the type of the work, and to when and where it is to be performed. The number of working hours is not subject to the right to issue instructions, however. The right to issue instructions is delimited firstly by the provisions of the employment contract. They define the framework for the binding instructions given by the employer. The more precise and detailed the performance owed according to the employment contract, the narrower is the scope for these instructions.

Solution

If the employment contract does not specify the timing of the hours to be worked, the employer can unilaterally lay down working hours within the limitations of the Working Hours Act.

Variation: However, if the employment contract requires that the work be performed from Monday to Friday from 08 a.m. to 05 p.m., the employer cannot give any binding instructions that deviate from this. S/He does not have the option of distributing the working hours thus agreed differently, for example on a Saturday.

However, a proviso can be expressly agreed in the employment contract allowing individual working conditions to be unilaterally changed. The aim here is also to make it possible to change the allocation of the concrete obligation to work. Such contract elements are called transfer clauses, since they are also intended to allow the unilateral determination of an employee's area of work.

Wording example

The employer shall also be entitled to assign to the employee other reasonable and equivalent activities that correspond to his / her qualifications, experience and capabilities. In this case, the remuneration shall remain unchanged.

The place where the work is to be performed can be determined unilaterally by the employer within the geographical area of the establishment for which the employee was hired. There is also a restriction here if the employment contract contains a precise geographical description of the place of work. It is possible to broaden the right to issue instructions by expanding the above wording.

Wording example

The employee can also be deployed in another establishment or at another reasonable location in ...

The interests of both sides have to be weighed up, especially if the employee's area of work is affected and if the employer exercising the right to issue instructions would involve the employee being transferred. Apart from the stipulations agreed in the employment contract, the employer must not violate the law or other collective agreements when exercising his / her right to issue instructions. Even if the instruction or transfer is covered by the individual contract and does not violate other provisions, the employer must always check whether any works-council co-determination rights have to be observed.

05.1.3 Secondary obligations of the employee

Chapter overview

05.1.3.1 Duty to notify / furnish proof in the case of illness

The employee's duty to notify the employer and furnish proof when s/he is unable to work due to illness is regulated by section 5 of the Continued Payment of Wages and Salaries Act. These are secondary obligations of the employee.

05.1.3.1.1 Duty to notify

If an employee is unable to work due to illness, s/he is bound by law to notify the employer

– that s/he is unfit for work, and
– how long s/he is expected to be unfit for work.

On principle, an employee is not required to provide any information on the cause or type of his / her illness. An exception is made if a third party caused the injury leading to the inability to work. In this case, there is a legal obligation to provide the employer with all the information required in order to assert any claim for damages. This also includes the cause of the illness. There is also an obligation to disclose the type of illness if it means that the employer must take measures to protect other employees, or if a recurring illness is involved that impacts on the employer's obligation to continue paying wages and sal-

aries. So if an employee becomes unfit for work due to the same illness again, s/he must notify the employer that it is a recurring illness.

The notification must be made promptly. In this context, this means that the employee must inform the employer as quickly as the circumstances allow in the individual case. Usually, it is sufficient if the employee notifies the employer by telephone at the beginning of operational working hours. If the employee becomes unable to work at a time when s/he does not have to work – and will not have to work in the immediate future – the employee must notify the employer as soon as the employee can foresee that the inability to work will continue until s/he is expected to return to work.

No special form is prescribed. The notification can thus be made orally or in writing. If the employer is notified late because the employee's condition prevents him/her from reporting the illness in good time, this shall not be deemed to be a culpable violation of duty. However, it is important that the employee always informs the employer (or the office authorized to receive sick notes) as the addressee of the notification.

If the employee does not address his/her notification to the responsible office, s/he risks his/her notification not reaching the correct office in good time.

If the illness occurs abroad, the notification must be made as quickly as possible, quoting the holiday address.

05.1.3.1.2 Duty to furnish proof

Case

An employee falls ill on Friday before going to work and is unfit for work from this day up to and including Monday of the following week. The third day on which he is unable to work is the Sunday.

In addition to the duty to notify, the employee is obliged to furnish proof of his/her inability to work. This proof must be provided by means of a medical certificate of incapacity for work (sick note). It must be issued by a physician with a licence to practice in the medical profession (approbierter Arzt). The

employee may consult the doctor of his / her choice. The legal obligation to submit a sick note only applies after the employee has been unable to work for more than three days, i.e. on the fourth day. There is no duty to furnish proof if the employee is ill for up to three days. It should be borne in mind that the period is calculated in calendar days. Calendar days are all days including off-duty days, Sundays and public holidays.

Solution

On Monday, the sick employee must submit a sick note to prove his incapacity for work.

The employer can also demand that sick notes are submitted earlier. Such an obligation can be regulated generally in the employment contract, or else the employer can call on employees do so every time they are ill. If such a general demand is made throughout the establishment, any applicable works-council co-determination rights must be taken into account.

Again, the addressee for sick notes is the employer or the office authorized to receive them. A sick note must contain the name of the person who is unfit for work, the fact that the person is unfit for work, and how long the illness is expected to last; in the case of employees with statutory health insurance, it must also state that the responsible health insurance company has been informed.

05.1.3.1.3 Duty to notify and furnish proof if inability to work continues

The law does not make any express provision on the duty to notify and furnish proof in cases where the employee remains unable to work for longer than the period indicated in the doctor's sick note. However, since the law does not provide for any exceptions to these obligations, not even for the time after expiry of the six-week period during which payment of wages and salaries continues, the employer should insist on compliance with the provisions as in the case of the initial illness. This also applies if the six-week period has expired.

05.1.3.2 Duty of loyalty

The employee has a duty of loyalty and must on principle refrain from doing anything that is detrimental to the employer in his/her position as a contracting party. 'Duty of loyalty' is a generic term covering a large number of individual obligations including the duty to notify, the obligation of secrecy and an undertaking to refrain from competing with the employer (restraint on competition). An obligation not to make statements that damage the employer's reputation, for example, also ensues from the duty of loyalty. The existing duties of loyalty do not prevent the employee from pursuing his/her interests vis-à-vis the employer in the existing employment relationship.

05.1.3.3 Secondary employment

If an employee also exploits his/her capacity to work outside of his/her main employment relationship, this is referred to as secondary employment, irrespective of whether it is paid or unpaid (volunteering) work.

If the work is not based on a contractual agreement, the employee can in principal engage in the secondary activity without the employer's prior approval. S/He is only obliged to inform the employer that s/he intends to take on secondary employment if this might be detrimental to the employer's operational interests. If it does harm operational interests, the employer might be entitled to demand that the employee refrain from doing this work. This is the case, for example, if the employee's secondary employment is competing with the employer, if the employee is neglecting his/her obligations under the employment contract (e.g. by engaging in the secondary activity during working hours), or if the maximum working times under the Working Hours Act are being exceeded.

05.1.3.4 Restraint on competition

An employee must not compete with his/her employer during the employment relationship. Employees are not allowed to work for a competing employer, to run their own commercial enterprise within the employer's field of operations, or to do business in this field either for their own or for another's account. This ban does not require any specific provision in the employment contract. It applies for the duration of the employment relationship. After the employment relationship ends, employees are free to use their capacity to work as they

see fit. If this legal restraint on competition is to be expanded or limited in terms of content or time, this must be agreed between the employer and the employee.

Practical tip
An agreement banning competition after an employment contract has been terminated must be made in writing. The maximum period is two years. A compensation payment to the employee must be agreed for this period amounting to at least half of his / her last contractual payments for each year of the restraint on competition. In view of the considerable financial obligations involved, the limited prospects of revoking any restraint on competition once agreed, and the sophisticated form of contract required, any agreement on a restraint on competition after contract termination should only be considered in selected individual cases.

05.1.3.5 Obligation of secrecy

Even without any special agreement, every employee has a general obligation of secrecy under labour law. The employee must observe secrecy with respect to business and trade secrets. This applies in particular to information that is only known to a very limited group of people and which the employer has a justified interest in keeping secret.

The obligation of secrecy only applies during the period of the employment relationship. If the employee is to be obliged to maintain secrecy after the termination of the employment relationship, this must expressly agreed between the employer and the employee.

05.2 Liability of the Employee

Liability on the part of an employee is always a possibility if, during his / her work for the establishment, s/he violates a duty leading to damage. Such damage might include personal injury, damage to the employer's property or to the property of customers or suppliers, or poor workmanship (e.g. the production of rejects).

05.2.1 Personal injury

The employee is not liable for personal injuries caused by a work accident. Liability is only a possibility in the case of malicious personal injury or an accident that happens on the way to or from the workplace.

05.2.2 Damage to property

An employer's claim for damages is only a possibility in the case of a culpable violation of duty by an employee (or his / her failure to act) causing damage to the employer.

All kinds of negligence are sufficient to justify the assumption of fault on the part of the employee, so that the latter would also be liable for the slightest negligence.

The strict liability that results from this is restricted in the employment relationship. The case law of the Federal Labour Court is based on a three-stage model of liability. According to this model, internal loss adjustment in the case of work initiated by the establishment on the basis of the employment relationship is regulated as follows:

– the employee is not liable for 'slightest' negligence;
– in the case of ordinary negligence, the damage is shared;
– in cases of gross negligence and intent, the employee is fully liable.

However, a reduction of liability is even a possibility in the case of gross negligence, if settling the damage that has occurred would endanger the employee's livelihood.

05.2.3 Damage to the property of customers and suppliers

The principles on the limitation of liability in the case of work for the establishment only apply in the relationship between the employer and the employee. However, in areas in which the employee would not be liable in the internal relationship with the employer according to the principles of internal loss adjustment, s/he has a right of indemnity vis-à-vis the employer.

05.3 Duties of the Employer

05.3.1 Payment of wages and salaries

The employer must pay the employee for his/her work. As a rule, wages and salaries are paid monthly. The remuneration owed by the employer is generally a gross remuneration, i.e. taxes and social security contributions must be deducted from it according to statutory provisions. Subject to relevant collective-agreement provisions, the parties are in principle free to agree any level of remuneration. However, if there is a particularly extreme disparity between the work performed and the remuneration, the agreement may be deemed immoral and thus null and void. In such cases, the employee has a claim to what is called 'normal remuneration' (übliche Vergütung).

05.3.2 Secondary obligations of the employer

Chapter overview

05.3.2.1 Granting of holidays

The most important statutory provisions on holiday are found in the Federal Holiday Entitlement Act [BUrlG]. Holiday is a statutory exception to the 'no work, no pay' principle.

05.3.2.1.1 Holiday entitlement and duration of holiday

An employee becomes entitled to holiday leave for the first time after a six-month waiting period; the decisive factor here is the legal status of the employment relationship. If the employee ends the employment relationship before the expiry of the six-month waiting period, s/he has a claim to one-twelfth of the annual holiday for each full month of the existence of the employment relationship. If dividing the annual entitlement by twelve results in fractions of days of holiday amounting to at least one half day, these must be rounded up to a full day of holiday.

After the expiry of the waiting period, the employee becomes entitled to the full holiday at the beginning of each calendar year. Apart from the case mentioned of an employee leaving before the expiry of the waiting period, there are only two other statutory cases in which the holiday entitlement or partial holiday entitlement is reduced.

The employee has a partial holiday entitlement if the waiting period is not completed in a calendar year. Another example of partial holiday entitlement is if the employee leaves in the first half of a calendar year after completing the waiting period. In this case, the division by twelve is repeated. If the employee leaves in the second half of the year, however, the full annual holiday entitlement applies.

The duration of the annual holiday entitlement (i.e. the number of days) is regulated by law. It amounts to a minimum of 24 working days; Saturday is also considered a statutory working day. The law thus bases its calculations on a six-day week. A conversion has to be made in cases where the working hours are evenly distributed among more, or less, than six days per week. The entitlement of 24 days is divided by six. The result (4) is then multiplied by the number of regular working days per week. The question as to how long the employee has to work on each individual day is irrelevant. This is not a decisive factor.

Case

An employee on a five-day week has an annual holiday entitlement of 20 working days. The employment relationship begins on 01 October 2007. How many days of holiday does the employee have on 31 December 2007?

Solution: The employee is entitled to 3/12 of the annual holiday – i.e. five days – for this calendar year.

The duration of holiday must be recalculated if the number of regular working days in the current employment relationship is changed. The essence of the holiday entitlement is the entitlement to be released from work and to receive holiday pay. The holiday pay is calculated from the average earnings received by the employee over the last 13 weeks before the start of the holiday. Additional remuneration received for overtime is not considered here. There is no legal entitlement to holiday pay.

05.3.2.1.2 Restriction of the holiday entitlement

The holiday entitlement is always limited to the respective calendar year. If the holiday cannot be granted and taken during the current calendar year for urgent operational reasons, or for the employee's personal reasons, it can be carried over up to 31 March of the following year (transfer period).

Any holiday that is not taken by the end of a calendar year or the transfer period is cancelled on principle. In an ongoing current employment relationship there is no entitlement to a money payment as compensation. In the same way, an existing legal holiday entitlement cannot be 'bought off'. Holiday must be actually granted and taken.

05.3.2.1.3 Taking holiday

The employer determines when the holiday is to be taken. The employer determines when the holiday begins and when it ends. The employee's holiday preferences must be taken into consideration in this context as long as they do not conflict with urgent operational needs or the holiday preferences of other employees who deserve priority for social reasons. Once the time for the holiday has been set, this has a binding effect, i.e. the employer cannot on principle unilaterally cancel holiday that has been granted.

Practical tip
Inability to work leads makes it impossible for an employee to take the holiday. If an employee falls ill during holiday, the days on which s/he is proven by a medical certificate to have been unable to work are not to be counted against the annual holiday.

05.3.2.1.4 Holiday compensation

This is an entitlement to payment of a sum of money as compensation for unused holiday entitlements. It only applies if the holiday cannot be taken because the employment relationship has been terminated. Holiday compensation is excluded during an ongoing employment relationship. Another precondition is that there must be enough time left between the termination of the employment relationship and the end of the calendar year or the transfer period for the employee to take the holiday to which s/he is entitled. Up to now, this condition was not met if the employee was prevented by illness from using the holiday entitlement by the end of the transfer period. Compensation was therefore excluded. According to a new ruling by the Federal Labour Court, the employee's holiday claim now does not lapse in such cases. The amount of the claim corresponds to the amount of holiday pay that would have been payable for the holiday entitlement.

05.3.2.1.5 Special legal provisions

Book Nine of the Social Security Code [SGB IX], for example, provides for an additional holiday entitlement of five days per holiday year for severely disabled people. Section 19 of the Protection of Young People at Work Act provides for a minimum holiday entitlement for young people under the age of 18 that is graduated according to age.

05.3.2.2 Sick pay, payment of wages and salaries on public holidays

The Continued Payment of Wages and Salaries Act, which provides for the continuation of remuneration in the event of illness and on public holidays, represents an exception to the 'no work, no pay' principle.

The continuation of payments on public holidays

The precondition here is that the working time is cancelled solely because of a public holiday, and the loss of working time is not due to other reasons such as the employee being assigned to a nonworking shift. In this case, an employee is entitled to the remuneration which s/he would have received without the loss of working time. There are no other preconditions for the continued payment of wages and salaries on holidays (e.g. a certain length of service).

Sick pay

The general precondition here is an employment relationship that has not been suspended and has existed without interruption for at least four weeks. Not every illness results in an employee being unable to work. Rather, the illness must make it impossible or unreasonable for the employee to perform the work owed according to the employment contract. Only then is an employee deemed 'unable to work'. Medical preventive-care and rehabilitation measures have the same status.

If an employee is unable to work and this is the only cause preventing him/her from working, the employee is in principle entitled to the remuneration to which s/he would be entitled for the regular contractual number of working hours.

If the employee has not properly met his/her duty to notify the employer and to furnish proof, continued payments can be refused until these obligations are met.

The entitlement begins on the first day the employee is unable to work and lasts for a maximum period of six weeks. If a new illness begins during the ongoing sick-pay period, the time period remains limited to these six weeks. If a new illness causing inability to work begins after the expiry of the sick-pay period, a new time period begins. A case of recurring illness is treated differently. Such a case is deemed to exists if the employee is again unfit for work due to the same illness. In this case, the employee is only entitled to sick pay again if s/he has been able to work for six months in the meantime or if twelve months have elapsed since the start of the first period of inability to work due to the same illness. The entitlement is excluded if the employee is to blame for his/her inability to work. The yardstick applied here is 'gross negligence against oneself'.

05.3.2.3 Employer's obligation to inform and explain

The employer has a particular obligation to inform employees about their tasks and responsibilities, the type of work to be performed and its place in the establishment's work sequence. The employer must also inform them in particular about safety rules, as well as accident and health hazards. These are legal obligations. Each new employee must be given initial instruction when s/he starts work. The need for subsequent instruction will depend on the development of the area of work, work materials, technology and hazards.

Responsibility for compliance with the health-and-safety and accident-prevention regulations lies initially with the employer and the safety experts s/he must appoint. However, the Labour Protection Act also allows the employer to entrust reliable and expert people with the task of ensuring compliance with this Act. For example, an executive manager can be appointed in writing to take charge of this. Negligent or intentional violations of the health-and-safety regulations can result in fines of up to 25,000 Euro and lead to criminal proceedings in the case of serious work accidents.

05.3.2.4 Duty of care

The employer has a general duty in respect of the care and supervision of the employees. This includes in particular the protection of personal rights and, in individual cases, obligations to provide information and protect the employee's personal belongings.

Working Hours 06

Working hours are regulated by various laws. A distinction is made between the 'public' and 'private' laws on working hours. The first category is essentially regulated by the Working Hours Act [ArbZG]. The ArbZG lays down the basic standards on when and how long an employee is allowed to work (maximum working hours). It is part of the overall field of industrial safety and addresses the employer. However, the ArbZG allows deviations to be made in collective agreements, so that, in practice, working hours are largely determined by the corresponding provisions of collective agreements – if any exist.

The provisions of private laws on working hours are typically the subject matter of works agreements and less frequently of collective agreements and individual employment contracts. They can also result from the working hours that are routinely practised at the establishment.

06.1 The Working Hours Act

06.1.1 Scope

The ArbZG applies to all wage-earners, salaried employees and people employed for their vocational training, regardless of the type of establishment in which they are employed. However, it does not apply to executive staff. The employment of young people (i.e. people under the age of 18) is regulated solely by the Protection of Young People at Work Act. The provisions of the Maternity Protection Act must also to be taken into account if pregnant women and nursing mothers are employed.

The ArbZG applies only on the territory of the Federal Republic of Germany. It therefore does not apply on principle to employees who are employed abroad, regardless of how long they work there. Similarly, the ArbZG does not apply to employees who are temporarily deployed abroad.

Example

An employee is transferred to an Asian country for five months for the assembly of a power plant. This country has no laws restricting maximum daily working hours. The employee cannot demand that his/her employer observe the provisions of the ArbZG.
However, different rules would apply if the employer had expressly agreed to observe the provisions of the ArbZG in an employment contract with the employee.

06.1.2 What constitutes working hours?

Working hours are defined as the time from the beginning until the end of the actual work done, i.e. the time spent at the workplace. Breaks and all private work interruptions (e.g. telephone calls, surfing the internet) are not part of working hours.

Times when the demands made at the workplace are lower, e.g. during standby or emergency duty, are fully counted as working hours. In the case of on-call service, however, only the periods during which the employee are actually working count.

Preparatory and follow-up work also count as working hours.

Example

Issue of materials by employers or cleaning the workplace.

The time required for changing clothes and washing is also counted as part of working hours if these activities are officially ordered.

Example

Wearing protective clothing or work uniforms is compulsory.

Home-to-office time, however (i.e. the time needed to travel from home to the workplace in the establishment), is not deemed part of working hours. Unless a different operational agreement has been concluded with the works council, working hours do not begin when employees enter the establishment site, but when they start work at their workplace.
It is not always easy to judge whether travel time should be deemed part of working hours. In principle, travel time is not a part of working hours. However, there are numerous exceptions:

– The employee is doing his/her job by travelling.

Example

A service technician uses his car to visit several customers in one day in Munich, Augsburg and Ingolstadt. He spends a total of three hours with the customers. He spends the remaining five hours in the vehicle. On this day the employee has worked eight hours, not just three.

– The employee does his/her regular work during a trip.

Example

A sales rep processes offers for other customers during a train trip to visit a customer.

– The employer instructs the employee to drive.

06.1.3 Daily (maximum) working hours

The Working Hours Act [ArbZG] is based on a six-day week. Saturday is regarded as a normal working day.
In principle, employees have an eight-hour day on working days. The number of working hours may be increased to ten hours on working days, but only on condition that an average of eight hours per working day is reached within an equalization period of six months or 24 weeks.

Example

An employer notices a sudden increase in the amount of work to be done. She can therefore extend the working hours to ten hours per working day for four weeks, if the employees only work for six hours per working day for four weeks over the next six months.

To summarize:

Maximum:
per day 10 hours
per week 60 hours

Average (over six months or 24 weeks)
per day 8 hours
per week 48 hours

Exception 1 – Pregnant women and nursing mothers

They are not allowed to work between the hours of 08 p.m. and 06 a.m. or to work overtime. Overtime is any work done by pregnant women or nursing mothers under 18 years of age for more than eight hours a day or 80 hours in two weeks.

In the case of pregnant women and nursing mothers over the age of 18, overtime is defined as more than eight hours per day or 90 hours in two weeks.

Exception 2 – Special provisions for young people

They are not allowed to work more than eight hours a day or more than 40 hours a week.

06.1.4 Breaks

Break times do not count as working hours. Employees must therefore neither work nor be available for work during their breaks. They can decide freely where and how they spend the time. If the establishment has regulations on breaks, this must definitely allow the employee to refrain from performing any work.

No employee is allowed to work for more than six hours without a break. A break must be taken after this. If the working day lasts between six and nine hours, the daily break totals half an hour. If work takes longer than nine hours, the break totals three-quarters of an hour.

Break times

up to six working hours	no break
six to nine working hours	half hour break
more than nine working hours	Forty-five minutes break

Example

Employees on an eight-hour day do not have to take a further break in addition to their half-hour break if they work a maximum of one hour of overtime per day. If they work for more than nine hours, they must take an additional quarter of an hour break before doing any overtime.

The total break time can be divided into quarter of an hour breaks.

Example

An employee has to work for ten hours on a given working day. He must be allowed to take his the first break of at least 15 minutes after six hours at the latest. If this first break is given after two and a half hours, a second break must be given after a further six hours at the latest.

The ArbZG does not lay down when breaks must be taken. However, at the beginning of the working day, a certain timeframe must be fixed within which employees can take their breaks. Breaks may not be placed at the beginning or the end of the working day. The employer must take action to ensure and monitor that the breaks are actually taken.

Any coordinated setting of break times is subject to works-council co-determination rights.

Special provisions for young people

Break times for young people are regulated by law differently from the above: they must have at least a half hour break if they work for four and a half up to six hours. If they work more than six hours, a break of at least one hour is compulsory.

The Ordinance on Workplaces states that the employer must provide an easily accessible room for breaks in establishments with more than ten employees.

06.1.5 Rest periods

At the end of the working day, there must be an uninterrupted rest period of at least eleven hours between two work shifts. Home-to-office and on-call service times count towards rest periods. The rest period is not tied to the calendar day. It must only be between two periods of work.

Example

If the working day on 11 March 2007 ends at 06 a.m., the employee may not start work again until 05 p.m. on 11 March 2007 at the earliest.

If this rest period is interrupted, the eleven hour timeframe begins again.

Special provisions for young people

They are not permitted to work again for twelve hours after the end of a working day.

6.1.6 Night work

Night work is any work lasting more than two hours during the night-time period between 11 p.m. and 06 a.m. Staff who normally work nights on a rotating shift or do such work for at least 48 days in a calendar year are considered to be night employees.

Example

If a shift ends at 01 a.m. or begins at 04 a.m., this is not regarded as night work, since the shifts do not last more than two hours during the night-time period.

This distinction is important because special protective regulations apply to night employees for health reasons.

Staff who do a night shift on a working day should normally only work a maximum of eight hours. Working hours can amount to up to ten hours by way of exception. The principle is the same as for day-time working hours, except

that the equalization period is much shorter for night work: average working hours may not exceed a maximum of eight hours per working day in the course of a calendar month or four weeks.

Because they are exposed to more difficult working conditions, employees who do night work can have a medical examination pursuant to labour law: once before beginning night work and once every three years thereafter. Staff who are older than 50 have a right to an annual examination. The costs must be borne by the employer. However, such examinations are often offered free of charge by a company physician. If such an examination shows that continuing night work would endanger an employee's health, s/he can demand that the employer transfer him/her to a suitable daytime job, unless there are urgent operational requirements against such a move. If this is the case, the works council must be given an opportunity to make suggestions, if appropriate, on how the night employee might still be transferred.

In addition, the employer must give due consideration to the special family situation of night employees. If an employee who is living with a child under the age of 12, and this child cannot be looked after by another person living in the household, this employee may demand to work only during the day in future. The same applies to employees looking after family members who need intensive nursing care. In these cases, the same conditions apply as for transfers for health reasons.

Practical tip
Works-council approval is required for the introduction of night work.

06.1.7 Ban on working on Sundays and public holidays

Working on Sundays and public holidays is only permitted in exceptional cases. If absolutely necessary, such work can be permitted in certain exceptional cases by the regulatory authority (in Bavaria the Trade Supervisory Office; Gewerbeaufsichtsamt), if the employer submits a corresponding justification. The ArbZG is the final authority on the individual prerequisites for approval. At least 15 Sundays a year must remain work-free. Furthermore, employees who work on a Sunday must be granted a replacement rest day within two weeks. This time

limit is longer for work performed on public holidays that fall on a working day. In this case, the limit is eight weeks.

Regardless of whether someone has a day off on a Sunday or public holiday or is given a replacement rest day on a working day, the replacement rest day must be granted in connection with the normal rest period of at least 11 hours unless this is impossible for technical or organizational reasons.

06.1.8 Exceptions in special cases

Special authorizations allowing exceptions to the ten-hour working-day limit, minimum rest periods and the ban on working on Sundays and public holidays can be granted, especially in emergencies characterized by:

– unusual, unforeseeable and sudden events affecting the employer/customer
– entrepreneurial unpredictability (but not rush orders)
– irregularity
– a danger of disproportionately serious damage

Example

Flooding, fire, broken water pipes

The same applies to exceptional cases, such as:

– a special event
– something outside the influence of the person concerned
– something unpredictable and temporary
– there is no other way to overcome the consequences
– technical and/or economic damage
– the work cannot be delayed
– something irregular

Exceptions – only from the ten-hour working-day limit and the minimum rest periods – can be approved especially in the following cases:

In the case of temporary work:

– for a comparatively small number of employees
– not permanently, but perhaps regularly
– if failure to act would endanger work results or cause disproportionately serious damage (e.g. loss of profits; delay causes high additional costs)
– if other measures are unreasonable (e.g. overtime, workers on temporary loan)

In the case of work that cannot be delayed:

– e.g. preparatory and follow-up work
– doing such work during regular working hours would cause interruptions and disturbances
– if it is necessary for restarting or maintaining operations
– if other measures are unreasonable

06.1.9 Employer's legal obligation to keep books and records

The employer is legally obliged to document the detailed working hours performed by the employees. There is an obligation to keep books and records on:

– hours worked in excess of the eight-hour-day limit
– working on Sundays and public holidays
– the beginning and end of the daily working hours

Important
The Federal Labour Court [BAG] has ruled in this context that the employer also has this obligation with respect to trust-based flexitime (Vertrauensarbeitszeit). Otherwise it would be impossible to monitor compliance with the ArbZG in the case of this group of employees. The BAG has also obliged employers to provide the works council with information on the following points – also in the case of trust-based flexitime – as well as the required records:

– number of hours worked in excess of the eight-hour-day limit
– beginning and end of each working day

– number of hours worked above or below the regular weekly number of working hours

These records must be kept by the employer for at least two years.

A copy of the ArbZG must be posted or laid out at a suitable place in the establishment.

06.2 Private Law on Working Hours

Private law on working hours regulate the exact times and periods during which employees must make their labour available to the employer. This simultaneously determines the remuneration that the employer has to pay.

06.2.1 Duration of working hours, overtime

The duration of working hours is not subject to the employer's right to issue instructions. The employer cannot unilaterally deviate from the contractually agreed number of working hours (e.g. 40 hours a week) by exercising his/her right to issue instructions. The relevant provision in the employment contract is binding and can on principle only be changed by a new contractual provision.

Overtime cannot be demanded by the employer simply on the basis of his/her right to issue instructions (with the exception of emergencies and other unusual cases in which dangers to the establishment need to be prevented or important operational interests protected). However, in order to achieve this the employment contract (or works agreement or collective agreement) must contain a corresponding pledge by the employee to work a certain amount of overtime per week or month, if needed. The employer must observe the principle of reasonable discretion when assigning overtime. S/He must therefore weigh up the interests of both sides and reach a reasonable settlement.

The remuneration to be paid for the overtime worked by an employee is a separate question. In this context it should be borne in mind that compensation clauses (Abgeltungsklauseln) – i.e. lump-sum provisions according to which overtime worked is also financially covered by the regular wage or salary – are invalid because they put the employee at an unreasonable disadvantage. A

maximum number of hours of overtime and the assessment period should be agreed instead.

06.2.2 Timing of working hours

Case

Employee A has been working the night shift for eight years at employer B's company. B directs that A is to work the day shift in the future. A considers this to be invalid because he has been working the night shift so long. Is A right?

By contrast to the duration of working hours, the way in which the agreed number of working hours are to be distributed over the individual working days is fundamentally a matter of the employer's discretion. However, different rules apply if an individual working-hours agreement has been concluded, as is usually the case for part-time employees.

Even if the same working hours have continued without changing for several years, this does not permanently tie the employer to such a distribution. In particular, it does not prevent the employer from using his/her right to issue instructions to make a change.

Solution

Employee A's opinion is incorrect. Employer B is entitled to switch A from the night shift to the day shift.

06.2.3 Rights of the works council

The works council has a say in determining when the working day, including breaks, is to begin and end. In particular, the works council has a right of co-

determination when overtime is assigned and short-time working introduced (see chapter C sections 03.1.2 and 03.1.3).

The works council must also co-determine the introduction, discontinuation and structuring of all forms of working hours such as flexible working hours, on-call and standby service, shift work and flexitime. In this respect, co-determination rights apply to the preparation of duty and shift schedules and the cancellation of one or more shifts that have already been agreed with the works council in an annual work schedule.

Warnings 07

07.1 Aims of a Warning

Case

On 01 March, employer B tells employee A, who has arrived 30 minutes late for work three times, that she will not tolerate such misconduct again. However, she does not tell A that she will dismiss A if such behaviour is repeated. B dismisses A after he arrives late again on 01 May. However, A is of the opinion that he should have been warned first. The statement made by B on 01 March could not be understood as a warning. Is A right?

When an employer issues a warning (Abmahnung), s/he objects to specific misconduct on the part of the employee, points out the correct behaviour to him/her, and at the same time warns him/her that further misconduct may lead to dismissal. The warning is a more lenient form of sanction than dismissal. As a rule, therefore, the employer must first issue a warning before dismissing an employee (without notice) on grounds of conduct.

According to case law, an employer must consider whether a more lenient form of sanction other than a warning might be sufficient. The employer must therefore consider whether his/her aim of making the employee aware of his/her misconduct and urging him/her to behave properly in future might not be achieved by more lenient means. A warning must thus be reasonable in relation to the seriousness of the misconduct.

In business practice, therefore, various less serious sanctions have frequently developed as a preliminary stage leading up to a warning. The employer's intention in using such means is to point out the misconduct to the employee without at the same time having to issue a warning implying the threat of dis-

missal. A distinction can be made between the following preliminary stages of a warning:

– a meeting at which criticism is expressed (Kritikgespräch)
– an oral reprimand / caution (Rüge)
– a (written) admonition (Ermahnung)

Example

An employer tells an employee who arrives two minutes late for the first time that he will not tolerate such misconduct again. Since not every minor violation can be the subject of a warning, a warning would not be permissible here be cause it would be disproportionate. A reprimand or a written admonition would be sufficient in this case. However, if the employee continues to arrive late on a regular basis, this would justify a warning.

All these measures have a legal disadvantage, however: they cannot replace a warning because they do not have the same legal effect. The above measures lack the required admonitory function of a warning, i.e. the employee is not told that s/he must expect dismissal if such behaviour is repeated. However, later dismissal on grounds of conduct always requires a previous warning about (at least) a similar violation of duty.

In order for the warning to be effective as a prerequisite for a later dismissal on grounds of conduct, it must fulfil several functions: criticism, reprimand / caution, admonition and evidence.

Solution

B's statement cannot be construed as a warning. The necessary warning function – i.e. that a repetition will lead to dismissal – is lacking. B must first validly warn A before B can dismiss A.

07.2 Misconduct that Justifies a Warning

Case

Employee A calls employer B 'an idiot' during a coincidental encounter while driving at the weekend. B is indignant and wants to issue a warning to A for this behaviour. Can she do this?

Forms of misconduct for which a warning is issued are usually assigned to one of the following three different areas of labour-law relations between the employer and the employee:

– performance
– operations
– trust

This distinction is significant in practice, because if there is an (exceptional) dismissal on grounds of conduct later – justified by misconduct in the sphere of trust – a previous warning is often not deemed necessary in case law. By contrast, such a previous warning is always required in the case of disturbances in the areas of performance and operations.

Disturbances in the performance field relate to a violation of the obligation to work by misconduct on the part of the employee. These include, for example:

– Unexcused absence from work
– unpunctuality
– idleness
– poor performance

Disturbances of operations relate to a violation of operational regulations, i.e. in particular technical workflow, operational organization, cooperation be-

tween the individual employees and relations with supervisors. These include, for example:

– Duty to notify and furnish proof in the case of illness
– Failure to use personal health-and-safety equipment
– Violation of the no-smoking ban

The following actions by the employee in particular can lead to disturbances in the sphere of trust. These include, for example:

– theft
– embezzlement
– falsification of a sick note
– expenses fraud
– accepting bribes
– acts of violence
– sexual harassment
– mobbing
– granting oneself leave of absence
– time-card fraud
– grossly insulting colleagues or supervisors

As a rule, a warning cannot be issued for an employee's misconduct while off-duty. This would only be possible if the misconduct had a direct impact on the employment relationship and/or the relationship of trust.

Solution

Employer B cannot issue a warning to employee A for insulting behaviour. This is an instance of off-duty behaviour which has no direct effect on the employment relationship and/or the relationship of trust.

A warning is not necessary as a prerequisite for a later dismissal on grounds of conduct if the employee cannot expect the employer to approve of his/her misconduct even without a warning. This is always to be assumed on principle in the case of violations of duty in the sphere of trust (see above-mentioned

examples). In such cases, it would be unreasonable to expect the employer to initially continue the employment relationship with the employee after the warning and to wait for a second, equivalent violation of duty in order then to be able to dismiss him/her. The contractual relationship here has been fundamentally and irreparably shattered. The employer can thus dismiss the employee immediately.

A warning is also not necessary if the employee has unequivocally stated that s/he will not take any notice of the warning and will not meet the employer's demands in the future either. This includes, for example:

– Continued refusal to use the personal health and safety equipment at work.

07.3 Requirements on the Contents and Form of a Warning

In order for the warning to be effective as a prerequisite for a later dismissal on grounds of conduct, it must fulfil several functions.

– Advisory function
  The warning is intended to make the employee fully aware of his/her misconduct. The behaviour objected to must be described precisely. Simple catchphrases, general statements (e.g. "often comes too late") or value judgements ("is lazy") are not sufficient.

Important
The warning must specify explicitly what was done or not done, when, where, how and to whom.

– Reprimanding function
  The aim is to show the employee that the employer is no longer willing to tolerate a certain form of misconduct in future. The employee must be called upon to behave in a dutiful manner in future.

– Admonitory function
  The employer threatens to terminate the employment relationship if the misconduct is repeated.

– Evidential function
  The employer documents the misconduct.

The warning must be definite enough. The warning must inform the employee of precisely what misconduct s/he has committed and which obligation under the employment contract s/he has violated. The employee's misconduct must be precisely described. If possible, witnesses of the incident for which the warning is being issued should be named, and corresponding documents kept as proof.

Practical tip
When reviewing and portraying the factual circumstances, it is very important that the supervisor and the human resources department work closely together.

No specific form is prescribed for the warning; it can also be issued orally.

Practical tip
In order to preserve evidence, it is highly recommended that warnings are always issued in writing.

There is no legal deadline within which the warning must be given. The employer can still issue it several weeks after the pertinent violation of duty. The right to issue a warning can, however, be lost over time. This is the case, for example, if the employer takes no action for several weeks, thus initially giving the employee the impression that s/he will not react to the employee's misconduct. The period after which this can be assumed depends on the individual case.

Practical tip
The warning should be given no later than four weeks after the incident.

The only persons who can issue a warning are those who are entitled to issue binding instructions to the employee concerned relating to the location, time, type and manner of the work s/he is to perform. However, the person entitled to issue the warning does not necessarily also have to be entitled to issue a dismissal. A technical supervisor with no authority to hire or dismiss employees can thus also issue a warning.

Practical tip
The warning should be signed and issued by the human resources department. Only in this way can the employer be sure that there is the necessary coordination with the supervisor, and that the warning is placed into the personnel file.

From a legal viewpoint, there is no obligation to give the employee receiving the warning an opportunity to be heard before the warning is given. However, an agreement can be made in the employment contract giving an employee an opportunity to be heard.

Practical tip
Depending on the type of misconduct, it might be a good idea to give the employee an opportunity to be heard on the accusations being made against him/her before the warning is issued.

There is no need to hear the works council before issuing a warning or to inform it (afterwards).

The employee must receive the warning in order for the warning to be effective. For purposes of proof, it is recommended that the written warning be handed to the employee in person.

Practical tip
The employer should always have the employee confirm receipt of the warning in writing.

07.4 Warning in the Case of Several Violations of Duty

If the employer wants to warn the employee over several violations of duty at the same time, it is definitely recommended that a separate (written) warning be issued for each individual violation of duty. This is a good idea because if just one of the violations of duty or accusations mentioned in the warning is incorrect or cannot be proven, the entire collective warning becomes invalid.

Practical tip
A separate written warning should be issued for each individual violation of duty by the employee.

07.5 The Relation Between Warning and Dismissal

Case

Employee A has been warned for the first time by employer B (for being 15 minutes late). A comes to work five minutes late again three years later. B dismisses A for this without issuing another warning. Can A do this?

Dismissal on grounds of conduct cannot be based on conduct for which a specific warning has already been issued. An employee can only be dismissed if s/he commits a similar violation of duty again later.

Whether dismissal on grounds of conduct is an option in the event of repeated, similar forms of misconduct depends on the seriousness of the latest violation of duty. This follows from the principle of proportionality.

Solution

Dismissal of employee A without another warning is not an option because it is not proportionate. The employee was only a few minutes late. Furthermore, three years have passed between the first and second time the employee was late, and there have been no further complaints during this period. A second warning should therefore be given.

Practical tip
Many labour courts hold the view that a warning is already ineffective after a maximum of two years due to the passing of time, and is therefore of no relevance to any dismissal proceedings. It is recommended that the employee be warned again before any dismissal on grounds of conduct, if the last similar violation of duty for which a warning was issued occurred more than two years ago.

It should be borne in mind in this context that several warnings for similar violations of duty (e.g. being late for work, not reporting or proving inability to work), can weaken the admonitory function of a warning. In order to avoid having previous warnings considered ‘empty threats’ by a labour court in the event of a later dismissal, the last warning before any dismissal should expressly and forcefully threaten dismissal if such behaviour is repeated. Furthermore, it is advisable to state that no further warnings will be issued. However, there is no fundamental rule to the effect that, in the case of relatively slight contract violations, a third warning issued for a similar reason is already regard as being ‘of less value’.

Example

An employee has been issued warnings three times in the last six months due to repeated unpunctuality because she was 10, 15 and 20 minutes late respectively. Each time, she was threatened with dismissal. Furthermore, the third warning contained the express statement that no further warnings would be issued. Six months after the third warning, the employee again arrives five minutes late without a valid excuse and is dismissed. In this case, the employee could not object that she had not been sufficiently warned.

Termination of the Employment Relationship 08

Employment relationships can be ended in different ways. Possibilities include contractual termination, unilateral termination and other reasons for termination. In the case of the contractual termination of the employment relationship, a distinction must be made between termination under the employment contract, i.e. agreeing a fixed term and certain conditions, and termination after the contract has been signed, e.g. a termination agreement. In the case of unilateral termination, dismissal is the most common form.

These different procedures can be summed up as follows:

08.1 Termination Agreement

The conclusion of a termination agreement represents an important option when it comes to the contractual termination of an employment relationship. A termination agreement enables the employer to end the employment relationship largely without risk. The advantage for the employer is that – if the employee agrees – the employment relationship can be ended without observing a notice period, without the involvement of the works council, and above all without observing the general or special provisions on the 'protection of employees against (wrongful) dismissal'.

A termination agreement is only effective if it is concluded in writing. It must be signed by both the employee and the employer in their own hand. Emails, faxes or photocopies do not suffice. Similarly, the employee and employer cannot agree by mutual consent to waive the written-form requirement. Again, an exchange of the original correspondence with only one of the parties' signature on each document is not sufficient.

When the termination agreement is being concluded, the employer does not have any special duty of care; i.e. s/he can in principle negotiate the termination agreement freely with the employee. However, the employer must not coerce the employee into concluding a termination agreement by threatening dismissal in a form that no reasonable employer would issue, or by deceit.

Example

If an employee is late for work for the first time, and the employer threatens to dismiss the employee unless he signs a termination agreement, this termination agreement would be contestable.

08.1.1 Contents of the termination agreement

Termination agreements must at the very least stipulate that the employment relationship is to end and when. The termination agreement must contain a reference to the employee's need to register with the Federal Employment Agency. S/He must register no later than three months before the employment relationship ends. If there are less than three months left between the date on which the employee gains knowledge of the termination agreement and the termination date itself, the employee must register within three days of gaining this knowledge.

Practical tip
It is advisable to regulate in the termination agreement all aspects resulting from the ending of the employment relationship. The termination agreement should be individually adapted to each individual case.

Termination agreements can thus contain provisions on the following issues:

– Severance pay
  Payment of a severance settlement is not a compelling prerequisite for a termination agreement. However, in most cases an employee is only willing to sign a termination agreement if s/he receives a severance payment. The amount of severance pay is a matter for negotiation between employee and employer. As a rule, the payment depends on how long the employee was employed by the employer, how much s/he earned, and why the employment relationship is to be terminated.

– Duty to explain
The termination of the employment relationship can have serious consequences for the employee, especially with respect to unemployment insurance. In principle, employees are obliged to inform themselves about these consequences. If the employment relationship is to be terminated on the employer's initiative and is in the employer's interests, the employer may have a duty to warn and inform the employee. For example, the employer may have an obligation to point out the negative consequences as regards the receipt of unemployment benefit in the case of a termination agreement as opposed to dismissal. Furthermore, there must be a reference to the need to register with the Federal Employment Agency (see above).

– Company property
If the employee is still in possession of company property, it is advisable to regulate its return.

– Release from the obligation to work
The termination agreement can stipulate that the employee is released from the his/her obligation to work until the agreed date of termination of the employment relationship, i.e. that s/he no longer has to work. However, the other rights and duties arising from the employment contract remain applicable during this release: the employer is still obliged to pay the contractually agreed wages, and the employee remains bound by his/her duty not to disclose confidential information and by the restraint on competition.

– Wage and salary claims
In order to be able to clearly distinguish between severance pay and outstanding claims for remuneration, it is advisable to agree on an clause covering wages/salaries still owed.

– Restraint on competition after contract termination
If the employer wants to rescind a restraint-on-competition provision agreed in the employment contract for the period after contract termination, it is advisable to include a provision to this effect in the termination agreement.

– Holiday
In principle, the employee must take his/her holiday during the existing employment relationship. If the employee is released from his/her obligation to work, it should be agreed that the employee's remaining holiday is to be added to the release phase (i.e. the period up to the termination date). If it is no

longer possible for the employee to take his/her holiday, an agreement on severance pay can be made that includes the remaining days of holiday.

– Employer's reference
The law obliges the employer to issue a letter of reference. In order to avoid legal disputes, it is advisable to attach the text of the employer's reference to the termination agreement.

08.2 Dismissal

The most important way of unilaterally terminating an employment relationship is dismissal. The dismissal notice must make it clear that the terminating party wants to end the employment relationship. The word 'dismissal' or 'termination' (Kündigung) does not have to be expressly used. The dismissal must clearly state the date on which the dismissal is to become effective and whether it is a routine or exceptional dismissal.

Practical tip
Any ambiguities in dismissals always disadvantage the terminating party, i.e. the dismissal may be invalid or have to be reinterpreted. It is therefore always advisable to formulate the dismissal notice unambiguously.

08.2.1 Written form

Case

Employer B sends his employee A an email terminating the employment relationship as of 31 October 2007. Employee A considers this dismissal to be invalid and comes to work on 01 November 2007. Is A right?

A dismissal must issued be in writing in order to be valid. Any dismissal notice that has not been signed by the terminating party or his/her representative in his/her own hand is not invalid. A fax or photocopy is not sufficient. A dismissal notice in electronic form is also insufficient.

Solution

Employer B's dismissal notice is null and void. B should not have issued the dismissal notice by email, but, for example, by letter. A is thus right to continue working.

08.2.2 Stating reasons for dismissal

In principle, no reasons for dismissal need to be given unless required by a collective agreement, employment contract or works agreement. From a legal standpoint, reasons only need to be given in the dismissal of trainees after the probationary period. In the case of exceptional dismissal (i.e. without notice), the reasons for dismissal must be communicated to the person being dismissed at the latter's request. In the case of dismissal for operational reasons, the employee has a right to be informed of the social criteria that led to the choice of who was dismissed.

08.2.3 Receipt of the dismissal notice

In principle, a dismissal notice can be issued at any time and at any location. However, the important thing is that the employee must receive the dismissal notice.

Example

It is permissible to give the employee the dismissal notice directly at his or her workplace. It is also possible to send the dismissal notice to his/her home.

Practical tip
For reasons of provability, it is advisable to have the employee confirm receipt of the dismissal notice in writing.

08.2.4 Routine dismissal (ordentliche Kündigung)

Routine dismissal requires compliance with the above deadlines and dates, i.e. the employment relationship does not end until the statutory or contractual notice periods expire.

The employee does not need a reason to terminate the employment relationship.

If the Protection Against Dismissal Act applies, the employer is only allowed to dismiss the employee on personal grounds, on grounds of conduct, or for operational reasons. The employer's right to terminate is further limited by special protection against dismissal applying to, for example, employees during parental leave, severely disabled people, people doing military or community service, and works-council and personnel-committee members or candidates. The right of routine dismissal can also be limited or even excluded by provisions in collective agreements or individual contracts.

Example

The right of routine dismissal is often limited by a collective agreement in the case of older employees and / or staff with a long period of service at the company.

The routine termination of an employment relationship is only possible if the definitive notice periods are observed. The statutory notice period is four weeks to the fifteenth or end of a calendar month. The notice period is extended – for the employer, but not for the employee – the longer an employee has been working for a company. The following notice periods apply for the employer:

Example 1

An employee is handed a dismissal notice on 28 June 2007. She has been working for the employer's company for seven years. The employment relationship will thus end on 31 August 2008 because of the two-month period of notice.

Example 2

An employee has been working for the employer for 20 years. On 12 June 2007, the employee hands in his notice because he has been offered a better job. There are no special contractual provisions that might affect the notice period. The statutory provisions therefore apply. They provide for a notice period for the employee of four weeks to the fifteenth or end of a calendar month. The employee therefore already ends his employment relationship on 15 July 2007.

Longer or shorter notice periods can be agreed by collective agreement. Shorter notice periods can also be agreed by individual contract, although this is only possible if the employee has been hired as a temporary worker and if the employer does not usually employ more than 20 staff (not including those employed for their vocational training). In these cases, too, the notice period may not be shorter than four weeks.

Practical tip

The extended statutory notice periods (section 622(2) of the Civil Code [BGB]) only apply to the employer. This means that an employee can terminate by giving only four weeks notice, even if s/he has been working for a company for decades. The employer should therefore consider concluding an individual contract stating that the extended notice periods pursuant to section 622 of the BGB shall also apply to any termination by the employee. This would ensure that the employer has enough time to find a replacement if the present employee terminates.

Contrary to the text of section 622(2) of the Civil Code [BGB], in the case of terminations issued after 02 December 2006, periods up to the employee's 25th year will in future also be taken into account when calculating the period of employment. This follows from court decisions by the European Court of Justice.

08.2.5 Exceptional dismissal (ausserordentliche Kündigung)

The employment relationship can be terminated for cause without notice if facts exist that make it unreasonable for the terminating party to continue the employment relationship until the expiry of the notice period – considering all the circumstances of the individual case and weighing up the interests of both parties to the contract. This right to exceptional dismissal cannot be excluded or made more difficult.

The following must be taken into account when weighing up the interests:

– the employee's length of service
– the routine notice period
– the type and seriousness of the misconduct
– the risk of repetition
– the employee's age
– the consequences of termination
– the size of the establishment

More lenient means – such as warning, transfer or routine dismissal – must also be considered when weighing up the interests.
Pursuant to section 626(2) of the BGB, exceptional dismissal is only possible within a two-week deadline. The decisive factor is the date on which the terminating party gained knowledge of the facts on which the dismissal is based. The party entitled to dismiss the employee must have sufficiently reliable and complete knowledge of the facts on which the dismissal is based to decide whether s/he can reasonably be expected to continue the employment relationship.

The main possible reasons for dismissal include the following:

– Refusal to work
  Permanent/persistent refusal to work can represent a reason for exceptional dismissal. A person who persistently refuses to work is someone who

deliberately or continuously does not want to perform and refuses to follow justified instructions.

– Dawdling / repeated unpunctuality
  Repeated unpunctuality can justify exceptional dismissal if it takes on the dimensions of a persistent refusal to work.

– Xenophobic statements
  Xenophobic statements generally justify exceptional dismissal.

– Insults
  Serious insults directed at the employer or a supervisor can justify exceptional dismissal. Private insulting statements made about supervisors in a private conversation and passed on to the employer in breach of confidentiality cannot usually justify immediate dismissal without notice.

– Company car
  The use of a company car for private trips despite an express, strictly monitored ban can represent a reason for exceptional dismissal.

– Fighting
  Physical fighting between two employees always justifies the exceptional dismissal of the attacking employee.

– Illness
  In principle, an employee's illness does not represent a reason for exceptional dismissal. The only situation in which something else can apply is if routine dismissal is excluded (e.g. in the case of an older employee, see above). Exceptional dismissal is justified if the employee fakes an illness, however.

Examples

An employee reports sick, but works for another company during this time.
If an employee claims he will become ill if the employer does not approve a certain holiday, this alone represents a reason for exceptional dismissal, irrespective of whether the employee later actually falls ill or not.
If, during his illness, an employee does not refrain from all activity that could prevent recovery, this can constitute cause for exceptional dismissal.

– Secondary employment
  Unapproved secondary employment can represent a reason for exceptional dismissal if the employee is competing with the employer's business.

– Damage to reputation
  False statements likely to damage to an employer's reputation justify exceptional dismissal following a previous warning. If specific business relations with clients are impaired by the damage caused to the employer's reputation, exceptional dismissal may be justified without a warning.

  Example

  If an employee tells one of the employer's suppliers or customers that the employer is insolvent, and the customer/supplier then terminates the business relations, this would entitle the employer to exceptional dismissal.

– Bribes
  The acceptance of bribes gives the employer the right of exceptional dismissal even if the employee is not persuaded by the bribes to violate his/her contractual obligations.

– Criminal offences
  Criminal offences can justify exceptional dismissal, depending on the type and seriousness. Criminal offences against the employer in particular can justify dismissal.

  Example

  The dismissal of an employee who steals objects belonging to the employer can be justified. The same applies to an employee who defrauds his employer in his expense report.

As a rule, a dismissal becomes invalid if an employee is acquitted in criminal proceedings or if the charge is dropped. However, if the employee is given a prison sentence, this too can be an independent reason for exceptional dismissal. This is the case if being prevented from working has a disadvantageous effect on the employment relationship, and the employer has no reasonable interim solution.
Not only a proven criminal offence committed by the employee can be justified cause for exceptional dismissal, but also the suspicion that the employee has committed a criminal offence (dismissal on grounds of suspicion). Dismissal on grounds of suspicion is justified if:
- the suspicion is substantiated by objective facts
- the grounds for suspicion are of the kind that could destroy the employer's trust in his / her employee, which is necessary for the continuation of the employment relationship
- the criminal offence so serious that it justifies exceptional dismissal
- the employer has heard the employee on the suspicion before dismissal. Before the employer may terminate the employment relationship on grounds of suspicion, s/he must give the employee an opportunity to put his / her case on the suspicion and, perhaps, to refute it.

– Surfing the internet
In principle, surfing the internet can only justify exceptional dismissal if the employer expressly prohibited this private use beforehand. However, something else can apply if the employee uses the internet for much of the time. In this case, the employee cannot expect the employer to tolerate this use.

Practical tip
Since the amount of time employees may surf the internet privately every day ultimately has to be decided on a case-by-case basis, it is advisable to agree a general ban on the private use of the internet.

– Violation of the duty not to disclose confidential information
A serious violation of the duty not to disclose confidential information can justify exceptional dismissal.

08.2.6 Dismissal pending a change of contract (Änderungskündigung)

Dismissal pending a change of contract is an option if an employee is not prepared to agree to a change in his / her working conditions, and the employer cannot enforce the change via his / her right to issue instructions.

Example

Employee A is hired and employed at establishment A. Transferring employee A within this establishment would be covered by the employer's right to issue instructions. However, if the employer would like to transfer the employee A to establishment B, and the employee does not agree to this transfer, the only way to achieve the transfer is by means of dismissal pending a change of contract.

In the case of dismissal pending a change of contract, the employer gives notice to terminate the existing employment relationship and at the same time offers the employee the option of continuing the employment relationship under modified terms and conditions.

Both the dismissal notice and the offer of employment under changed conditions must be issued in writing because this involves the termination of the employment relationship. The offer of a new contract must contain enough details to enable the employee to recognize what his / her future working conditions will be and what the employment relationship will entail. The employee must be able to accept the changed employment contract with a simple "yes" answer.

It is now up to the employee to decide how s/he responds to the offer.

08.2.7 Partial termination (Teilkündigung)

The aim of partial termination is to change individual provisions of the employment contract against the will of the other party and to leave the rest unchanged. Partial termination is illegal on principle because it leads to a unilateral change in the employment contract.

Protection against (Wrongful) Dismissal 09

A distinction must be made in the protection of employees against (wrongful) dismissal between general protection, which applies to all employees, and special protection, which is reserved for certain groups of people.

09.1 General Protection against (Wrongful) Dismissal

General protection against (wrongful) dismissal is guaranteed by the Protection Against Dismissal Act [KSchG], according to which dismissal is only legally effective if it is socially justified, i.e. if the employee has personal characteristics or behaves in ways that constitute grounds for dismissal, or if there are urgent operational grounds for dismissal.

09.1.1 Prerequisite for the applicability of the Protection Against Dismissal Act

General protection against (wrongful) dismissal applies if the employment relationship at the employer's establishment or the company has existed for longer than six months and more than ten staff are employed at the establishment, not including trainees. The threshold of ten employees only applies to people who have been hired since 01 January 2004. In the case of employees who were already working at the establishment before 01 January 2004, the Protection Against Dismissal Acts already applies if more than five staff are employed at the establishment. Part-time employees count only proportionately towards the thresholds, depending on the number of hours they work per week.

09.1.2 Social justification of dismissal

A dismissal can be deemed socially justified on the grounds of:

– the employee's personal characteristics (dismissal on personal grounds)
– the employee's behaviour (dismissal on grounds of conduct)
– urgent operational requirements (dismissal for operational reasons)

Chapter overview

09.1.2.1 Dismissal on personal grounds

An employee can be dismissed on personal grounds if s/he is no longer suited or able to perform the work owed, either in full or in part. The reduction in the employee's capability or suitability must be so significant that this impairs the employer's future operational or economic interests to an unreasonable degree.

Before giving notice of dismissal on personal grounds, the employer is obliged to take all reasonable and suitable measures to avoid dismissal without putting operational interests at risk. For example, s/he must examine whether dismissal can be avoided by transferring the employee to another job where the deficiencies would probably not have an effect. Factors to be taken into consideration when weighing up whether an employee can be dismissed on personal grounds include the employee's age, length of service, the course of the employment relationship, the cause of the lack of suitability and, if appropriate, any enhanced need for social protection.

The following reasons can justify dismissal on personal grounds:

- Illness
  Illnesses are the most common reason for dismissal on personal grounds. Four basic types must be distinguished when it comes to termination due to illness:
  - Termination due to frequent short illnesses
    Termination due to frequent short illnesses is only possible if there is a danger of reoccurrence, i.e. if the employee can be expected to miss work frequently because of illness in the future (negative prognosis). Case law does not lay down any general standards, but decides on a case-by-case basis. When the necessary future prognosis is made, frequent short illnesses in the past are to be taken as an indication that illnesses are likely to take a similar course in the future. In the case of past absences,

case law regards average annual absence rates of six weeks over the last three years as insignificant.

- Termination due to a long illness
  The prerequisite for termination due to a long illness is that the employee is already ill when s/he receives the dismissal notice, and recovery is either not in sight at all or likely to take a long time. Here, too, the question as to how long a period of inability to work the employer has to accept is decided on a case-by-case basis. Termination due to a long illness is excluded if the employee is likely to be able to work again before the notice period expires.

- Termination due to an illness-related reduction in performance
  Termination due to an illness-related reduction in performance is an option if the reduction has a significantly detrimental effect on operations. However, an arbitrary, minor reduction in performance is not sufficient. Rather, the decisive factor is whether the work performed falls short of the employer's justified expectations (based on the equivalence of mutual performance by the two sides) to such a degree that it becomes unreasonable to expect the employer to continue the employment contract; a performance of only two-thirds of the norm can be deemed a significant imbalance of mutual performance. The practical difficulty here lies in determining the normal level of performance. Before giving notice of termination, the employer must examine whether the employee can be kept on under different working conditions, e.g. in an existing job that is suitable for the ill employee, or in part-time employment.

- Termination due to illness-related long-term inability to work
  In the case of termination due to an illness-related long-term inability to work, the very fact that the employee can no longer meet the obligations of his/her employment contract already has a sufficiently detrimental effect on operations to justify termination. If the employee is fit enough to take another vacant job, the employer is obliged to offer the employee this job, even if it requires retraining. The employer is also obliged to make jobs that are suitable for the ill employee available to the extent possible within the scope of his/her right to issue instructions; however, the employer is not obliged to fire someone else to free up a suitable job.

- Alcoholism and drug addiction
  Alcoholism and drug addiction represent a reason for dismissal on personal grounds if the misuse of alcohol or drugs is due to illness. Otherwise, dis-

missal on grounds of conduct can be considered. The employee's willingness to undergo therapy is key when considering termination due to alcohol or drug addiction. A negative prognosis for the future is always justified if the employee is not willing to undergo withdrawal treatment or has had a relapse after previous withdrawal treatment.

– No work permit
  Should an employee not have a work permit as required by sections 285 and 286 of Book 3 the Social Security Code [SGB III], or if the work permit has expired, this represents a reason for dismissal on personal grounds – certainly if the authorities have withdrawn the work permit with legal effect. If the employee is entitled to appeal against the authorities' decision, the chances of success and the expected duration of the appeal procedure are key.

– Other official permits
  The lapse of other permits that are necessary for practising in a profession can also entitle the employer to dismissal an employee on personal grounds.

  Example

  A doctor's licence to practise medicine, a pilot's licence to fly, a truck driver's driving licence.

– Military service
  Military service can justify dismissal by the employer on personal grounds if, in the case of employees from non-EU countries, the military service lasts longer than two months and the employees' non-availability has a significantly detrimental effect on operations.

09.1.2.2 Dismissal on grounds of conduct

Termination can, among other things, be socially justified by the employee's behaviour. The prognosis principle also applies in the case of dismissal on grounds of conduct, i.e. the purpose of dismissal here is not to penalize misconduct, but to avoid further violations of contractual obligations in the future.

Dismissal on grounds of conduct is thus the employer's last means to stop a contract violation that is detrimental to his/her interests.

Case

29-year-old employee A has been employed at B's establishment for six years on fixed working hours. In the course of a week, A is 30 minutes late for work three times, with the result that the machine at which A works cannot be started on time. Employer B warns A about this, pointing out that A is putting his employment relationship at risk.

Variation 1: A does not listen and is late for work again the following week. For this reason B gives him routine notice of dismissal.

Variation 2: A reacts to B's warning and is on time for work for the next three years. He is then 20 minutes late for work again twice in one week. For this reason B gives him routine notice of dismissal.

Dismissal for reasons of behaviour is justified if the misconduct of which the employee is accused violates a contractual obligation and the employment relationship is directly impaired as a result. There must be no other appropriate, vacant job available, and the termination of the contractual relationship must appear to be reasonable after weighing up the interests of both sides. As a rule, dismissal on grounds of conduct must be preceded by a warning on the same issue.

Violation of a contractual obligation after a prior warning on the same issue

The key aspect in this context is whether the criticized behaviour is sufficient in an individual case to persuade a calm and understanding employer to terminate the employment relationship. The following contractual obligation violations are potential causes:

– Defective performance
  Violations of performance obligations by the employee: e.g. poor quality, low output, refusal to work, absenteeism.

– Disturbance of work sequences
  Insults, violations of conduct obligations such as the ban on smoking and alcohol.

– Disturbances in the sphere of trust
  Criminal offences in particular.

– Violation of secondary obligations
  Sending in sick notes late or not at all.

The employer may only terminate the contractual relationship if the employee is no longer expected to comply with the contract. The employer can only draw this conclusion if s/he has given the employee a warning on the same issue and the contract-violating behaviour for which a warning was given is repeated.

Example

Taking excessively long breaks, arriving late for work, surfing the internet during working hours.

Solution: In view of the fixed working hours and A's contractual obligation to comply with them, repeatedly arriving late for work represents a disturbance of the performance sphere of the employment relationship. A has again been late for work, even though B has warned A about this breach of duty – i.e. B has pointed out to A that B regards this behaviour as a violation of the contract and has warned him that the employment relationship is threatened if this is repeated.

No reasonable possibility of another job

Dismissal can only be considered if this cannot be avoided by taking more lenient action. One important possibility in this context is transferring the employee to another job or continuing employment under different and possibly less favourable contractual terms. Such a transfer would only make sense, however, if the misconduct would not have any effect at the 'new' job.

For example, if two employees working on a production line are continually arguing, and the argument is always triggered by employee A, in this case it might be advisable to transfer employee A to another production line.

Practical tip
Since the prerequisites for routine dismissal on grounds of conduct are less stringent than for exceptional dismissal, routine dismissal on grounds of conduct might be considered as a more lenient option if exceptional dismissal is not possible.

Balancing of interests

The different interests of the employee and the employer must be weighed up in cases of dismissal on grounds of conduct and on personal grounds. The main aspects to be considered on the employee's side include the type, seriousness and duration of the infringement, the employee's length of service, age, financial obligations vis-à-vis dependents, the situation on the labour market and the possibilities of a transfer. On the employer's side, factors such as work discipline, plant discipline, keeping operations running, the risk of economic loss, risk of repetition, damage to the employer's reputation and protecting the other employees can all be of key importance.

Solution

Variation 1: A's many years of service for the company justify his interest in retaining his job. B's interest in eliminating the disturbance by dismissing B is based on the need to ensure workplace harmony and to protect work discipline, the evident risk of repetition, and the direct effect on the sequence of operations caused by machine downtime. Dismissal would be justified.

Variation 2: A has responded to B's warning and comes to work on time for the next three years. In this case, dismissal for coming to work late would thus not be justified. Rather, another warning should be given in this case.

9.1.2.3 Dismissal for operational reasons

Furthermore, a dismissal can be socially justified if it is made necessary by urgent operational requirements which stand in the way of the employee's further employment in the establishment concerned. Dismissals for operational reasons are thus related to situations in which an employer can no longer provide the employee with a job because the employer cannot – or does not want to – continue running the establishment in the same way as in the past.

Example

Fifteen staff are employed in a workshop; 14 of these are mechanics, one is a sprayer. Since the vehicle-spraying business is losing money, the employer decides to outsource this work to an external company. The sprayer's job is thus no longer needed, so that dismissal for operational reasons is an option.

In order for a dismissal for operational reasons to be deemed socially justified, it must be made necessary by urgent operational requirements; there must be no alternative employment for the employee in the employer's establishment; and the employer must have given sufficient consideration to social aspects.

Job losses are always preceded by a decision made by the employer, and the employer is forced to prove the urgent operational requirements leading to the loss of the job. The employer's freedom of decision in this context covers economic, technical, organizational and HR-policy decisions. However, a decision by the employer to reduce the number of jobs does not in itself substantiate an urgent operational requirement.

And even if there are urgent operational requirements, a dismissal for operational reasons will be deemed socially unfair if the employer does not give (sufficient) consideration to the employee's length of service, age, obligations to support dependents and any disability when selecting the employees to be laid off.

09.1.2.3.1 Mass layoffs

If an employer wants to lay off a large number of employees over a period of 30 calendar days, s/he must notify the Federal Employment Agency beforehand. This duty to notify applies as follows:

Table 01
Reporting requirements in the event of mass layoffs

Number of staff employed at the establishment	Federal Employment Agency must be notified if layoffs total
21 – 59 employees	more than 5 employees
60 – 499 employees	more than 25 employees or more than 10 % of the workforce
500 and more employees	more than 30 employees

The intention to dismiss the above number of employees must be communicated to the responsible branch of the Federal Employment Agency in writing, i.e. by a document signed by hand. A fax, photocopy or email is not sufficient. The employer's notification must contain his/her name, the head office of the establishment, the number and occupational groups of staff who are usually employed there, the number of employees to be laid off, the social criteria for the selection of staff to be laid off, the basis for calculating any severance pay, the reasons for the layoffs, and the period during which the layoffs will take place.

Practical tip
The notification of mass layoffs must contain all of these items of information. If just one of them is missing, the notification and the dismissals will not be legally effective.

Furthermore, the works council must be informed in due time about the reasons for the planned layoffs, the number of occupational groups involved and the number of employees to be laid off, the number of occupational groups

of the staff normally employed, the period during which the people are to be laid off, the planned criteria for the selection of the employees to be laid off and the planned criteria for severance payments. The works council must be informed in writing and a copy sent to the Federal Employment Agency. If the works council does not issue a statement, the notification shall be deemed effective if the employer presents credible evidence showing that he/she informed the works council at least two weeks prior to making the notification. At the same time the Agency must be notified as to the status of consultations.

The works council can make further statements to the Employment Agency. It must supply the employer with a copy of such statement.

The Agency must be notified of mass layoffs before any dismissals are issued. The notification of the Agency on the mass layoffs leads to a blocking period of one month. Layoffs do not become effective until after this period.

If the Agency is not notified, or is notified incorrectly, the layoffs will be legally ineffective. The blocking period does not begin until after complete notification. Any dismissals issued prior to this will be legally invalid.

09.2 Special Protection Against Dismissal for Certain Groups of People

In addition to general protection against dismissal, which applies to all employees, there is also special protection against dismissal, which aims to protect the following groups of people in particular:

– Trainees
  After the probationary period, a traineeship can only be terminated without notice for cause. Routine dismissal is excluded.

– Severely disabled people
  After an employment period of six months, severely disabled people with a grade of disability of at least 50, and people regarded as equivalently disabled, can only be dismissed if the Integration Office has given its consent in advance.

– Pregnant women and mothers
  Dismissal is inadmissible from the beginning of pregnancy until four months after childbirth. This covers all forms of dismissal. Protection against dismissal only applies if the employer is aware of the pregnancy or is informed

by the pregnant employee within two weeks of her receiving the dismissal notice.

Example

An employee receives her termination notice on 13 January 2007. The employee thus has until 27 January 2007 to inform the employer about her pregnancy.

The supervisory authority can approve the dismissal of the pregnant employee in exceptional cases. Exceptional cases include (among others) serious violations of contract, serious offences against property, acts of violence against the employer, plant closure, and dangers to the existence of the establishment if the employment relationship continues. The grounds for dismissal must not be connected with the employee's situation during pregnancy or after childbirth. The notice of dismissal must be given in writing; it must state the admissible reason for the dismissal.

Practical tip
The supervisory authorities in Bavaria are:

- for Northern Bavaria, the Nuremberg Trade Supervisory Office (Gewerbeaufsichtsamt Nürnberg). You can download the application form from the homepage of the Mittelfranken government (www.regierung.mittelfranken.bayern.de) under 'Gewerbeaufsicht > Formulare, Infoblätter > Antragsformular Zulassung der Kündigung'.
- for Southern Bavaria, the Munich Trade Supervisory Office (Gewerbeaufsichtsamt München-Land).

In the case of exceptional dismissal, the application must be submitted within two weeks of gaining knowledge of the reason for the dismissal. There are no regulations on the form of the application.

– People on parental leave
  The employer may not terminate an employment relationship once parental leave has been claimed, at least no less than eight weeks before the start of parental leave, or during parental leave itself. As in the case of maternity protection, the supervisory authority can declare the dismissal admissible in exceptional cases.

– People doing military or community service
  Routine dismissal is excluded from the date on which the call-up papers are received until the end of basic military service or community service, as well as during a military exercise. The same applies to temporary enlistees (Soldaten auf Zeit) until the expiry of military service (no more than two years).

– Staff who work as emissions-control or hazardous-incident officers
  Routine dismissal is excluded from the date of the employees' appointment until a year after their recall.

– Members of bodies representing employees, electoral board members, candidates
  Special protection against dismissal applies to members of the works council, representative bodies for young workers and trainees, and members of the representative body for disabled employees during their term of office; it remains in effect for up to a year after the end of their term of office – and in the case of substitute members until the end of their term as substitute members. Protection against dismissal applies to all types of dismissal except exceptional dismissal.

Practical tip
If cause for exceptional dismissal exists, the works council must give its approval before the dismissal notice is issued, except in the case of people who are still protected against dismissal after their term of office.

Members of the electoral board and candidates enjoy special protection against dismissal from the date of their appointment or nomination until the announcement of the election results; this protection remains in effect for a further six months.

The first three employees listed in the invitation to employee meetings and/or election meetings, or in the application for the appointment of an electoral board, cannot be given statutory notice of dismissal from the date of the invitation or application until the announcement of the election results; if the election is not successful, this period lasts until three months after the invitation/application.

However, the members of the executive staff committee, the company conciliation committees and the economic committee are not protected against dismissal.

Obligations on Termination of the Employment Relationship 10

10.1 Duties of the Employer

Before an employment relationship is terminated, the employer must grant the employee sufficient opportunity to look for a job.

Furthermore, the employer is obliged to hand over the employee papers. The employee papers include the wage-tax card, the social-insurance ID card, the social-insurance supporting documents (Sozialversicherungsnachweisheft), the certificate of employment and the work permit. The employer has no right to withhold the employee papers.
Furthermore, the employee must be given proof of the holiday granted to him/her or compensated in the current calendar year.

The employee has a right to an employer's reference. The employee can choose between a simple and a detailed reference. In a simple letter of reference, the employee is given a certificate confirming only the type and duration of the employment. A detailed reference also contains an assessment of the employee's performance and conduct.

10.2 Duties of the Employee

The employee must hand over any working materials made available to him/her and still in his/her possession.

If a restraint-on-competition provision was agreed in the employment contract for a period after contract termination, the employee must adhere to this. If s/he does not do so, the employer is entitled to withhold the compensation payment due for the restraint on competition or to demand the repayment of any compensation paid. In this case, the employer can also withdraw from the contract or demand damages.

C Collective Labour Law

The Principles of the Works Constitution Act 01

The basic idea behind the Works Constitution Act is that employees should participate in the operational decisions that directly affect them. The employer's sole right to make decisions on his/her establishment and the staff employed there is limited to this extent. In order to be able to participate in this way, the employees elect representatives from among themselves – the individual members of the works council. These representatives then form a body – the works council. The works council represents the establishment's employees vis-à-vis the employer. The Works Constitution Act [BetrVG] regulates how the works council exercises co-determination within the establishment. This Act also lays down the kinds of establishments in which a works council has to be set up, the way it is elected, and the procedures for cooperation between the employer and the works council.

01.1 The Establishment

The Works Constitution Act [BetrVG] distinguishes between the 'establishment' (Betrieb) and the 'company' (Unternehmen). As a rule, the establishment is the business unit where the works council exercises its rights of co-determination and participation. However, the company is the main focus in some cases. It is therefore essential to be familiar with both terms in order to understanding and apply the BetrVG correctly.

01.1.1 Distinction between the establishment and the company

The company is the legal, economic unit. It is with the company that the employer pursues what is usually an economic objective, e.g. making a profit, gaining market share. The establishment, on the other hand, is defined as a company's individual production facility and workplace. Here, the employer pursues not an economic, but a work-related objective. The term 'establishment' is thus defined more narrowly than 'company'. A large company can have several establishments (see the excursus in chapter A section 02.3 for a more detailed distinction between the terms 'company' and 'establishment').

Important
It is important to always distinguish between the company level and the establishment level.

01.2 Scope of the Works Constitution Act [BetrVG]

01.2.1 Geographical scope

Case

Company A has an establishment in Munich, an establishment in Nuremberg and a production facility (also an establishment) in the Czech Republic. Which locations are subject to the BetrVG?

The BetrVG applies to all domestic establishments, i.e. to all establishments in the Federal Republic of Germany irrespective of the nationality of the employer or the employees. If a foreign company runs an establishment in Germany, it is subject to the provisions of the BetrVG for this establishment. Conversely, the BetrVG does not apply to establishments of German companies that are located abroad (principle of territoriality).

Solution

Only the establishments in Munich and Nuremberg are subject to the BetrVG; the establishment in the Czech Republic is not.

01.2.2 Personal scope

The BetrVG applies to all employees, including those employed for their vocational training (e.g. trainees, apprentices). It also applies to staff employed in

home working (home-based employees) if they work mainly for a specific establishment (section 5 of the BetrVG).

Special provisions apply to employees on temporary loan. They are employees of the loaning company – not of the borrowing company. However, in some cases such employees are entitled to vote at the establishment of the borrowing company if a works council is elected there (section 7 sentence 2 of the BetrVG).

However, certain executive bodies of legal entities and some shareholders of partnerships are specifically excluded from the scope of the Act. As a rule, these are people who do not work on the basis of an employment contract. Similarly, the BetrVG does not apply to executive staff (leitende Angestellte), unless a statutory exception applies.

01.2.3 Material scope

The BetrVG applies to all establishments in the private sector, i.e. owned by a private legal entity (e.g. GmbH, AG).

Public-law establishments and administrations are thus excluded (e.g. administrations and establishments of the federal government, federal states (Länder), local authorities and other public-law corporations, incorporated institutions and foundations. Participation and co-determination rights similar to those laid down in the BetrVG apply for public-sector employees. There, these participation rights are exercised not by a works council (Betriebsrat), but by a staff council (Personalrat). The system is governed by federal and state staff representation laws.

An establishment must have a certain minimum number of employees before a works council can be set up (section 1(1) of the BetrVG). As a rule, the establishment must employ at least five permanent employees with voting rights for the works council, of whom at least three are eligible to stand for election. A works council can be set up if these conditions are met.

The BetrVG does not apply, therefore, to establishments with fewer than the above minimum number of employees called very small establishments (Kleinstbetriebe). A works council cannot be set up there.

The key factor in the calculation of this minimum number is thus number of employees who are permanently employed 'as a rule'. It is therefore not enough to simply to count the employees in the establishment. Rather, it is also necessary both to look at the situation in the past and to make a prediction about workforce development in the future. Then the number of employees who are generally employed at the establishment must be determined – apart from periods with unusual large workloads (annual accounting operations, Christmas business, inventories) or temporary lulls in the workload (travel and holiday periods). This minimum number is calculated 'by head', i.e. the only criterion is how many members of staff are permanently employed. The number of hours they regularly work, i.e. whether full-time or part-time, is irrelevant. Part-time employees are thus counted in full.

Practical tip
If the employees of the establishment do not want a works council and do not elect a works council, there is no way of forcing the creation of a works council. In this case, no court can appoint a mandatory works council for the establishment.

01.3 Works Council

01.3.1 Election of the works council

The works council is elected by the employees of the establishment. All employees of the establishment who are eighteen or older (section 7 of the BetrVG) are entitled to vote in the works council election. Employees on temporary loan may also vote at the establishment of the borrowing company if they are employed there for longer than three months.

Note
Whenever the term 'employees entitled to vote' is used, this always means 'entitled to vote in the works council election'.

All employees who are eighteen or older and have been working at the establishment for at least six months can be elected as members of the works council, i.e. they are eligible for election (section 8 of the BetrVG). Home-based employees are also eligible for election if they have been working primarily for the establishment for six months. Whether or not an employee is a member of a union is not relevant.

Important
Whilst employees on temporary loan may vote in the establishment of the borrowing company, they cannot be elected to the works council themselves.

The number of members to be elected to the works council – i.e. the size of the works council – depends on the number of staff employed at the establishment and is based on section 9 of the BetrVG.

Regular works council elections are held every four years, always between 01 March and 31 May (section 13(1) of the BetrVG). The last regular works council elections were held in the spring of 2010, so the next election is scheduled for 2014, 2018 and so on. The works council's regular term of office is thus four years. Outside this four-year period, elections are only to be held in special cases governed by law (sections 13(2) and (3) of the BetrVG).

The conduct of the works council election is the responsibility of the electoral board. The principle that applies is: 'no electoral board, no election'. The incumbent works council must appoint an electoral board no later than ten weeks before the expiry of the works council's term of office (section 16 of the BetrVG). If there is no electoral board eight weeks before the works council's term of office expires, the labour court can appoint an electoral board at the request of at least three employees with voting rights, or a trade union represented at the establishment, or the central or group works council. A trade union is deemed to be represented at the establishment if at least one employee is a member.

If there is no works council at the establishment, an electoral board is appointed by the central works council – or by the group works council in the absence of a central works council. If there is neither a central nor a group works council, or if they take no action, an electoral board is elected at an employee meeting

by the majority of those present. If no employee meeting is held, despite an invitation, or if the employee meeting does not elect an electoral board, it is appointed by the labour court at the request of at least three employees with voting rights or a trade union represented at the establishment.

It is therefore possible for an electoral board for works council elections to be set up by a small number of employees (three employees) or a trade union against the will of the great majority of employees.

The works council is elected by a direct vote in a secret ballot (section 14 of the BetrVG). The employees with voting rights and the trade unions represented at the establishment can propose candidates for the works council election. Detailed election regulations (Wahlordnung) are to be found in the ordinance for the implementation of the BetrVG dated 11 December 2001.

The election can be contested in the labour court if there have been violations of significant provisions on works council elections (section 19 of the BetrVG). The election can be contested by the employer, a trade union represented at the establishment, or at least three employees with voting rights. The election can only be contested within two weeks after the election results are announced.

The costs of the works council election are borne by the employer (section 20(3) of the BetrVG). In addition to the costs of the election itself (postage, paper and other election materials), these also include lost work, since the works council election takes place during working hours. The employer must also pay the costs of necessary training for the electoral board members. However, this only applies if the training provides knowledge that is directly necessary for the work of an electoral board member.

Pursuant to section 20(1) of the BetrVG, no one is allowed to interfere with the works council election; in particular, no employee may be prevented from voting or from being elected. Influencing the works council election by inflicting (or threatening) disadvantages, or by granting (or promising) advantages, is also forbidden (section 20(2) of the BetrVG).

Furthermore, members of the electoral board and candidates for election to the works council enjoy special protection against dismissal. Routine dismissal of these people is not permitted pursuant to section 15(3) of the Protection Against Dismissal Act [KSchG]. Members of the electoral board and candidates can only be dismissed for cause, i.e. without notice. This is only possible if the employee has seriously violated his / her obligations under the employ-

ment contract. Furthermore, the dismissal has to be approved by the works council. If the works council does not approve the dismissal, the employer can apply to the labour court for a decision in lieu of an approval decision by the works council. For members of the electoral board, special protection against dismissal begins on the date of their appointment; for candidates, it lasts from the date of their nomination until the announcement of the election result. Special protection against dismissal is extended by a further six months after the announcement of the election result. Routine dismissal is also excluded during this period. Exceptional dismissal remains possible. However, works-council approval of the dismissal is not necessary in this case.

01.3.2 The legal position of the individual works council members

Pursuant to section 37(1) of the BetrVG, members of the works council carry out their duties without payment in an honorary capacity. To enable them to do this properly, works council members must be relieved of their work under their employment contracts. They must therefore be relieved of their professional activities without any reduction in their pay to the extent necessary for them to duly fulfil their duties on the works council. The decisive factor is whether, considering all the circumstances, the respective works council member was justified in considering it necessary to miss work.

The members of the works council are obliged to inform the employer that they are leaving their work when performing works council duties. In this context they must communicate the location and expected duration of the planned works council duties. They must report back once the works council duties have been completed. However, the members of the works council do not require the employer's permission.

Case

Works council member A goes to her supervisor ten minutes after starting work and says she is now going to do works council work. Supervisor S forbids this.

Solution: A was obliged to notify the supervisor of the expected duration of the works council work. Ultimately, S could not forbid the works council work – A does not require his permission.

In establishments with 200 or more employees, a certain number of works council members is obligatory; they must be entirely relieved of their professional work without any reduction in pay (section 38 of the BetrVG). These employees who are to be relieved of their regular work are elected by the works council (section 38(2) sentence 1 of the BetrVG).

Although the members of the works council carry out their duties in an honorary capacity, this work must not lead to a reduction in their income. If a member of the works council is relieved of his/her obligation to work to do works council work, this does not lead to any reduction in pay. S/He is therefore entitled to continued payment of his/her wage/salary. This ensures that a works council member does not suffer any economic disadvantages if s/he neglects his/her contractual work because of necessary work for the works council. However, this only ensures that a works council member retains his/her present earned income. Usually, an employee continues to develop in the course of his/her professional career, and his/her income increases. During their term of office, therefore, works council members also benefit from the wage development of comparable employees whose professional development is average for the establishment (section 37(4) of the BetrVG: income guarantee). Employees are deemed comparable who were doing the same (or essentially the same) qualified work as the works council member at the time when the latter took office. This pay guarantee remains in force for a further year after the end of the term of office.

In principle, the aim is that a member of the works council should receive the same pay as s/he would have earned if s/he had not taken on the position on the works council – and therefore would possibly have had a better professional development.

The works council members are entitled to paid release from work to attend training and education events (section 37(6) of the BetrVG), on condition that they learn things that are necessary for works council work. The works council is entitled to this as a body pursuant to section 37(6) of the BetrVG. The choice of participants is therefore the responsibility of the works council. The employer must bear the costs of works council members participating in the training (sections 40 and 37(6) of the BetrVG).

Furthermore, each individual works council member is entitled to paid release from his/her work obligations for a total of three weeks during his/her regular term of office to participate in training and education events that are recognized as suitable (pursuant to section 37(7) of the BetrVG).

The works council members have a duty not to disclose confidential information. They sometimes gain insights into very sensitive areas in their works council work. They must therefore treat trade and business secrets which come to their knowledge as members of the works council in strict confidence and must not to disclose them (section 79(1) sentence 1 of the BetrVG).

The works council members must not to be hindered or disturbed in the conduct of their work on the works council (section 78 sentence 1 of the BetrVG). They may not be placed at an advantage or disadvantage as a result of this work (section 78 sentence 2 of the BetrVG). A deliberate violation of this ban is actually subject to prosecution pursuant to section 119 of the BetrVG.

The individual works council members also enjoy special protection against dismissal. Routine dismissal of a works council member is not permitted pursuant to section 15 of the Protection Against Dismissal Act [KSchG]. A member of the works council can only be dismissed without notice, i.e. for cause. However, this in turn is only possible if the works council member has committed a serious violation of his/her employment-contract obligations. Furthermore, the works council must approve the dismissal. If the works council refuses to approve the dismissal, the labour court can issue a decision in lieu of works-council approval (section 103 of the BetrVG). Similarly, routine dismissal is not permitted for a year after the end of the term of office. Exceptional dismissal remains possible. However, works-council approval of the dismissal is not necessary in this case.

01.3.3 Organization and management of the works council

The works council elects a chairperson and a deputy chairperson from among its members (section 26(1) of the BetrVG). The chair of the works council (or his/her deputy if the chair is presented) represents the works council within the framework of the resolutions passed by the council. The chairperson (or his/her deputy) is entitled to receive statements to be submitted to the works council (section 26(2) of the BetrVG). S/He convenes works council meetings, sets the agenda and chairs proceedings (section 29(2) of the BetrVG).

The meetings of the works council are usually held during working hours. The employer is to be notified in advance about the time and date of the meeting. Meetings of the works council are not open to the public. At the request of one-quarter of the works council members, trade unions represented at the establishment can participate in an advisory capacity – i.e. without voting

rights – in the meetings of the works council. Pursuant to section 29(4) of the BetrVG, the employer only has the right to take part in meetings that are scheduled at his / her request and in meetings to which s/he has been expressly invited.

The works council can organize consultation hours during working hours. An employee's absence from work to attend the consultation hours or use other works council services does not entitle the employer to reduce the employee's pay. Pay is thus to be continued during this time.

Pursuant to section 43 of the BetrVG, the works council must convene an employee meeting once per calendar quarter and give a progress report at this meeting (see chapter A section 02.9 for more details on the employee meeting).

01.3.4 Costs of the works council

The employer must bear all the costs of the works council's work pursuant to section 40 of the BetrVG. The employer must provide the necessary rooms, resources, information / communications technology (computers, telephones and copying machines, etc.) and office staff for meetings, consultation hours and ongoing business (section 40(2) of the BetrVG).

01.4 Cooperation Between the Employer and the Works Council

01.4.1 Trust-based cooperation

The employer and the works council are obliged to work together in a trust-based manner for the benefit of the employees and the establishment (section 2(1) of the BetrVG). The works council and the employer are to cooperate – they are not opponents. The principle of trust-based cooperation is also expressed at many other points in the BetrVG:

– Obligation to discuss and negotiate (section 74(1) of the BetrVG)
  The employer and works council are to meet at least once a month and hold negotiations on contentious issues with a serious will to reach an agreement. Unilateral measures by the employer which violate this principle are invalid.

– Ban on industrial action (section 74(2) sentence 1 of the BetrVG)
  Industrial action between the employer and the works council is inadmissible,

i.e. the works council may not call a strike among the establishment employees because of differences of opinion with the employer. The BetrVG provides for a procedure via the conciliation committee to settle conflicts on co-determination rights between the employer and the works council. Furthermore, the works council may not call on the employees of the establishment to participate in a legal strike called by a trade union. This ban on industrial action relates to the works council as a body. This does not affect the right of individual works council members to participate in a legal strike called by a trade union.

– Securing workplace harmony in other ways (section 74(2) sentence 2 of the BetrVG)
  The employer and the works council are to refrain from taking measures likely to disturb the work sequence or workplace harmony. Calls for a boycott are therefore always inadmissible.

– Ban on party-political activity (section 74(2) sentence 3 of the BetrVG)
  The employer and the works council are to refrain from all party-political activity. For example, all party-political publicity and collecting signatures or money donations are banned.

– General right to information (section 80(2) of the BetrVG)
  As a consequence of the cooperation obligation, the works council has a right to information from the employer to the extent necessary for it to carry out its statutory tasks (see chapter C section 02.3 for more details on this general right to information).

01.4.2 Violation of legal obligations

If the works council as a body or one of its members grossly violates its legal obligations then, among other things, the employer can request the labour court to dissolve the works council or expel a works council member (section 23(1) of the BetrVG). For example, if the works council were to call the employer a swindler and a liar at an employee meeting, this could be deemed a gross violation of its duties. Another gross violation of duty would be if the works council as a body or individual members were to call upon employees to support a union-backed strike while exercising a works council office. The application to the labour court can be filed either by the employer, or by at least a quarter of the employees with voting rights, or by a trade union represented at the establishment.

However, the works council, too, can take action against the employer if the employer grossly violates his/her duties under the Works Constitution Act. In these cases, the works council can apply to the competent labour court for an injunction (Unterlassung) or an order to tolerate (Duldung) or conduct a particular action (Vornahme einer Handlung). Such a gross violation would be if the employer repeatedly failed to obtain the approval of the works council for the employment of employees on temporary loan pursuant to section 99 of the BetrVG, or ordered and enforced overtime without observing the works council's co-determination right pursuant to section 87(1) no. 3 of the BetrVG.

The Tasks of the Works Council 02

The works council also has general tasks (section 80 of the BetrVG) in addition to the special co-determination and participation rights on staff-related, social and economic matters provided for under the Works Constitution Act.

02.1 Monitoring Tasks

It is the works council's task to ensure that the employer observes all the laws on employee protection and that they are properly applied at the establishment. Specifically, section 80(1) no. 1 of the BetrVG states that the works council is to ensure that the applicable laws, ordinances, collective agreements, works agreements and accident-prevention regulations which benefit employees are actually carried out and properly applied in the establishment.

The task of monitoring applicable laws which benefit the employees covers:

– the Working Hours Act
  the works council ensures that the maximum daily working hours are not exceeded at the establishment and that the statutory breaks and rest periods are observed.

– the Federal Data Protection Act
  the works council ensures that the employer observes the data-privacy regulations when handling employees' personal data.

– the Labour Protection Act and the Act to Protect Young Persons in Employment

– Social Security Laws
  the works council must, for example, ensure that the employer properly calculates and pays his/her social security contributions.

However, the works council can only effectively monitor whether the employer is observing applicable legal norms if it is informed. This is why section 80(2) sentence 1 of the BetrVG grants the works council a general entitlement to information. From the employer's viewpoint, this means that s/he has an obliga-

tion to inform the works council (see chapter C section 02.3 for more details on the employer's obligation to inform).

02.2 Obligation to Promote and Other Tasks

In addition to the monitoring tasks mentioned above, the works council also has promotion obligations. For example, it is expected to

- promote the equal treatment of women and men (section 80(1) no. 2a of the BetrVG)
- promote the reconciliation of work and family life (section 80(1) no. 2b of the BetrVG)
- promote the integration of severely disabled people and other people who require special protection (section 80(1) no. 4 of the BetrVG)
- promote, in cooperation with the representative body for young workers and trainees, the concerns of young employees and those employed at the establishment for their vocational training (section 80(1) no. 5 of the BetrVG)
- promote the employment of older staff at the establishment (section 80(1) no. 6 of the BetrVG)
- promote the integration of foreign employees and understanding between them and German employees at the establishment, and request measures to combat racism and xenophobia at the establishment (section 80(1) no. 7 of the BetrVG)
- promote and secure employment at the establishment (section 80(1) no. 8 of the BetrVG)
- promote industrial-safety measures and operational environmental protection (section 80(1) no. 9 of the BetrVG).

In quite general terms, the works council can ask the employer to take measures which serve the establishment and the workforce (section 80(1) no. 2 of the BetrVG). The employer is not obliged on principle to implement such suggestions. Only on issues where the works council has an enforceable right of co-determination can it, if necessary, enforce its suggestion – even against the employer's will – by proceedings before the conciliation committee (see chapter C sections 02.3 and 02.6 for more details on the works council's individual co-determination rights; see chapter C section 02.8.3 for more details on proceedings before the conciliation committee).

It is the task of the works council to prepare and conduct the election of the representative body for young workers and trainees (section 80(1) no. 5 of the BetrVG; see chapter A section 02.7 for more details on the representative body for young workers and trainees).

In addition, the works council is expected to receive suggestions from employees and the representative body for young workers and trainees and, if they seem justified, to work with the employer to implement them (section 80(1) no. 3 of the BetrVG).

02.3 Employer's Obligation to Inform

In order for the works council to duly carry out its tasks, it must be informed in good time and comprehensively by the employer (section 80(2) sentence 1 of the BetrVG). The employer must inform the works council completely and in good time about all matters that fall within the its area of responsibility. This obligation to inform does not only arise when the works council asserts its rights of participation in a concrete measure to be taken by the employer. Rather, the information provided by the employer is supposed to enable the works council to examine on its own authority whether it needs to become active, or whether participation rights are affected, and whether it can take action. Only if it is evident from the outset that the works council's rights of participation are not affected does the employer not need to inform the works council.

Within the scope of the obligation to inform, the employer can also be obliged to make existing documents available to the works council on request, if it needs them to meet its monitoring obligation (section 80(2) sentence 2 of the BetrVG). The number and type of documents the employer must supply to the works council vary according to the circumstances and depend on the individual case.

Important
The works council does not have a general entitlement to be handed employment contracts.

The term ‘documents’ is broadly defined and can include written records, statistics, official documents, etc. It can also include electronic data media.

Case

Department manager A is known among employees as a person who really ‘oppresses’ his employees and does not take the provisions of the Working Hours Act too seriously. Several employees have now complained to the works council that they continually have to work over ten hours a day. Even at weekends they are continuously being called by department manager A on business matters and are sometimes even ordered into the office. Works council member B now wants the employer to hand over documents on the daily number of hours worked by A’s employees. Does the employer have to accede to this request?

Solution: Yes. It is part of the works council’s general tasks to ensure that the employer observes the applicable laws, etc., which benefit the employees. The Working Hours Act is a law intended to protect employees. It regulates the maximum number of hours that an employee is allowed to work per day and the conditions that apply to Sunday working. In order to examine whether the Working Hours Act is being violated in the department managed by A, the works council needs to see the hours worked by the employees concerned.

02.4 Right to Inspect Wage and Salary Lists

In order (in particular) to be able to monitor equal treatment and whether the internal pay structure is just, and to exercise its co-determination rights on issues of wage structures, piecework rates and bonuses at the establishment, the works council is allowed to examine the lists of gross wages and salaries even without a compelling reason (section 80(2) sentence 2 of the BetrVG). This applies to all wage types and wage components (standard wages, merit increases, bonuses, gratuities, other special payments, etc.) – including payments to employees not covered by collective agreements.

Important
- The works council is only allowed to look at documents. The employer does not need to hand over the wage and salary lists. The works council may make notes when inspecting the documents but is not authorized to photocopy or hand-copy the lists.
- The right to inspect documents does not cover the salaries of executive, staff because they do not belong to the group of employees whose interests are represented by the works council.

The right to inspect documents does not depend on the consent of the respective employee, because the employee's individual privacy is given lower priority here in case law.

02.5 Right to Consult Experts

In order to enable the works council to properly carry out difficult tasks, the law gives it the right to consult experts (section 80(3) of the BetrVG). However, the works council is only entitled to do so if this is absolutely necessary in a specific case: i.e. the works council must objectively lack the necessary expert knowledge to duly carry out a specific task assigned to it by law; it must have already exhausted all internal sources of information. For example, it must first consult specialists at the establishment before it may ask to consult an external expert. The works council is entitled to a certain scope for judgemental evaluation in this respect. However, before the it can call an expert in, it must first conclude an agreement on this with the employer. The agreement must cover the contents, the name of the expert and the costs involved.

Practical tip
The employer should describe the topic, the name of the expert, the costs and the date as precisely as possible in an agreement. Only in this way can the costs and the time required be kept under control.

If the employer and the works council cannot agree, so that no agreement is concluded, the labour court can issue a decision in lieu of the employer's approval.

02.6 Works Council's Rights of Participation and Co-determination

The rights of the works council vary considerably in influence. A distinction must be made between simple participation rights and full co-determination rights.

Participation rights do not affect the employer's authority to make decisions on principle. Although the employer must involve the works council in the course of his/her decision-making process (e.g. by informing or consulting it), s/he is ultimately free to make his/her own decision.

Participation rights include

– the right to be informed
– the right to be heard and to make suggestions
– the right to consultation

Co-determination rights are the works council's strongest form of participation. Here, the works council can exert influence on measures planned by the employer. The employer can no longer take decisions alone in areas where the works council is entitled to full co-determination rights. S/He needs the approval of the works council for his/her plans. There are also cases in which the works council has a right to refuse approval and a right to object. Here, the works council does not participate equally in the employer's decision, but it can block it with its veto. If the works council does not approve the employer's plan, the employer cannot simply carry it out as though nothing has happened.

The following chart illustrates the works council's individual participation rights. The influence of the participation rights increases from the bottom to the top.

Table 02
Work council's rights of participation

Co-determination (in the narrower sense)	
The works council has right of co-determination	– Both sides have an equal right to take the initiative. – Decisions can only be taken together. – Conciliation committee decides if no agreement can be reached (rapid arbitration). *Example:* timing of working hours, social compensation plan, wage structures: sections 87(1), 91, 97(2), 98(1), 112 of the BetrVG
The works council must give its approval	The employer's measure requires the works council's approval, but the works council does not have the right to enforce an alternative proposal. *Example:* hirings, transfers, classifications, reclassifications: sections 94, 95(1), 98(2), 99(2), 103 of the BetrVG
Involvement	
The works council must be consulted (discussion)	The employer and the works council discuss matters. *Example:* organization of the workplace, the work sequence and the workload: sections 89(2), 90(2), 92(1)2, 92a, 96(1), 97(1), 106(1), 111 of the BetrVG
The works council must be heard	The employer informs the works council of his/her intentions; there is often a deadline for a works council statement. *Example:* dismissals: sections 102(1)1, 82(2), 84(1) of the BetrVG
The works council must be informed	The employer informs the works council of his/her plans, enclosing documents *Example:* personnel planning: sections 80(2)1, 85(3) 1, 90(1), 100(2), 105, 108(5) of the BetrVG, section 7(3) of the TzBfG

The works council has comprehensive co-determination rights in social, HR and economic matters.

02.6.1 Rights of information

In areas where the works council has a right to information, the employer must inform it in good time about the planned measure and, if appropriate, provide it with the necessary documents. Information rights are thus the weakest form of works-council participation. However, rights of information sometimes only represent a preliminary stage for further, stronger participation rights of the works council.

There are many special rights to information which are individually regulated in laws.

However, there is also a general regulation in section 80(2) sentence 1 of the BetrVG. According to this, the employer has a general obligation to inform the works council comprehensively and in good time about everything that falls within the works council's area of responsibility (see chapter C sections 02.1, 02.2 and 02.3 for more details).

02.6.2 Right to make suggestions and right to be heard

In areas where the works council has a right of proposal, the employer must acknowledge and examine any proposals the works council makes. However, the employer is not obliged to implement proposals made by the works council.

In areas where the works council has a right to be heard, the employer must obtain and acknowledge the works council's opinion on a planned measure. One of the most important of these rights is laid down in section 102(1) of the BetrVG, according to which the employer must hear the works council before any employee can be dismissed. Any dismissal issued without hearing the works council is invalid (see chapter C section 03.4.2 for more details).

02.6.3 Right to consultation

Consultation rights oblige the employer to ask the works council for its opinion on a plan and to discuss the matter with it. For example, the works council has a right to be consulted on:

– the structuring of workplaces
– staff planning
– vocational training

02.6.4 Right to refuse approval and right to object

In areas where the works council has a right to refuse approval or a right to object, the works council can refuse to give its approval or can object to an employer's measure for the reasons listed in the law. This markedly restricts the employer's authority to make decisions. Although the works council does

not participate with equal rights in making the decision, it can at least block it. The employer can, if necessary, have the labour court issue a decision in lieu of the works council's refused approval.

Example

Pursuant to section 99 of the BetrVG, the works council has a right of co-determination in the hiring, classification, reclassification and transfer of employees in companies above a certain size. The employer must first inform the works council about such planned HR matters, and the works council can then refuse to approve the measure. If the works council refuses to give its approval, the employer must have the labour court issue a decision in lieu in lieu of approval – otherwise s/he cannot carry out the HR measure (see chapter C section 03.4.1 for more details).

02.6.5 Full co-determination rights

The employer can no longer make decisions alone in areas where the works council is entitled to full co-determination rights. S/He needs the approval of the works council for his/her plans. Here, a lack of approval from the works council cannot be replaced by a labour court decision. If the employer and the works council cannot agree, the conciliation committee makes a binding decision (see chapter C section 02.8.3 for more details). In this way, the works council can force an agreement with the employer. The term enforceable co-determination is therefore also used.

In areas where it has full co-determination rights, the works council can even approach the employer and demand a decision or regulation (right to take the initiative, Initiativrecht). In other words the works council does not have to wait until the employer becomes active, but can take action itself. The employer must then negotiate with the works council. If the two sides cannot agree, the conciliation committee makes a binding decision in this case, too. In this way, the works council can force a regulation against the employer's will. The extent to which the works council is able to force a regulation depends on the specific contents and purpose of the respective co-determination right.

Example

The works council must co-determine questions on the operational structuring of wages pursuant to section 87 sentence 1 no. 10 of the BetrVG. In this sense 'wages' include all payments made by the employer to employees for their work – including voluntary payments. These are payments which the employer is not legally obliged to make – neither by a law, nor by a collective agreement, nor by an employment contract that s/he has concluded with employees. Here, the right of co-determination is only limited. For, in this case, the employer is free to decide whether s/he wants to make any additional payments at all and how large these payments should be. However, once the employer has decided to introduce a voluntary payment, the works council then has co-determination rights over the principles governing the distribution of the funds made available.

However, since the works council has no co-determination rights over whether the employer wants to make any voluntary payments at all, it cannot force the employer to do so. The works council thus has no right to take the initiative on the introduction of voluntary payments.

For example, the works council cannot force the employer to pay out a Christmas bonus or other special payments to his/her employees if s/he is not legally required to do so.

Full works-council co-determination rights apply mainly in the area of social matters pursuant to section 87 of the BetrVG (see chapter C section 03.1 for more details).

02.7 Voluntary Co-determination

There is nothing to prevent the employer and the works council from also concluding works agreements on other matters that go beyond the statutory co-determination rights. Rather, they have comprehensive authority to make decisions on matters relating to operations and employment contracts – irrespective of the existence of enforceable works-council co-determination rights.

There are many possibilities for voluntary provisions governing operational issues in a works agreement that is binding for all the employees of the establishment. Section 88 of the BetrVG lists some matters for which the works council and the employer can voluntarily conclude works agreements. These include:

– additional measures to prevent work accidents and damage to health
– measures on operational environmental protection
– the establishment of social facilities
– measures to promote capital formation
– measures for integrating foreign employees and combating racism and xenophobia at the establishment.

This list in section 88 of the BetrVG is not final; it only offers examples. Furthermore, there are numerous other matters that can be regulated within the scope of voluntary works agreements.

Important
The works council has no enforceable entitlement to the conclusion of such voluntary works agreements. In other words, the works council cannot force their conclusion via the conciliation committee (see chapter C section 02.8.3 for more details on the conciliation committee process within the scope of voluntary co-determination).

02.8 How does the Works Council Exercise its Co-determination Rights?

In cases where the works council has a co-determination right, the employer and the works council have to reach an agreement. In practice, the employer and the works council usually conclude a written works agreements on issues that are subject to co-determination. The works agreement is thus the works council's most important instrument for exercising its co-determination rights. However, the employer and the works council can also simply come to an informal understanding (semi-formal works agreement) on matters subject to co-determination.

02.8.1 Works agreement

Works agreements are written agreements between the employer and the works council. They lay down binding regulations for all the employees of an establishment. A works agreement applies directly and with mandatory force for all the employees of an establishment – like a law or collective agreement (section 77(4) of the BetrVG). This has the advantage that the contents of the works agreement no longer have to be implemented individually between the employer and every single employee in employment contracts. However, the employer is not allowed to conclude an employment contract with an employee on terms that are less advantageous for the employee. Only when the provisions of an employment contract are more favourable for the employee do they take priority over the provisions of the works agreement. Employees cannot waive rights that have been granted to them in a works agreement without the approval of the works council (section 77(4) of the BetrVG). One could therefore say that a works agreement is the 'law of the establishment'.

Works agreements must be formulated in writing (section 77(2) sentence 1 of the BetrVG), i.e. the employer and the works council must sign the same document. Oral works agreements are null and void (section 125 of the BGB). In this case, they can at best have an effect as a so-called semi-formal works agreement (Regelungsabrede).

A works agreement can be concluded in two ways: either the employer and the works council agree themselves or, if they cannot agree, they appeal to the conciliation committee. In this case, a works agreement can also be based on the judgement of the conciliation committee. Then the employer and the works council do not have to sign together (section 77(2) sentence 2 of the BetrVG).

The contents of a works agreement may only cover questions that are within the works council's area of responsibility. This is relevant especially when works agreements contain provisions that are not concluded on the basis of a works-council co-determination right, but are voluntarily agreed between the employer and the works council without any legal obligation. For example, a works agreement cannot contain any provisions dealing with the employees' private domain.

Example 1

Employer A notices that many of her employees have recently been coming to work late or overtired on Monday mornings. She asks some of them the reason for this, and most of them reply that they have been taking advantage of the beautiful weather at the weekend and been partying or barbecuing with friends late into the night. Employer A therefore decides to 'get to the root of the problem'. She quickly agrees with the works council and they conclude a works agreement on 'Behaviour at the Weekend' stating that the employees at the establishment must be in bed no later than 10 p.m. on Sunday evenings. In this way, the employer and the works council want to ensure that the employees get to work on time and are well rested on Monday mornings. Is this allowed?

Solution: No. What the employees do during their free time is solely their business. This relates to their private domain, which the employer may not interfere with – even with the approval of the works council. The employees can decide themselves what time they go to bed on Sunday evenings. The employer and the works council have no authority to make rules on this.
Of course, the employer does not have to simply accept that her employees come to work too late. She can punish this misconduct – like any other misconduct: she can issue warnings, and ultimately dismiss them if they persistently refuse to change their ways.

Example 2

Employer A's business is going very well. Every year, therefore, he donates a considerable sum of private money to charitable organizations. He believes that people who are doing well should help those who are not so well off. In his view, far too few people share this attitude, and he decides to do something about it. He discusses the matter with his works council, and they agree that the employees of the establishment earn very well and belong to the kind of people who should help others. The works council and the employer therefore conclude a works agreement entitled 'We Help Others', in which the works council and the employer state that ten percent of each employee's monthly wages will be withheld in future and that this money will be donated to a charitable organization. Is this allowed?

Solution: No. The employer and the works council cannot simply make decisions on how the employees are to spend their wages. Even if it is in pursuit of highly noble aims, they cannot simply decide that the employees must donate part of their pay to charity.

Of course, provisions in works agreements must also not violate laws; they must observe the equal-treatment principle, the anti-discrimination laws and the employees' personal freedom. Furthermore, the collective agreement takes priority pursuant to section 77(3) of the BetrVG (see chapter A section 01.10 for more details). This means that pay and other working conditions, which are (usually) regulated by a collective agreement, cannot be the subject of a works agreement – unless the collective agreement expressly allows it.

When an issue affects several establishments of a company, a works agreement can also be concluded that applies to several establishments. The central works council is then responsible, and the works agreement is called a central works agreement. It is even possible to regulate matters throughout an entire group. Such agreements, called group works agreements, are then concluded by the group works council. These include, for example

- group-wide regulations on a retirement pension scheme,
- a group works agreement on the exchange of employee data between group companies.

A works agreement ends when the works council and the employer rescind it by consensus. Works agreements can also be concluded for a certain period – i.e. for a fixed-term. They then end automatically when the term expires. Furthermore, a works agreement can be terminated unilaterally by the employer or the works council. Section 77(5) of the BetrVG states that works agreements can be terminated by giving three months notice. However, the employer and the works council are free to agree shorter or longer different notice periods, to lay down certain dates for termination, or even to exclude routine termination (i.e. by giving notice) altogether. Termination without notice for cause always remains possible, however. Furthermore, a works agreement always ends when the employer and the works council conclude a new works agreement on the same subject. This new works agreement then supersedes the old one.

Provisions in works agreements on matters that are subject to enforceable co-determination continue to apply even after the works agreement expires until they are replaced by another agreement (aftereffect (Nachwirkung), section 77(6) of the BetrVG). This aftereffect can also be excluded by the works council and the employer, however.

02.8.2 Semi-formal works agreement

The works agreement is not the only form of binding agreement between the employer and the works council. In this context, the law speaks very generally of 'agreements' in section 77(1) of the BetrVG. The term semi-formal works agreement (Regelungsabrede or Betriebsabrede) has become established for agreements that are not concluded by formal works agreements.

A semi-formal works agreement is also a binding agreement between the works council and the employer. However, it establishes rights and obligations only in the relation between the works council itself and the employer. In particular, unlike a works agreement, it does not apply directly and with mandatory force to the employees of the establishment. This means that if the employer wants the contents of a semi-formal works agreement to also be binding between the employer and the employees, s/he must implement the contents of the semi-formal works agreement, for example by issuing corresponding instructions or concluding employment contracts to this effect with the individual employees. This is complicated and time-consuming. In practice, therefore, semi-formal works agreements are unsuitable on principle for permanently regulating operational matters, or if the provisions of such agreements are to have a direct effect on the individual employment relationships. In practice, a semi-formal works agreement can be useful for one-off agreements between the employer and the works council or for agreements that only affect the employer and the works council (e.g. organizational matters). These include, for example:

- Agreements between the employer and the works council on when and where the works council holds its consultation hours
- Agreements between the employer and the works council on when and where an employee meeting is to be held
- Measures relating to individual employees where the works council has a right of co-determination, e.g.
  - where the works council refuses to approve the hiring of an employee pursuant to section 99 of the BetrVG
  - where the employer and an employee cannot agree on when a certain

> employee can take a holiday; in such disputes the works council has a right of co-determination pursuant to section 87 no. 5 of the BetrVG which it does not exercise by way of a simple semi-formal works agreement alone

Furthermore, a semi-formal works agreement can be concluded informally, i.e. also orally. However, for purposes of provability, it should preferably be recorded in writing. By contrast, a works agreement must always be concluded in writing, otherwise it is not legally effective.

Within the scope of enforceable co-determination, a semi-formal works agreement is only possible if the regulation does not need to have a normative effect. If the agreed measure is to be implemented via the employer's right to issue instructions, for example, a semi-formal works agreement is sufficient. For the rest, a semi-formal works agreement protects the co-determination right, so that the works council cannot demand a works agreement for the same subject at a later date.

02.8.3 What happens if the employer and the works council cannot agree?

In cases where the works council has a co-determination right – also in the sense of the right to refuse approval and the right to object – there must be a way to settle conflicts in the event that the employer and the works council cannot agree. The law provides for two ways: the first is for the labour court to make a binding decision; the second is the establishment's conciliation committee. The law on the respective co-determination right lays down how an agreement is to be reached.

Conciliation committee

A conciliation committee is to be set up (section 76 of the BetrVG) when this is necessary to settle differences of opinion between the employer and the works council. It must be set up according to the principle of parity with the same number of members representing both the works council and the employer. As a rule each side appoints two assessors, although they are free to appoint more in difficult cases. An impartial chairperson must be appointed in addition to the assessors. If the two sides cannot agree on a chairperson, s/he is appointed by the labour court.

The conciliation committee passes its resolutions by majority vote after oral proceedings. Initially the chairperson abstains. Only if no majority is achieved does the chairperson participate in the voting, following further consultations. The rulings (or 'judgements') of the conciliation committee must be recorded in writing and signed by the chairperson (section 76(3) of the BetrVG).

Within the scope of enforceable co-determination, the conciliation committee becomes active even if only one side requests it to. In such cases, the conciliation committee's judgement has the effect of a works agreement. It replaces the agreement between the works council and the employer.

Within the scope of voluntary co-determination, the conciliation committee only becomes active if this is requested by both the employer and the works council in consensus. In this context, the judgement of the conciliation committee always represents only a mediation proposal. It takes the place of an agreement between the employer and the works council only if both sides agree to abide by the judgement in advance or if they accept it later (section 76(6) of the BetrVG).

The costs of the conciliation committee are borne by the employer.

On the basis of a collective agreement, a (rapid) arbitration board can be set up instead of the establishment's conciliation committee and assume its responsibilities. Relevant collective agreements frequently provide for a relatively short deadline for decisions by the arbitration board. The chairperson of the arbitration board has usually already been appointed in advance, so that there is nothing to prevent a quick decision being reached.

Individual Participation Rights of the Works Council 03

03.1 Enforceable Co-determination in Social Matters

Section 87(1) nos. 1 to 13 of the BetrVG lists social matters in which the works council has an enforceable right of co-determination. This means that the employer can only take measures in these legally regulated cases if they are approved by the works council. This approval can be provided in that the works council comes to an informal understanding (semi-formal works agreement) with the employer; or else the two sides conclude a written works agreement, which is expedient and normal practice (see chapter C sections 02.8.1 and 02.8.2 for more details on works agreements and a semi-formal works agreements). If the employer and the works council cannot agree, the conciliation committee makes a binding decision. The judgement of the conciliation committee then replaces the agreement between the employer and works council (see chapter C section 02.8.3 for more details on the conciliation committee).

The works council does not have a right of co-determination if the matter requiring co-determination is already regulated by a law or a collective agreement.

Furthermore, co-determination rights only apply if the measure to be taken by the employer affects more than one employee (collective matter, kollektiver Tatbestand). If a measure to be taken by the employer only affects one employee, however, there is no co-determination right.

03.1.1 Organization of the establishment, employees' conduct at the establishment (Section 87(1) no. 1 of the BetrVG)

The employer runs the establishment and therefore decides how the establishment and the workflow are to be organized. Employees must fit in with this prescribed work organization. Furthermore, the employer has a right to issue his/her employees instructions and thus lay down rules on how they are to do their work. The employees must follow these rules. This unilateral organiza-

tional and disciplinary power of the employer is subject to co-determination by the works council, specifically under the following prerequisites:

The works council has a right of co-determination on rules that affect coexistence between employees and their conduct towards one another (organizational behaviour, Ordnungsverhalten). However, measures by which the employer directly specifies the employees' work obligation in detail and prescribes how the employees are to carry out their work obligation are not subject to a co-determination right (work behaviour, Arbeitsverhalten). Distinguishing between organizational behaviour, which is subject to co-determination rights, and work behaviour, which is not, can be difficult in specific individual cases.

Examples of rules on the organization of the establishment that are subject to co-determination:

- Rules on gate controls and bag checks
- The obligatory use of plant IDs and time clocks
- Rules banning smoking and alcohol consumption
- Dress code, e.g. wearing name badges on work uniforms
- Rules on whether staff may listen to the radio at the workplace during working hours
- Rules that staff must switch off mobile phones and keep them in their lockers during working hours
- Ethical rules
  Ethical rules regulating how employees deal with fellow employees, non-employees or business partners are subject to works-council co-determination. This also applies to codes of conduct, ethical guidelines and ‚whistle-blowing' hotlines, which were made necessary by the Sarbanes Oxley Acts (SOA) and primarily affect companies listed on the US stock exchange.

Examples of work behaviour not subject to co-determination:

- Rules based on administrative acts that are binding on the employer, e.g. a licensing authority's requirements for a certain processing plant
- Ban on smoking and alcohol based on accident-prevention regulations
- Instructions on employee's work behaviour
- Warnings

03.1.2 Beginning and end of daily working hours, distribution of working hours over weekdays, breaks (Section 87(1) no. 2 of the BetrVG)

This co-determination right only relates to the distribution of total weekly working hours prescribed by a collective agreement or the employment contract. Only the time of day of the working hours is subject to co-determination, not the number of hours worked.

The co-determination right also covers to the duration and time of day of breaks. Breaks are interruptions in working hours during which employees neither have to work, nor have to be available for work. The purpose of breaks is to enable employees to relax. The following are subject to co-determination:

– drawing up work rotas
– introducing new shift times
– introducing flexible working hours
– establishing on-call or emergency duty

03.1.3 Temporary reduction or extension of customary working hours (Section 87(1) no. 3 of the BetrVG)

The works council has a co-determination right when working hours customary at the establishment are temporarily shortened or extended. Temporary shortening means short-time working, temporary extension means overtime. Short-time working is the temporary reduction of customary working hours by hours, days or weeks. Overtime is time in excess of the number of hours of work laid down by the collective agreement or employment contract.

Working hours customary at the establishment are defined as the regular operational working hours. However, this does not mean the number of working hours most common at the establishment. Rather, the focus should be on the working hours that apply at the establishment to certain jobs and employee groups. There can thus be several customary working hours in one and the same establishment. This means that even a temporary extension of customary working hours for part-time employees is also in principle subject to the obligation for co-determination.

03.1.4 Time, place and method of payment of wages and salaries (Section 87(1) no. 4 of the BetrVG)

This works-council co-determination right concerns the circumstances surrounding the payment of wages and salaries. Wages and salaries in this sense are deemed to be all remuneration paid out in money, irrespective of what it is called – including wages, salaries, all bonuses and holiday pay – but also payments in kind made by the employer. The following are subject to co-determination:

– The intervals at which wages and salaries are to be paid (e.g. monthly, weekly)
– The date of payment (e.g. always on the fifteenth of a month)
– The method of payment (e.g. in cash or by bank transfer)

03.1.5 General holiday principles, holiday schedule, timing of individual employees' holidays (Section 87(1) no. 5 of the BetrVG)

The works council has a right of co-determination when the general holiday principles and holiday schedule are decided. General holiday principles are the operational guidelines according to which individual employees are to be granted holiday. The following are subject to co-determination:

– Holiday closedown
  The works council has a co-determination right on whether holiday is to be granted uniformly for all employees at the establishment or certain groups of employees in the form of a holiday closedown. The co-determination right covers the timing and duration of the holiday closedown in this context.

– Principles on procedures when several employees request holiday for the same time
  The works council has a co-determination right when, for example, a decision is to be made at the establishment giving employees with school-age children priority when granting holiday during school vacations.

– Rules on a holiday ban
  The works council has a co-determination right if a holiday ban is to be imposed. For example, if employees in the accounting department are not to be granted any holiday in November or December due to the increased workload associated with preparing the annual financial statements.

The works council never has any co-determination rights when it comes to timing holidays for individual employees. Only if the employer and employee cannot agree does the works council have a co-determination right. In such a case, the employer must, by way of exception, call in the works council to decide in an individual case.

03.1.6 Introduction and use of technical equipment to monitor employee behaviour or performance (Section 87(1) no. 6 of the BetrVG)

This co-determination right even applies if the employer introduces or uses technical equipment that is only suited for monitoring the employees. The technical equipment must therefore not necessarily be used to monitor the employees; its suitability for monitoring is sufficient.

Examples of technical monitoring equipment

- Video monitoring of the premises at the establishment, even if it is installed for security reasons and not to monitor the employees
- Equipment for recording telephone data
- Equipment for tapping phone calls
- Automatic time-recording devices, time-stamping clocks, time clocks
- Introduction of the “PAISY HR” information system
- Fingerprint scanner to control access
- Introduction of internet and email at the workplace

If employees’ workplaces are to be equipped with internet connections, this triggers a works-council co-determination right. The internet connection opens up extensive monitoring possibilities for the employer. For example, a proxy server can be used to log and cache all online content seen by an employee. The employer can then easily determine when and for how long the employee has been surfing the internet and which sites s/he has visited.

03.1.7 Rules on health protection and the prevention of industrial accidents and occupational diseases (Section 87(1) no. 7 of the BetrVG)

This works-council co-determination right relates to operational rules on health protection and the prevention of industrial accidents and occupational diseases in the context of the statutory provisions and accident-prevention regulations. Accident-prevention regulations are not government regulations. They differ

from laws and regulations in that they are not issued by the government, but by the responsible professional association (Berufsgenossenschaft). Even so, accident-prevention regulations oblige the employer to take certain measures in the establishment to prevent industrial accidents, occupational diseases and health hazards for his/her employees.

The co-determination right initially depends on the existence of statutory provisions or accident-prevention regulations which apply to the establishment. However, the co-determination right only applies to the extent that these regulations allow scope for individual rules at the establishment. If a statutory regulation or accident-prevention regulation requires a very specific safety precaution that the employer is obliged to take, there is no scope for the works council's co-determination right. The situation is different if a regulation only prescribes a general framework or a general objective which the employer has to achieve. In this case it is up to the employer how and by which specific measures s/he wants to achieve the prescribed aim. In such a case, the works council has a right of co-determination. The following therefore applies: the more generally the regulation is formulated, the more scope remains for the works council's co-determination right. The works council's co-determination right only exists to the extent that the employer him/herself can determine anything, i.e. if s/he retains scope for action.

Examples

Pursuant to section 4 of the Labour Protection Act [ArbSchG], the employer must organize the work in such a way that hazards to life and health are prevented as far as possible. This provision only prescribes a general aim which the employer must achieve. It does not lay down which specific safety precautions the employer must take to protect his/her employees' life and health. This is left to the employer him/herself. S/He thus has scope for action within which the works council has a co-determination right.

If a regulation lays down a specific safety distance between machines, the employer must implement this distance. No scope of action remains here for the employer. The works council therefore has no co-determination right.

03.1.8 Form, basic features and administration of social facilities (Section 87(1) no. 8 of the BetrVG)

Social facilities are all facilities through which the employer grants further advantages (beyond wages and salaries) to improve the social situation of the employees and, where applicable, their families. The employer does not necessarily have to finance the entire social facility alone. For example, in works canteens the employees usually pay a proportion of the food costs themselves.

Examples of social facilities: Works canteens, break rooms at the establishments, holiday homes, children's homes, nurseries, sports facilities, libraries, employee pension schemes (e.g. pension funds and relief funds).

The co-determination right only relates to the form, basic features and administration of existing social facilities. However, the employer alone decides whether to establish a social facility in the first place and how much money to spend on it. S/He also decides whether to close an existing social facility without any obligation to allow co-determination.

Example

The employer alone decides whether to open a works canteen and how much money to make available for it each year. Once the employer has decided to open a canteen, the works council has a co-determination right on the basic features and administration of the canteen, for example in drawing up rules on its usage or deciding on opening times and meals prices.

03.1.9 Company apartments (Section 87(1) no. 9 of the BetrVG)

Section 87(1) no. 9 of the BetrVG is a subcase of the rules on social facilities in section 87(1) no. 8 of the BetrVG. This only applies to rented company apartments, not to company housing that an employee must occupy without concluding a tenancy agreement in the interests of the establishment, e.g. porter or caretaker apartments.

03.1.10 Wage issues at the establishment (Section 87(1) no. 10 of the BetrVG)

The works council has a co-determination right on questions of wage structures at the establishment, especially when payment principles are developed or new payment methods are introduced, applied or modified. The purpose of this co-determination right is to ensure that the internal pay structure is appropriate, transparent and just.

In the sense of section 87(1) no. 10 of the BetrVG, wage includes all payments made by the employer to employees for the work they do, irrespective of how they are described: wages, salary, bonuses, holiday pay, Christmas bonus, gratuities, premiums, etc.

Payment principles are a system for determining remuneration for all the employees, certain departments or employee groups of the establishment. The payment principles include, for example, questions such as:

- whether a time work rate or piecework is to be paid
- whether premiums are to be paid and, if so, for what kind of work
- whether commissions are to be paid and, if so, when
- what percentage of total remuneration is made up by the components basic pay, premiums and commission

The works council's co-determination rights are limited in the case of payments which are not legally mandatory – i.e. voluntary payments by the employer. In this case, the employer is free to decide whether to make any additional payments at all and how much s/he wants to spend on them. The works council cannot, therefore, force the employer to make voluntary payments. However, once the employer has decided to introduce a voluntary payment, the works council has a say on the principles for distributing the resources made available.

Example

Employer A can look back on a very successful business year. She would therefore like to reward her employees and made them all a special payment. The works council has no influence over the employer's decision whether to make a special payment or not and how much money she wants to set aside for this. However, it does have a co-determination right when it comes to how this voluntary bonus payment is to be distributed among the employees.

The specific amount of remuneration is not subject to the right of co-determination.

Wage-structure issues are frequently regulated by a collective agreement. If such a collective agreement exists, these issues cannot be regulated at the establishment level (priority of the collective agreement), so that the right of co-determination is also excluded. However, many collective agreements allow scope which the employer and the works council can use for works agreements. The works council has a right of co-determination in such cases.

The co-determination right only applies when it is a matter of laying down general, abstract principles of wage structuring (collective matters). The co-determination right does not apply to individual wage agreements for individual employees.

03.1.11 Setting piecework rates, premium wage rates and comparable performance-related payments (Section 87(1) no. 11 of the BetrVG)

Section 87(1) no. 11 of the BetrVG extends the works council's co-determination right only to certain forms of performance-related payments and to setting the amount of payments. The aim is to make wage and salary payments as fair as possible.

03.1.12 Principles on the employee suggestion system (Section 87(1) no. 12 of the BetrVG)

In the sense of Section 87(1) no. 12 of the BetrVG, the employee suggestion system concerns suggestions for improvement made by employees to improve the establishment's earnings position, to simplify, ease or accelerate work at the establishment, or to improve safety. They only include suggestions that represent an additional performance by the employee, in other words work done voluntarily over and above the normal work obligation.

Inventions that can be patented or become a utility model are not covered by Section 87(1) no. 12 of the BetrVG. The Employee Invention Act applies to these. No co-determination right exists here.

The employer alone decides whether s/he wants to introduce a employee suggestion system. The employer therefore decides without any influence from

the works council whether to pay bonuses for suggestions. S/He also determines alone how much money to spend on it. The employer decides the amount of the bonus without co-determination; it can be a money payment or a payment in kind.

The works council has a co-determination right when it comes to laying down general principles on the size of bonuses for submitting, processing and evaluating suggestions.

03.1.13 Principles on the conduct of group work (Section 87(1) no. 13 of the BetrVG)

Co-determination does not apply to all group work – only to group work in which a group of employees carries out an overall task that has been assigned to it, essentially on its own responsibility, in the context of the operational workflow (partially autonomous group work).

The co-determination right applies only to the principles on the conduct of group work (e.g. the position and tasks of the group spokesperson, holding group discussions, cooperation within the group and with other groups, conflict resolution within the group, consideration of employees with a weaker performance record). It does not cover the introduction or ending of group work.

03.2 Participation and Co-determination in HR matters

03.2.1 Personnel planning

The employer must inform the works council about personnel planning and in good time, in particular about present and future personnel requirements and the resulting HR measures. S/He must subsequently discuss the necessary measures with the works council (section 92(1) of the BetrVG). These include, for example:

- How should future personnel requirements be covered?
  - by hiring new staff, transferring staff
  - using employees on temporary loan
  - giving staff who currently have a fixed-term employment contract a full-time contract
  - etc.

– What qualifications must the employees have who will be needed in the future?
  Can employees currently working at the establishment be trained in time so that they acquire the qualifications needed?

– How can a future situation involving surplus staff be overcome?
  – dismissals
  – by exploiting normal staff fluctuations
  – etc.

The works council can also make its own suggestions on introducing and carrying out personnel-planning measures (section 92(2) of the BetrVG). The employer is not obliged to implement these suggestions, however.

Conclusion: The works council only has a right of information, consultation and proposal. In the final analysis, the employee decides as s/he sees fit.

03.2.2 Job security

Pursuant to section 92a (1) sentence 2 of the BetrVG, the works council can make suggestions to the employer on securing and promoting employment. The employer must examine the works council's suggestions and arguments and discuss them with the works council. If the employer considers the works council's suggestions to be unsuitable, s/he must justify this opinion. This justification must be given in writing in establishments with more than 100 employees.

Conclusion: The works council has only a right of consultation and proposal. The employer is not obliged to implement the works council's suggestions.

03.2.3 Staff questionnaires and assessment principles

The employer uses staff questionnaires to collect personal data and information on the knowledge and skills of employees or applicants.

The employer is free to decide whether to introduce and use such questionnaires at the establishment. S/He is also free in his/her decision to abolish staff questionnaires once they have been introduced. The works council cannot, therefore, force the introduction of staff questionnaires. It can only submit

a corresponding suggestion to the employer. It is up to the employer to decide whether to implement this suggestion.

However, once the employer has decided to introduce staff questionnaires, the works council can exercise its co-determination right as regards the contents of the forms – staff questionnaires require the works council's approval (section 94(1) of the BetrVG).

The same applies to personal information in written employment contracts which is generally to be used for the establishment, and to other general assessment principles (e.g. forms used by supervisors to evaluate their employees' performance. Here, too, the employer needs the works council's approval (section 94(2) of the BetrVG).

If no agreement is reached on the contents of the corresponding documents, the conciliation committee decides (see chapter C section 02.8.3 for more details on the conciliation committee).

Conclusion: The works council has a full co-determination right as regards the contents of staff questionnaires, the personal information contained in written employment contracts and general assessment principles.

03.2.4 Selection guidelines

Guidelines on selecting staff to be hired, transferred, reclassified or dismissed require the approval of the works council's (section 95 of the BetrVG). Selection guidelines raise transparency when a choice is made between several possible employees or applicants. To this purpose general, abstract principles regarded as decisive for staff selection are laid down in selection guidelines and the criteria weighted. As a rule, selection guidelines are laid down in the form of a works agreement (see chapter C section 02.8.1 for more details on works agreements).

Example

Selection guidelines for hiring new staff can state the technical and personal qualifications an applicant must have. The criteria may include school edu-

cation and vocational training, letters of reference, professional experience and priority for internal applicants.

In establishments with up to 500 employees, the works council cannot force the use of selection guidelines against the will of the employer. The situation is different in establishments with more than 500 employees. In this case the works council can enforce the establishment of selection guidelines even against the employer's will (section 95(2) of the BetrVG).

If the two sides cannot agree on the contents of the selection criteria, the conciliation committee decides (see chapter C section 02.8.3 for more details on the conciliation committee).

03.3 Participation and Co-determination on Vocational Training

Vocational training in the sense of the BetrVG includes not only classic vocational training, but also advanced training, retraining and all other forms of vocational training – courses, seminars, instruction, etc. – which serve to qualify employees for professional requirements. They must be systematic, target a certain educational objective, and provide employees with specific knowledge and skills. These include, for example:

- Seminars preparing executive staff for a stay abroad or training them in HR management
- Courses on new technical processes for master craftsmen
- Instruction on labour and social law for employees in the human resources department
- Additional instruction for trainees
- Language and computer courses for secretarial staff
- Trainee programmes in which management trainees move through various departments at the establishment for training purposes

The BetrVG distinguishes between on-the-job and off-the-job vocational-training measures. On-the-job training is when the employer largely determines the content, the group of participants, the instructors and the sequence of the training measure. It is irrelevant whether the training measure is conducted during or outside of working hours.

Off-the-job training measures are organized, offered and conducted by an external organizer, for example by professional seminar providers, employers' associations, trade unions or educational institutions.

03.3.1 Promotion of vocational training

Pursuant to section 96(1) of the BetrVG, the employer and the works council are obliged to promote vocational training within the framework of personnel planning. The works council can demand that the employer researches training requirements. Vocational-training measures must be discussed with the works council. The works council can also make its own suggestions on this.

Conclusion: The works council only has a right of information, consultation and proposal. In the final analysis, the employer decides as s/he sees fit.

03.3.2 Vocational-training facilities and measures at the establishment

Pursuant to section 97(1) of the BetrVG, the employer must consult with the works council if s/he wants to

- set up and equip vocational-training facilities at the establishment (e.g. a trainee workshop, a retraining facility or an education/training centre)
- introduce vocational-training measures at the establishment
- allow employees to participate in outside vocational-training measures.

03.3.3 Implementation of training measures at the establishment

The works council has an enforceable co-determination right in the implementation of training measures at the establishment (section 98 of the BetrVG), unless the vocational training is prescribed by training regulations. For example, the works council has a co-determination right

- on the content and scope of the skills/knowledge to be taught (e.g. the specific curriculum and syllabus)
- on the methods used to teach the skills/knowledge (e.g. face-to-face courses, e-learning programmes or a mixture of the two)

– on how long the training measure is to last and when it is to be held (e.g. regular English courses every Monday and Wednesday from 09 a.m. to 11 a.m. over a period of one year)
– on whether there is to be an examination at the end and, if so, what kind of examination (e.g. oral or written examination, what subjects are to be tested)
– on the purpose of the training measure
– on deciding the general makeup of the group of participants (e.g. junior managers, employees soon to be deployed abroad, trainees)

The works council only has a right of determination if the employer also has legal scope to make his / her own decisions. If training measures are strictly prescribed by training regulations, there is no scope for works-council co-determination.

The employer is free to decide without any co-determination obligation whether s/he wants to introduce a certain vocational-training measure at the establishment. S/He must only consult with the works council on this. If the employer then decides to introduce the vocational-training measure, the works council then has an enforceable co-determination right on all subsequent questions as to how the measure is to be implemented.

There is an exception to this: if the employer has planned or carried out measures that lead to a change in the work to be performed by the employees, and their professional knowledge and skills are no longer sufficient to perform their tasks, the works council also has an enforceable co-determination right as regards to whether the vocational-training measures are to be carried out (section 97(2) of the BetrVG). If the employer and the works council cannot agree, the conciliation committee decides.

03.3.4 Selection of participants

The works council has a co-determination right pursuant to section 98(3) and (4) of the BetrVG in selecting the employees who will be allowed to participate in vocational training. The co-determination right applies to vocational-training measures at the establishment. In the case of off-the-job vocational-training measures, the works council only has a co-determination right if the employer releases the participants – with or without pay – from work or – (entirely or partially) pays for the measure (e.g. participation fees, travel expenses).

The employer can decide on technical qualifications for admission and the number of participants unilaterally, i.e. without co-determination. The works council's co-determination right only applies to the selection of the participants, and depends on the works council making its own proposals. The works council cannot simply object to the choice made by the employer. If the works council and the employer together suggest more candidates than there are spaces available, and the employer and the works council cannot agree, the conciliation committee decides. In this way, the works council can indirectly influence the participants who are selected by the employer via its right of proposal.

Example

Employer A would like to offer his employees an opportunity to attend English courses at a language school at his expense. He is willing to release a maximum of ten employees for the courses and to pay their participation costs. Employer A chooses seven employees for whom he believes an English course will be useful. The works council recommends two additional employees. Employer A has no objection to the participation of the two employees suggested by the works council and agrees. However, the works council feels that one of the employees suggested by the employer, Mr M, does not deserve the English course. The works council therefore states that it does not agree with the nomination of Mr M. Can the works council prevent the participation of employee M?

Solution: No. The works council initially has no co-determination right with respect to the participants named by the employer. If there are enough places, so that the participants suggested by both the employer and the works council can take part in the training measure, the works council cannot simply object to a nomination by the employer. Whether the employer and the works council agree in this case on a candidate suggested by the employer is irrelevant; in particular, the works council has no recourse to the conciliation committee. The employer can allow the employee he suggested to participate in the training measures. In the above case, this means that the employer and the works council have suggested a total of nine participants. There are thus enough places for all of them, because a total of ten are available. The works council cannot prevent the participation of Mr M.

Variation of the example: Employer A again recommends seven employees who he believes would benefit from an English course. The works council suggests another five people, making a total of twelve candidates for only ten

available places. The employer and the works council cannot agree on the ten participants.

Solution for this variation: If the works council and the employer recommend more candidates than there are places available, and the employer and the works council cannot agree, the conciliation committee decides. The conciliation committee must include in its basis for selection both the employees suggested by the works council and those suggested by the employer. The result of the conciliation committee's decision might then be that six of the employer's candidates and four of the works council's candidates can participate. In this way, the works council can indirectly influence the participants who are selected by the employer via its right of proposal.

03.3.5 Appointment of the manager responsible for vocational training

Pursuant to section 98(2) of the BetrVG, the works council can object to the choice of a manager chosen to be in charge of vocational training at the establishment (e.g. a trainer), or demand this person's withdrawal if s/he is not personally or technically suitable or neglects his / her duties.

03.4 Participation and Co-determination on Individual HR Measures

03.4.1 Hiring, classification, reclassification, transfer

In establishments with a normal workforce of more than 20 employees with voting rights, decisions on hiring, classification, reclassification and transfer require works-council approval (section 99 of the BetrVG). However, the works council may not refuse its approval arbitrarily, but only for the exclusive rea sons listed in the law. If the works council exercises this right of refusal, the employer can apply to the labour court for a decision in lieu of works-council approval.

An employee is deemed to be hired (Einstellung) when s/he is integrated into the establishment to work together with the staff employed there. The key factor here is when the employee actually starts work. When s/he concluded his / her employment contract is irrelevant.

Important
The employment contract is legally effective with or without the works council's approval. However, the employer is not allowed have the employee work at the establishment without the approval of the works council. The employer is therefore advised to make the conclusion of the employment contract dependent on works-council approval or a court decision in lieu of approval.

It is of no relevance to the works council's co-determination right whether the employee is being hired again or for the first time, whether for a fixed-term or indefinitely, whether the employee is to work part-time or full-time, for a probationary period, as a temporary worker or for the purpose of training. An employee is also deemed to be hired if s/he is taken on permanently, having previously had a fixed-term employment contract, or if his/her fixed-term contract is extended.

Example 1

Trainee A has been doing an apprenticeship with her employer B for the last three years. Now she has successfully completed her training. Employer B has always been very satisfied with trainee A's performance and would like to take her on permanently. Does he have to involve the works council?

Solution: Up until now, the trainee has been employed by the employer on the basis of a vocational training contract. If the employer now wants to take her on with a regular employment contract, this is based on a new decision by the employer. Taking on the former trainee in a regular employment relationship is therefore deemed a hiring as defined by section 99 of the BetrVG. The works council's approval is necessary.

Example 2

Employee A has had a child and takes two years parental leave. After the parental leave, she returns to her old job and starts working again. Is the approval of the works council required?

Solution: The employment relationship is suspended during parental leave. No new decision by the employer is needed if the employee starts working again after her parental leave. This is not, therefore, deemed a hiring as defined by section 99 of the BetrVG. The approval of the works council is not required.

Variation of example no. 2: After employee A has been on parental leave for six months, she finds that being at home all the time 'gets on her nerves'. She would like to go to work again, at least for a few hours a week. She therefore agrees with her employer to work temporarily part-time in her old job – for a fixed-term until the end of her leave. After that she intends to resume working in her old job as before, as was originally planned. Does the works council have to be involved?

Solution: If the employer and the employee agree that the employee can work in her old job part-time during her maternity leave, then this employment is based on a new decision by the employer. This is deemed to be hiring as defined by section 99 of the BetrVG, and requires the works council's approval.

If the employer employs freelancers or self-employed management consultants, this is not usually considered to amount to hiring as defined by section 99 of the BetrVG.

Classification (Eingruppierung)

Classification (Eingruppierung) is defined as the employee's first classification in the wage or salary group according to the collective agreement that applies to the employee, or the fixing of his/her remuneration according to the normal compensation scheme at the establishment. As a rule, this is carried out at the same time as hiring; however, it represents separate matter subject to co-determination. No classification is carried out if the establishment has no 'remuneration regulation'.

Important
Correct classification according to the wage groups of a collective agreement or a wage system at an establishment is mandatory. In other words, the correct classification is an automatic result of the work that is performed or to be performed according to the contract. Classification by the employer is therefore simply the application of the remuneration regulation according to the collective agreement or the wage system at the establishment; it is not a legal act. Similarly, the works council's co-determination right is not a right to influence a legal relationship, but only a right of co-assessment to ensure that the classification is carried out correctly. The works council must assess the classification made by the employer and check that it is correct. Since, as already stated, the classification of the employee is automatic and based on the work performed or to be performed pursuant to the contract, the employee has a claim to the correct wage or salary irrespective of whether the works council approves or not.

Reclassification (Umgruppierung)

A reclassification (Umgruppierung) is when the employee's allocation to the relevant wage group is changed. To this extent, it is irrelevant whether the employee receives a higher income (upgrading), a lower income (downgrading) or the same income after reclassification. These include, for example:

- The employee is assigned a different job which corresponds to the job characteristics of a different remuneration group (in this case, it could also be a 'transfer').
- The value of the employee's work changes, for example because the amount of work in a higher-value category increases, so that the employee 'grows into' a higher wage group. The same applies if the amount of work in a lower-value category increases, so that the employee 'grows into' a lower wage group.
- The previous remuneration regulation is changed or restructured. Now employees have to be assigned to their new wage groups according to the new remuneration regulation. This is a reclassification, even though the work performed by the employees and, perhaps, their remuneration remains the same.
- The employee is moved to a field not covered by the collective agreement because the employer determines that the employee's work has a value

that is higher than the highest remuneration group ('declassificaiton' from the collective-agreement system and, in some circumstances, classification in a non-pay-scale remuneration system that is outside the collective agreement).

Transfer (Versetzung)

A transfer (Versetzung) in the sense of the Works Constitution Act is when the employer assigns a different area of work to an employee and this assignment is likely to last longer than one month or involves a considerable change in the circumstances under which the work is to be performed (section 95(3) of the BetrVG). The decisive question is thus when the term 'new area of work' applies. The answer to this question depends mainly on the circumstances of the respective individual case. Certainly, the change for the employee must be so significant that the overall picture of his/her work changes. Minor changes do not constitute a transfer.

In principle, an employee's area of work includes the contents of his/her work task and the circumstances of the work, the type of work, and the way it fits into the work sequence at the establishment.

Examples for Assignment of new work, change of job

Example of a transfer

Employee A is employed as a warehouse worker. He restocks the warehouse shelves, compiles the goods ordered and helps load the trucks. In future, he is to work as a truck driver and deliver goods to customers.

Example for no transfer

Employee A is employed by a carmaker as a production worker on the assembly line. His task is to install seats into the cars. At present, middle-range saloons are being produced on his assembly line. The model is to be discontinued, and the company launches a top-of-the-range saloon as a replacement. In future,

this will be produced on the assembly line where A works. So in future A will install seats in the new top-of-the-range saloon.

If the employee continues in the same area of work, formally speaking, but significant new parts are added to – or removed from – his tasks, this can also be deemed a transfer. The employee's work must be given such a new profile that it can called a different job. When this is the case depends on the specific, individual circumstances. As a rule, the change can be called a transfer if the new tasks (or removed tasks) make up about 25 percent of the work.

Example of a transfer

Employee A is employed as a warehouse worker. He works a five-day week, always from Monday to Friday. Employee A stocks the warehouse shelves, compiles the orders and helps load the trucks. Because a truck driver quits unexpectedly, in future he is to work as a truck driver and deliver goods to customers three days a week. For the remaining two days he is to continue working in the warehouse as usual.

Example for no transfer

Employee S works as a secretary. Up to now, there has been an employee in the establishment's mailroom who distributed the mail every day to the employees. This employee is now retiring, and his position is not to not be filled. In future, secretary S must therefore go to the mailroom one floor higher and pick up the mail for the employees in her department. At her desk she must stamp the mail with a receipt stamp and distribute the mail to the employees in her department. This takes about ten minutes a day.

Change in the classification within the organization of the establishment

A change of position within the operational organization is deemed a transfer if, for example, it means that the employee concerned has to work with new

colleagues or perform his / her job within a different work organization, even if the duties remain the same.

Example of a transfer

Employee S is a secretary in the sales department, where she works with two colleagues. Her supervisor, Mr V, is the sales department manager. A secretary in the purchasing department has unexpectedly quit, so that the secretariat is understaffed. Secretary S therefore moves from the sales department to purchasing. She packs up her private belongings and moves into the purchasing secretariat, which is three floors lower. There she sets up her new desk opposite her new colleagues and starts work. Her new supervisor is now Mr P, head of the purchasing department.

Example for no transfer

Employer A maintains a typing pool for her establishment. Three members of staff are employed in the typing pool. They receive dictated cassettes from every department in the establishment, type the dictations as WORD documents and send them back to the responsible operatives by email. Up to now the typing pool has been assigned to Division A, and the supervisor is therefore division manager A. Now the employer decides to reorganize. In future, the typing pool will be assigned to Division B, and its supervisor will be division manager B. As part of this reorganization, the typing pool receives its own cost centre – number 0815. The work of the employees in the typing pool does not change. They retain their present office, the work remains the same, and the three employees remain as the same team in the 'typing pool' unit. Only the supervisor has changed, and they have a different cost centre.

Change of the place of work

Example of a transfer

Employee A works as an operative in the purchasing department. The purchasing department is to be moved to another company site about 30 kilo-

metres away. Employee A and his colleagues are to continue their present work unchanged at the new location.

Example for no transfer

Employee A has his office on the fifth floor. Because of renovation work, he and his department must move to the second floor of the same office building.

Otherwise, if an employee is released from work until the end of her notice period, this is not a transfer. The employee is not given any new duties here; she is simply released from her obligation to perform her previous work.

Similarly, if only the timing and number of working hours change, this not a transfer. In this case, the works council has co-determination right pursuant to section 87(1) no. 2 of the BetrVG.

Chapter overview

03.4.1.1 Employer's duty to inform

The employer must promptly and comprehensively notify the works council before any planned hiring, classification, reclassification or transfer. The works council can be informed orally or in writing. However, in order to preserve evidence, this should best be done in writing. The employer must submit the necessary application documents to the works council and provide information on the persons concerned, i.e. name, other personal data and information on personal and technical qualifications. The employer must inform the works council (submitting the necessary documents) about the effects of the

planned measure on the other employees in particular, for example the loss of jobs or the transfer of other employees. When new staff are hired, the employer must inform the works council in particular about the intended job and its intended classification.

The employer must notify the works council in good time. In good time means no later than one week before conclusion of the employment contract – or before the employee starts work, if this is before conclusion of the contract – the planned hiring, because this is the amount of time the works council has to refuse its approval of the planned HR measure.

Practical tip
The one-week period during which the works council can refuse its approval does not begin If the employer does not (duly) notify the works council.

The works council members are obliged to maintain secrecy about all personal details and all information on employees' affairs that come to their knowledge when they are informed in this context and where the importance or contents of the information passed on requires confidential treatment; this obligation still applies after they leave the works council (section 99(1) sentence 3 of the BetrVG).

03.4.1.2 Reasons for the works council to refusal approval

The works council may only refuse to approve a hiring, classification, reclassification or transfer for one of the exclusive reasons listed in section 99(2) of the BetrVG. The works council cannot justify its refusal for any other reasons.

The individual reasons for refusal are as follows:

- If the HR measure violates a law, an ordinance, an accident-prevention regulation, a stipulation in a collective agreement or works agreement, or a court decision or an official order (no. 1). These include, for example:
  - The employer wants to transfer a pregnant employee to a position where she must perform work which is banned under the Maternity Protection Act.

  - The employer wants to hire a young person to do work which is banned under the Protection of Young People at Work Act.
  - The employer hires an employee in a way that violates the ban on discrimination under the General Equal Treatment Act.
  - The employer wants to hire a person who does not come from an EU country and has no work permit.

- If the HR measure violates a staff-selection guideline pursuant to section 95(2) no. 2 of the BetrVG.
  These grounds for refusal only relate to staff-selection guidelines in which the works council has actually exercised its rights of co-determination pursuant to section 95(1) and (2) of the BetrVG by formal discussion and passing a resolution. On the other hand, if the selection guidelines were unilaterally established by the employer, and the works council has simply tolerated these without objection, the works council has not exercised its co-determination right pursuant to section 95(1) or (2) of the BetrVG. In this case, there is no justification for the refusal of approval.

- Of there is justified concern, based on facts, that the HR measure will lead to the dismissal of (or other disadvantages for) staff employed in the establishment (no. 3).

- If the employee affected is put at a disadvantage by the HR measure (no. 4).
  This provision is primarily of significance in the case of transfers and reclassifications. No. 4 has no significance when staff are hired because this in itself never represents a disadvantage for an employee. This includes, for example:
  Worsening of working conditions and actual working circumstances in the case of a transfer.

- If no job announcement has been posted at the establishment; this is required pursuant to section 93 of the BetrVG (no. 5).
  This assumes that the works council has demanded that vacant positions are announced internally in the establishment.

- If there is justified concern, based on facts, that the applicant or employee who is being considered for the HR measure would disturb workplace harmony (no. 6).
  The works council can refuse its approval if there is justified concern that the applicant being considered will disturb workplace harmony by illegal behaviour or gross violation of the principles stipulated in section 75(1) of the

BetrVG, in particular through racist or xenophobic behaviour. This requires a prognosis based on concrete facts to the effect that the applicant or employee will disturb workplace harmony in future. Such a prognosis can, for example, be based on previous cases of misconduct by the applicant or the employee. A simple suspicion on the part of the works council based on vague suspicions, is not sufficient. These include, for example:
– stealing from colleagues
– sexual harassment at the workplace
– harassment of foreign colleagues in a former establishment

03.4.1.3 Refusal of approval

If the works council wants to refuse its approval, it must inform the employer in writing within a week. The refusal must be based on a works council resolution. If the works council fails to meet this deadline, it will be deemed to have given its approval. The same applies if the works council does not refuse its approval in a due fashion, for example because

– the refusal was not based on a proper resolution
– the refusal was not submitted in writing
– no specific facts were submitted to justify the refusal in cases covered by section 99(2) nos. 3 and 6 of the BetrVG
– in other cases, reasons were presented that clearly could not be allocated to any of the statutory reasons for refusal.

If the works council refuses its approval in the proper form and within the deadline, invoking one of the reasons stipulated in section 99(2) of the BetrVG, in principle the HR measure must initially not to be carried out. The employer then has the following options:

– S/He accepts the refusal of approval by not carrying out the HR measure.
– S/He can apply to the labour court for a decision in lieu of works-council approval (section 99(4) of the BetrVG). In principle, s/he must delay the HR measure until the labour court has taken a decision in lieu of works-council approval. In urgent cases, however, the employer has the option of provisionally implementing the HR measure (section 100 of the BetrVG – see excursus below).
– In urgent cases, the employer can provisionally implement an HR measure even before the approval process has been concluded – i.e. before the expiry of the works council's one-week objection deadline and before the

conclusion of court proceedings on a decision in lieu of works-council approval (section 100 of the BetrVG).

Important
If the employer wants to provisionally implement a HR measure pursuant to section 100 of the BetrVG, s/he must inform the works council in good time.

03.4.2 The works council must be heard by the employer before every dismissal

If the establishment has a works council, it must be heard before every dismissal is issued by the employer (102(1) of the BetrVG). This means that the employer must duly inform the works council of his / her intention to dismiss an employee and give it an opportunity to issue a statement. Once the employer has done this, s/he is free to decide as s/he chooses on whether to actually dismiss the employee or not. The works council thus has no full co-determination right; in particular, its approval to the dismissal is not required. Under certain circumstances, the works council only has the possibility of objecting to the dismissal.

The obligation to hear the works council applies to routine and exceptional dismissals. In the case of a routine dismissal, the works council must be heard even if the Protection Against Dismissal Act [KSchG] does not apply to the employment relationship – i.e. during the first six months of the employment relationship or in small establishments, if there is a works council. The works council must also be heard before a dismissal pending a change of contract.

Chapter overview

03.4.2.1 Notification of the works council

The employer must duly inform the works council about the main circumstances surrounding the dismissal to enable it to form its own opinion about the intended dismissal: the employer informs the works council's chairperson or his/her deputy, if the chairperson is not available.

Due notification must include the following information:

- Personal data on the employee to be dismissed, including his/her name, age, marital status, number of children, obligations to support dependents, length of service, work duties and, if applicable, any special protection against dismissal the employer might be aware of (e.g. pregnancy, severe disability). In principle, the employer can rely on the information in the wage tax card in this context. S/He must not make any further inquiries.
- Ideally, the specific date of dismissal should also be stated.
- The type of dismissal (routine or exceptional dismissal).
- The main reasons for the dismissal, which the employer is aware of and upon which s/he intends to base the dismissal. To this purpose, the employer must describe to the works council the facts on which the dismissal is based in such a way that the works council can examine the soundness of the reasons for dismissal – without needing to make any further inquiries itself.

Wording example

Wrong: The employee Mr A stole something from his colleague, Mr C.

Right: On 12 June 2007 between 09 a.m. and 10 a.m., Mr C's office was empty because he had an important meeting with his boss in the latter's office. The employee Mr E knew about this appointment because it was in the department's central appointments calendar, visible to all colleagues. At around 09:30 a.m., Mr E entered Mr C's empty office and closed the door behind him. He was seen doing this by the secretary, Ms S. In his colleague's office Mr E searched Mr C's briefcase and took his wallet. According to Mr C, the wallet contained about 200 Euro in bills and about 5 Euro in coins, a credit card, his identity card and driving licence. Mr E left Mr C's office a few minutes after entering it. Again, he was seen doing this by the secretary, Ms S. After Mr C returned to his office at around 11 a.m., he discovered that his wallet was missing. He asked his secretary, Ms S, if she had noticed anything while he was gone. In reply, she told him what she had seen. Mr C reported his loss to his supervisor.

During the afternoon the supervisor had a meeting with Mr E and confronted him with the allegation that he had stolen Mr E's wallet. Mr immediately admitted it and gave the wallet back.

The employer must tell the works council what made him/her want to dismiss the employee. It is not enough to describe the facts in general terms or to use slogans or catchphrases. As a rule, it is also not enough to communicate simple value judgements without any information on the main facts for the assessment.

Exception: During the first six months of an employment relationship, when the employee is not yet protected from dismissal pursuant to the KSchG (section 1(1) of the KSchG), it is enough for a due hearing of the works council if the employer only presents subjective ideas as the basis for the decision to dismiss the employee. Here, by way of exception, general value judgements are also enough (e.g. "The employee doesn't fit in with the other employees"; "The employee doesn't make a trustworthy impression"; or "The employee isn't suited for the planned work.")

Example

Dismissal on grounds of Illness

In the case of dismissal on grounds of frequent short-term illness, the employer must provide the works council with a precise breakdown of previous absences and say which of them were due to a work accident. The employer must also communicate the type of illness, if this is known. The employer must also provide information on the economic damage and the detrimental effect on operations that have been caused by the absences and can be expected in the future.

Dismissal for operational reasons

In the case of a dismissal for operational reasons, the employer must provide details on why the job of the employee to be dismissed has to go. It is not enough to point out in general that there are not enough orders or too little work. Furthermore, the employer must explain the reasons for the social selection that has been made. This must include information on the age, length of service, obligations to support dependents and, if applicable, any severe disability of the employees who have been included in the social selection. The employer must show which employees are the least worthy of social protection and are therefore to be dismissed.

Dismissal on grounds of misconduct

In the case of 'dismissal on grounds of conduct' – meaning dismissal because the employee has not behaved properly – the conduct that has violated the contract must be precisely described to the works council. If the employee has already been warned in the past, this information must also to be passed on to the works council. Furthermore, the works council must be informed about any exonerating circumstances, e.g. a reply from the employee concerned, or the fact that a witness was unable to confirm the suspicion of theft.

The employer must not deliberately portray the facts that form the basis for the dismissal in a false or misleading manner, e.g. by not mentioning facts that could exonerate the employee.

Important
If the employer does not inform the works council about certain reasons for dismissal of which s/he was aware when the dismissal was issued, these cannot be used by the employer in any subsequent court proceedings.

If further reasons for dismissal come to light after the dismissal is issued, and the employer wants to base another dismissal on these reasons, the employer must again hear the works council and thereafter issue a new dismissal.

If further reasons which existed on the date the dismissal was issued become known later, and the employer would also like to use these reasons in later court proceedings (i.e. add them later), this is permissible. However, the works council must also subsequently be heard on this as a precaution.

The law does not explicitly prescribe the exact time when the employer must notify the works council about the intended dismissal. In any case, this must take place before the dismissal is issued. However, there is a minimum period of time which must usually lie between the date when the works council is notified and the date when the dismissal is issued – this is the time the law gives the works council to make its statement on the intended dismissal.

In the case of routine dismissal, the works council has one week to express any reservations about the dismissal or to object to it pursuant to section 102(2) sentences 1 and 2 of the BetrVG. If the works council does not make a statement within this deadline, it is deemed to have given its approval of the dismissal. In the case of an exceptional dismissal, the works council has only three days within which to make a statement (section 102(2) sentence 3 of the BetrVG). If the last day of this three-day deadline falls on a Saturday, Sunday or public holiday, the works council can make its statement to the employer on the following working day.

Table 03
Consulting the works council prior to termination

Routine dismissal	Example
The works council has one week to make a statement.	– The employer notifies the works council on Tuesday, 13 May 2008. – The works council has until midnight on Tuesday, 20 May 2008, to make its statement. *Conclusion:* The earliest date on which the employer can issue the dismissal is Wednesday, 21 May 2008.

Exceptional dismissal	Example
The works council has three days to make a statement.	– The employer notifies the works council on Monday, 14 April 2008. – The works council has until midnight on Thursday, 17 April 2008 to make its statement. *Conclusion:* The earliest date on which the employer can issue the dismissal is Friday, 18 April 2008.
If the last day of this deadline falls on a Saturday, Sunday or public holiday, the works council can make its statement on the following working day.	– The employer notifies the works council on Thursday, 17 April 2008. – The works council has until midnight on Monday, 21 April 2008 to make its statement, because 20 April is a Sunday. *Conclusion:* The earliest date on which the employer can issue the dismissal is Tuesday, 22 April 2008.

The law does not prescribe any specific form for notifying the works council. The notification can therefore be carried out orally or in writing, but it is certainly advisable to notify the works council in writing. Then the employer can prove in any subsequent court proceedings that s/he duly heard the works council. The employer should therefore have proof of the following in particular:

– the date on which the works council was notified
– who notified the works council and how
– what reasons were given for the dismissal
– when the works council's statement was communicated and by whom
– finally, when the dismissal was issued to the employee

Important
If the works council is not (duly) heard, the dismissal is deemed invalid.

A dismissal that is issued without hearing the works council is invalid. This applies even if the works council gives its approval at a later date. The same applies if the works council is not duly heard, for example if the employer does not provide the works council with all the necessary information. The employee can assert the invalidity of the dismissal in the labour court within a period of three weeks after the dismissal is received (section 4 of the KSchG). This also applies to employees who are dismissed during the first six months of their employment relationship and therefore do not enjoy protection against dismissal under the KSchG.

Important
The works council must only be heard before dismissals issued by the employer. The works council does not have to get involved if the employer and the employee end the employment relationship in a different way. For example, it does not have to be heard in the following cases:

– if the employee terminates the employment relationship
– if the employment relationship is terminated by mutual agreement by means of a termination agreement (Aufhebungsvertrag)
– when a fixed-term employment relationship expires

The employer is not obliged to hear the works council on the dismissal of an executive employee as defined by section 5(3) of the BetrVG. The works council only has to be informed in good time about the intended dismissal of an executive employee, although the validity of this dismissal is not affected by any violation of the duty to inform.

Practical tip
If it is doubtful whether the person to be dismissed really is an executive employee as defined by section 5(3) of the BetrVG, the works council should be heard as a precautionary measure. For if it is subsequently determined that the person dismissed was an employee after all and not an executive employee, the dismissal is invalid because the works council was not heard beforehand. The employer can eliminate this risk by hearing the works council as a precautionary measure.

03.4.2.2 Works council's statement

The works council as a body must pass a resolution on its statement on the planned dismissal in a duly convened meeting. The works council can approval the intended dismissal, express reservations, or file an objection. It can also waive making a statement entirely or inform the employer that it has decided to allow the deadline for the hearing to lapse.

If the works council files an objection or expresses reservations, it must inform the employer in writing giving reasons. If the works council makes a statement before the one-week deadline expires, this concludes the hearing procedure. The only exception to this is if it is apparent to the employer that the statement is not definitive and final.

03.4.3 The exceptional dismissal and transfer of works-council members and other officials

The exceptional dismissal (i.e. 'for cause') of members of the works council, the representative body for young workers and trainees, and the electoral board (and its candidates) requires the approval of the works council pursuant to section 103 of the BetrVG (section 103(1) of the BetrVG). The works council has a co-assessment right on whether the 'cause' really suffices for dismissal. The approval of the works council requires an effective resolution; the works council member concerned must be excluded both from the debate and from voting on the resolution.

If the works council refuses to give its approval, the employer can apply to the labour court for a decision in lieu of works-council approval. The court grants

the employer's application if the exceptional dismissal is justified considering all the circumstances. The application must be filed within two weeks of the employer (or the manager authorized to dismiss) gaining knowledge of the grounds for dismissal.

The transfer of members of the works council, the representative body for young workers and trainees, or the electoral board (and its candidates) to another job leading to the loss of the works council office or eligibility to stand for election also requires the approval of the works council. This approval is not required if the person concerned agrees to his / her transfer.

Here. too, if the works council refuses to give its approval, the employer can apply to the labour court for a decision in lieu of works-council approval. The labour court grants the employer's application if the transfer is necessary for urgent operational reasons (section 103(3) of the BetrVG).

03.5 Participation and Co-determination on Economic Matters

There is only limited participation and co-determination on economic matters.

– Consultation with the economic committee
  A joint management-employee economic committee must be set up in companies that usually have more than 100 permanent employees (section 106(1) of the BetrVG). The economic committee debates economic matters with the employer and must inform the works council of its deliberations (see chapter A section 02.8 for more details on the economic committee).

– Consultation with the works council on planned changes in plant operations
  Planned changes in plant operations (e.g. closure of (parts of) establishments, relocation of (parts of) the establishment, staff cuts) that can involve major disadvantages for the workforce or parts of the workforce must be discussed in advance with the works council (see chapter C section 03.6 for more details on changes in plant operations).

– Co-determination in offsetting or alleviating economic disadvantages as a result of changes in plant operations
  The works council has an enforceable co-determination right only to the extent that it can push through a social compensation plan to offset or alleviate economic disadvantages sustained by employees as a result of

changes in plant operations (see chapter C section 03.6 for more details on changes in plant operations and social compensation plans).

03.6 Participation and Co-determination on Changes in Plant Operations

03.6.1 What is a change in plant operations?

A change in plant operations as defined by section 111 of the BetrVG is in principle any change to the management organization, the structure, the field of activities, the working methods, production, the location and similar things if they have major disadvantages for the employees or considerable sections of the employees. Section 111 sentence 3 of the BetrVG names situations that are deemed to be changes in plant operations:

- Restriction and closure of the entire establishment or of large parts of the establishment section 111(3) no. 1 of the BetrVG
  For practical purposes, the most important case of the restriction of an establishment is a reduction in staff.
- Relocation of the entire establishment or of major parts of the establishment section 111(3) no. 2 of the BetrVG
- Merger with other establishments or the demerger of establishments section 111(3) no. 3 of the BetrVG
- Fundamental changes in the operational organization, the operational purpose of the establishment or the facilities section 111(3) no. 4 of the BetrVG
- Introduction of fundamentally new working methods and manufacturing processes section 111(3) no. 5 of the BetrVG

The planned change in plant operations must have the potential for having major disadvantages for the employees or a significant number of employees. Major disadvantages in this sense include dismissals, cuts in wages or salaries, transfers, longer journeys to the new place of work, etc. Furthermore, all employees – or at least a significant percentage of the workforce – must be affected. Thus, a change in plant operations is only deemed to exist if a large number of employees are affected. In this respect, the numbers and percentages stipulated in section 17(1) of the Protection Against Dismissal Act [KSchG] can be used as a basis, provided that at least five percent of the employees are affected. In detail, this means the following:

Table 04
Existence of a change in plant operations

Minimum number of employees	number affected
Establishments with 21 – 59 employees	at least 6 employees
Establishments with 60 – 499 employees	10 % of the workforce or at least 26 employees
Establishments with 500 – 599 employees	at least 30 employees
Establishments with more than 600 employees	at least 5 % of the workforce

At least five percent of the employees of the establishment must always be affected. However, in case law these numbers only serve as reference values. They may be slightly lower in individual cases.

The employer must inform the works council comprehensively and in good time about planned changes in plant operations and discuss changes with the works council. This obligation to involve the works council only applies to companies that normally have more than 20 employees with voting rights.

In companies with more than 300 employees, the works council can call on the services of a consultant for support (section 111 sentence 2 of the BetrVG). The costs must be borne by the employer.

03.6.2 Reconciliation of interests (Interessenausgleich)

In companies that normally have more than 20 employees with voting rights, the employer must inform the works council comprehensively and in good time about a planned change in plant operations and consult with the works council on it. The subject of this discussion is whether, when and how the change in plant operations is to be carried out. The aim is to achieve a reconciliation of interests, i.e. harmonizing the employer's interest in the efficient management of the establishment with the employees' interest in retaining their jobs and working conditions. The objective is for the employer and the works council to agree as far as possible on the entrepreneurial decision as to whether, when and how the planned change in plant operations is to be carried out and to conclude a reconciliation-of-interests agreement pursuant to section 112 of the BetrVG.

A reconciliation-of-interests agreement is a written agreement between the employer and the works council on the terms of the planned change in plant operations. In a reconciliation-of-interests agreement the employer and the works council agree on whether, when and how the planned change in plant operations is to be carried out. The works council can agree to the planned change in plant operations in a reconciliation-of-interests agreement – however, the employer and the works council can also agree that the planned change in plant operations is not to be carried out.

In practice, however, the issue is usually whether, and, if so, in what way, the employer is willing to modify the planned change in plant operations. Various solutions are possible for the reconciliation of interests, depending on the type of change that is planned. These include, for example

- Deviations from the employer's original plan can be agreed in a reconciliation-of-interests agreement: for example that the change in plant operations is carried out later than originally planned.
- The group and number of employees affected can be agreed, along with how they are affected (e.g. dismissals, transfers).
- Selection guidelines can be agreed in a reconciliation-of-interests agreement governing the selection of staff for transfers, reclassifications and dismissals as a result of the change in plant operations.
- It can also be agreed that employees must be taken over by other establishments belonging to the company.
- Bans on dismissals can be agreed, as well as further-training or qualification measures for employees who will be affected by the change in plant operations.
- A reconciliation-of-interests agreement can name the employees who are to be dismissed as a result of the change in plant operations (list of names). If the employer and the works council agree on such a list of names, this has certain advantages for the employer in any subsequent proceedings on protection against dismissal.

Important
In a reconciliation-of-interests agreement the issue is whether, when and how a change in plant operations is carried out. It is not the purpose of the reconciliation-of-interests process to offset or lessen the economic disadvantages for the employees caused by the change in plant operations – this is done in the social compensation plan.

If the employer and the works council cannot agree, i.e. if no reconciliation-of-interests agreement is reached, the employer or the works council may apply to the governing board of the German Federal Employment Agency for mediation; the governing board may assign the task to other employees of the German Federal Employment Agency. If no such application is made or if the attempt at mediation is unsuccessful, the employer or the works council may appeal to the conciliation committee. The conciliation committee must then attempt to find common ground between the employer and the works council. It can make recommendations of its own in this context. However, the conciliation committee cannot decide on a reconciliation-of-interests agreement against the will of the works council or the employer. If the employer and the works council cannot agree in the conciliation committee, failure is declared and the proceedings are ended. After this, the employer can start with his/her planned measure immediately.

Important
A reconciliation-of-interests agreement cannot be forced by the works council. The employer makes his/her entrepreneurial decision as to whether, when and how s/he will implement the change in plant operations without any obligation to co-determination. S/He is only obliged to consult with the works council on this and to try to achieve a reconciliation-of-interests agreement. Similarly, in proceedings before the conciliation committee, the latter can only attempt to reach an agreement between the employer and the works council – but it cannot make a binding decision in lieu of an agreement between the employer and the works council with its judgement.

If the employer implements a change in plant operations without having at least attempted to reach a reconciliation of interests with the works council

beforehand, this can have serious financial consequences for the employer. Pursuant to section 113 of the BetrVG, employees who are then laid off as a result of the change in plant operations can demand severance payments within the limits of section 10 of the KSchG and can also legally enforce the claim. If employees suffer other economic disadvantages as a result of the change in plant operations, the employer must also compensate them for a period of up to twelve months (disadvantage compensation). Furthermore, the same applies if the employer and the works council have concluded a reconciliation-of-interests agreement and the employer deviates from this without a compelling reason.

Practical tip
In order to avoid having to make severance or other compensation payments in the context of disadvantage compensation, the employer should always attempt a reconciliation of interests with the works council and also duly conclude the process. To this purpose, according to case law the employer should appeal to the conciliation committee if s/he cannot reach agreement with the works council – and, if necessary, have failure declared. If the employer does not do this, case law presumes that s/he has not tried hard enough to reach a reconciliation-of-interests agreement – with the result of sanctions via disadvantage compensation.

03.6.3 Social compensation plan

The employer and the works council can agree on a 'social compensation plan' (section 112(1) of the BetrVG), irrespective of whether a reconciliation-of-interests agreement has been reached or at least attempted. The social compensation plan contains provisions on offsetting or alleviating economic disadvantages suffered by the employees as a result of the planned change in plant operations. In other words, the idea behind the social compensation plan is to compensate for the loss of a job or a deterioration in working conditions. In addition, it aims to help the employees affected by a layoff to bridge the period until they start working in a new employment relationship or drawing statutory old-age insurance benefits. In principle, the employer and the works council are free to decide which disadvantages they want to offset or alleviate and to what extent. They thus have a great deal of scope.

Examples of arrangements in social compensation plans

- Severance payments for staff who are laid off
- Wage compensation for staff who are transferred
- Paid retraining courses
- Compensation for higher travel expenses to a new location if the establishment is moved.

A social compensation plan is reached in the same way as a reconciliation-of-interests agreement. The employer first informs the works council about the planned change in plant operations, if s/he has not already done so in the course of the negotiations on the reconciliation of interests.

If the employer and the works council agree on a social compensation plan, this must be recorded in writing and signed by the employer and the works council. The social compensation plan has the effect of a works agreement and therefore directly establishes claims for the employees who are to benefit.

If the employer and the works council cannot agree on a social compensation plan, the employer or the works council may apply to the governing board of the German Federal Employment Agency for mediation; the governing board may assign the task to other employees of the German Federal Employment Agency. If no such application is made or if the attempt at mediation is unsuccessful, the employer or the works council may appeal to the conciliation committee. The conciliation committee makes a binding decision. The judgement of the conciliation committee is made in lieu of the agreement between the employer and the works council. Section 112(5) of the BetrVG provides guidelines for the decision of the conciliation committee. For example, when making its decision the committee must on the one hand consider the social concerns of the employees affected; on the other hand it must also ensure that its decision is economically defensible for the company. When computing the total payments under the social compensation plan, the conciliation committee must not put the company's continued existence – or the jobs remaining after the change in plant operations – at risk (section 112(5) no. 3 of the BetrVG).

The social compensation plan can thus be forced by the works council – unlike a reconciliation-of-interests agreement, which can only be voluntarily agreed. The enforceability of a social compensation plan is restricted pursuant to section 112a of the BetrVG if the change in plant operations consists exclusively of a reduction in staff. In this case, the social compensation plan can only be

enforced by a judgement of the conciliation committee if the threshold values stipulated in section 112a (1) of the BetrVG are reached.

Newly formed companies are not obliged to conclude social compensation plans in the first four years after their formation pursuant to section 112a (2) of the BetrVG.

If the reconciliation of interests/social compensation plan involves transfer measures, the two sides must be advised by the Federal Employment Agency in the course of their negotiations on the reconciliation of interests or social compensation plan, if these measures are to be promoted by the Federal Employment Agency. Otherwise no promotion is possible.

03.7 Participation and Co-determination in Structuring the Workplace, Work Sequence and Working Environment

Pursuant to section 90 of the BetrVG, the employer must inform the works council in good time of any plans on

– new construction, renovation and extension of business premises

– technical facilities
(e.g. production facilities, machines, assembly lines)

– working methods
Technologies used for performing work tasks (e.g. technical aids, IT equipment)

– work sequences
Organization, timing and spatial design of work processes (e.g. assembly-line work, single-shift or multiple-shift working, group work or individual work)

– work places
(e.g. spatial and technical arrangement of the working materials)

and submit the necessary documentation. Pursuant to section 90(2) of the BetrVG, the planned measures and their effects on the employees, the type of work and the resulting requirements must be discussed in good time in consultations with the works council in such a way that the works council's suggestions and reservations can be taken into account.

If changes in the workplace, the work sequence or the working environment clearly violate established ergonomic knowledge about how work should be humanely organized, and if this involves particular stress for the employees, the works council can demand that the employer take reasonable measures to avert, alleviate or compensate for such stress (co-determination right according section 91 of the BetrVG).

03.8 Criminal and Fixed-Penalty Regulations, section 119 ff. of the BetrVG

Different violations of the Works Constitution Act are penalized in different ways. Here, the law distinguishes between criminal offences against bodies established under the Works Constitution Act and their members (section 119 of the BetrVG), breaches of confidentiality, especially passing on business and trade secrets (section 120 of the BetrVG), and offences punishable by an administrative fine pursuant to section 121 of the BetrVG.

03.8.1 Criminal offences against bodies established under the Works Constitution Act and their members

These regulations relate to obstructing or illegally influencing elections provided for under the Works Constitution Act, interfering with or obstructing the work of bodies established under the Works Constitution Act, and discrimination against – or preferential treatment for – their members or third parties who exercise certain functions under the Works Constitution Act.

03.8.2 Breaches of confidentiality

This provision supplements section 119 of the BetrVG. It penalizes breaches of the duty not to disclose certain facts. This criminal provision relates to the obligation to maintain secrecy pursuant to section 79 of the BetrVG. This, too, is an offence requiring an application for prosecution; i.e. it has to be reported. It is punishable by a fine of between five and 360 ‘daily rates’ (Tagessätze = approx. a day’s wage / salary) or a prison sentence of up to one year.

03.8.3 Offences punishable by an administrative fine

If the employer violates the works council's right to information as described in section 121 of the BetrVG (e.g. in the case of individual HR measures as defined by section 99 of the BetrVG), an administrative fine up to 10,000 Euro can be imposed. Here, it is up to the discretion of the authorities whether the offence is prosecuted.

Appendix

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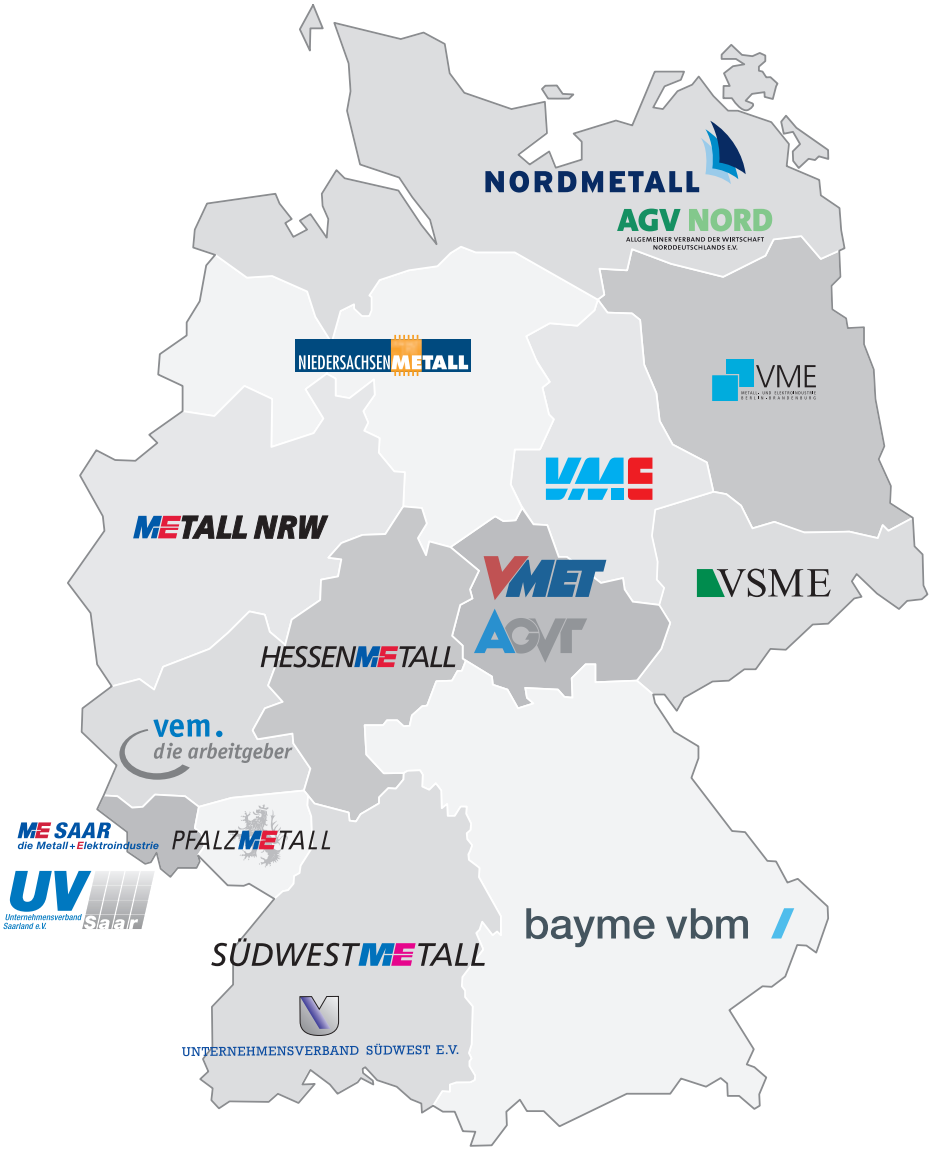
Members of Gesamtmetall



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