This update is intended to provide a brief and general overview of the legal background and procedures for the dismissal of employees under German labour and employment law.

An employee who has been employed for more than six months may be terminated only if one of the particular reasons for termination permitted by the German Termination Protection Act (Kündigungsschutzgesetz – hereinafter referred to as “KSchG”) exists (see section 1 below). Even if such a reason for termination exists, special termination protection (see section 2 below) and the general requirements (see section 3 below) must be taken into consideration.

1. German Termination Protection Act
   • Generally, termination of an employment relationship is restricted by KSchG, which applies:
     - If the business employs more than 10 full-time employees; employees being employed as of December 31 2003, benefit from protection under the German Termination Protection Act in case that the employer employed more than five full-time employees as of said date.
     - If the employee has been employed for more than six months when he/she receives the written notice of termination.
   • Employees who have been employed for less than six months can be terminated without giving a particular reason. However, the provisions regulating special termination protection (see section 2 below) as well as the applicable notice period and other general requirements (see section 3 below) must be considered.
   • The particular reasons enumerated in the KSchG that permit termination include reasons (i) related to the personal situation of the person to be dismissed (e.g. long-term sick leave), (ii) related to the behaviour of the person to be dismissed (for example theft or fraud to the detriment of the employer) or (iii) related to the business of the employer (for example the employer’s decision to restructure the business, which reduces the number of positions).
   • Examples of reasons justifying termination are set out below:
     - Illness can – under certain circumstances – be regarded as a sufficient reason for termination (reason related to the personal situation of the employee). However, to be permissible, termination for illness must meet a specific set of circumstances, discussed briefly below:
       - Repeated short-term illness or a long-term illness that will continue for an indefinite period may qualify as a sufficient reason for termination. However, in each case the specific circumstances of the illness, such as the expected duration (which must in any case be for several months), must be considered to determine whether a termination can be justified. The individual circumstances of the employee must also be considered.
       - In addition, a termination is only justified if the business is being negatively affected by the employee’s illness, and if termination of the employment contract is the employer’s last resort to stop negative effects to the business.
   • An employee’s poor performance constitutes a reason for termination only under very limited circumstances. The employee’s performance must be so poor that it barely constitutes performance at all in order to qualify as a particular reason for termination under the KSchG.
   • Attacks on other employees or executives generally qualify as a valid reason for termination under the KSchG (reason related to the behaviour of the employee). However, under certain circumstances the employer must deliver a warning letter to the employee prior to the termination. Then the employee may be terminated if his/her repeat behaviour justifies the termination.
   • The most commonly used reason for termination is related to the business of the employer (referred to as “business reasons”), which can qualify as a valid reason for termination under the KSchG.
If an employee who has been terminated for business reasons makes a claim for unfair dismissal, the employer can justify the termination by showing the following:

- Reduced workload has resulted in the elimination of the employee's position. In this case, the employer must provide evidence that (i) the employer has decided to internally restructure its work organization, leading to the elimination of the employee's position, or (ii) external economical reasons have forced the employer to eliminate the employee's position. (Please note that a termination for internal reasons generally provides a more defensible reason than a terminal due to external causes.)

- The relevant employee (i.e. the employee to be dismissed) must have objectively better social data (e.g. age, length of service, family obligations, disability) than employees with comparable duties who have not been dismissed. This means that, as a general rule, the most recently hired employee should be the first terminated, younger employees should be terminated before older employees, employees without a disability should be dismissed prior to disabled employee, and those without family commitments should be terminated before those who have families. However, the decision must always take into consideration all individual circumstances.

- The employer (i) has no comparable position to offer to the employee or (ii) offered the employee another non-comparable position for which the employee was qualified, but the employee rejected such position.

The following example illustrates a justified termination for business reasons:

An employer with 20 employees employs two secretaries: Secretary A is 55 years old, joined the company 12 years ago, is married and has three children; secretary B is 27 years old, joined the company 2 years ago, is not married and has no children.

Because of an internal business decision to reduce costs and to restructure the work organization, the position of one secretary is eliminated. Another comparable position or non-comparable position for which the employee is qualified is not available in the employer's business.

In this case, the employer is not free to decide which secretary to dismiss based upon such factors as competence, attitude and other performance-related factors. The decision must be based upon which secretary has the more appropriate social data justifying termination.

After consideration of all individual circumstances, the employer must dismiss secretary B since she has the “better” social data. A termination of secretary A would be invalid, and she would have a claim for continued employment with the employer.

2. Special termination protection

Special protection against unlawful dismissal applies in a number of cases, for example where an employee is:

- an officially acknowledged handicapped person;
- an employee on three years’ parental leave; or
- pregnant.

In any of these instances, prior approval of the appropriate German authorities is required.

3. General requirements

- In any termination, the following general requirements - in addition to those described – must be kept in mind:

  - The employer must give written notice of termination to the employee. Any other form of notice of termination – for example verbal or via email or fax – is void.

  - The written notice of termination must be signed by the employer; if the employer is a legal entity, the termination letter must be signed by someone legally authorized to do so (for example, a Managing Director of a German GmbH).

  - The employer must also observe the applicable notice period, which is ordinarily determined by law (between four weeks and seven months, depending upon the length of the employment). If the employer and the employee have mutually agreed upon a longer contractual notice period, the longer contractual notice period will prevail. Any agreement on a notice period that is shorter than the applicable statutory notice period will be invalid.

  - Generally, termination of employment can only be effected as of the end of any calendar month. The employer must therefore keep the effective date of employment termination in mind when calculating when to deliver the notice of termination. For example, if termination is to be effective as of the end of September, and a two-month notice period applies, notice must be served no later than the end of July.

  - During any applicable probationary period agreed upon by the parties at the time employment commenced (§ 622 subsection 3 German Civil Code, hereinafter referred to as “BGB”), employment can be terminated at any time upon two weeks’ prior notice.

  - If the termination letter has been signed by a person who is not a legally authorized representative (see section 3.2 above), the original of a power of attorney should be included with the termination letter, indicating that the person signing the letter is acting on behalf of the employer. We strongly recommend including the power of attorney, since otherwise the employee has the right to refuse acceptance of the termination letter. If it
Dismissal Procedure in Germany

September 2014

comes to litigation, the employer has to prove that the proper and original written notice of termination was served upon the employee at the appropriate time. We usually recommend that – if practicable – the notice is served to the employee in person and the employee confirms receipt in writing.

4. Compensation payments

• An employee generally has no claim for a compensation payment.

If a termination is invalid, the employer has to reemploy the employee. Of course the employee has a claim for any back pay that would have been due from the date of the (invalid) termination until the binding decision of the Labour Court (even if the employee did not work during this period).

• Because of high risks and difficulties involved in effecting a proper involuntary termination of an employment relationship, employers often seek to get the employee being terminated to agree upon a settlement agreement and a compensation payment. The amount of such a compensation payment is usually calculated under the following (non-binding) formula:

\[
\text{compensation payment} = \text{Monthly gross salary multiplied by years of employment multiplied by } X (X \text{ is a factor between 0.5 and 1)}
\]

• However, there is no obligation on either the employer or the employee to agree to a compensation payment under such a formula. If the employee believes that his or her position is very favourable (for example, if the termination of the employment relationship by the employer is likely to be held invalid) and the employer is very anxious to terminate the employment relationship, the employer may be forced to agree to pay significantly higher amounts than would arise under the formula.

• In exceptional cases, an employee may have a claim for compensation if a court decides that the termination was invalid, but the reemployment is intolerable either for the employer or the employee. An example of this would be where the termination itself led to significant hostility between the employer and the employee, and the court believes that the employee has reason to fear reprisals if he is reemployed.

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