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Employment Reorganisation Roadmap

Germany

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Contents

1. Employee representation

1.1. What are the main forms of employee representation involved in restructurings?

The main forms of employee representation involved in restructurings are:

– the works council – if a company has at least two establishments with works councils, and at least two establishments are affected by a uniform measure, the joint works council could be the competent representative body; in some group-wide restructurings a group works council (if established) can be the competent body

– the economic committee (in companies with 101+ employees)

– trade unions (in certain limited cases)

– the representative body for disabled employees (*Schwerbehindertenvertretung*), and/or

– the youth and trainee representative body (*Jugend- und Auszubildendenvertretung*).

1.2. Is there a system of employee participation rights?

Employees have the following participation rights:

Supervisory boards: The supervisory board is an additional corporate body above the management board which must be appointed in public limited companies. It is mandatory for a private limited company to have a supervisory board only if certain thresholds are reached; it is optional in all other cases. Its main function is to supervise the way in which the business is managed. Employees have the right to elect members of a company's supervisory board. In companies with more than 500 employees,employees may elect one third of the members; in companies with more than 2,000 employees, they may elect one half of the members. For the purposes of this threshold, employees must be "regularly employed" (ie employed on a continuous basis) by the company.

Works council/general works council/group works council: The works council has various rights of participation and co-determination at a business level. It also has the right of co-determination (ie approval) in specific social, personnel and economic matters (eg working time, payment structures, recruitment and restructurings). These matters are regulated in works agreements concluded between the employer and the works council. There are increasing levels of participation rights, from information and notification rights to co-determination rights.

Trade unions: The rights to free and voluntary formation of trade unions by employees, to trade union membership and to collective bargaining are constitutional rights in Germany and are heavily protected by the courts.

2. Process on business sales

2.1. Are employees automatically transferred to a buyer by operation of law on a business sale?

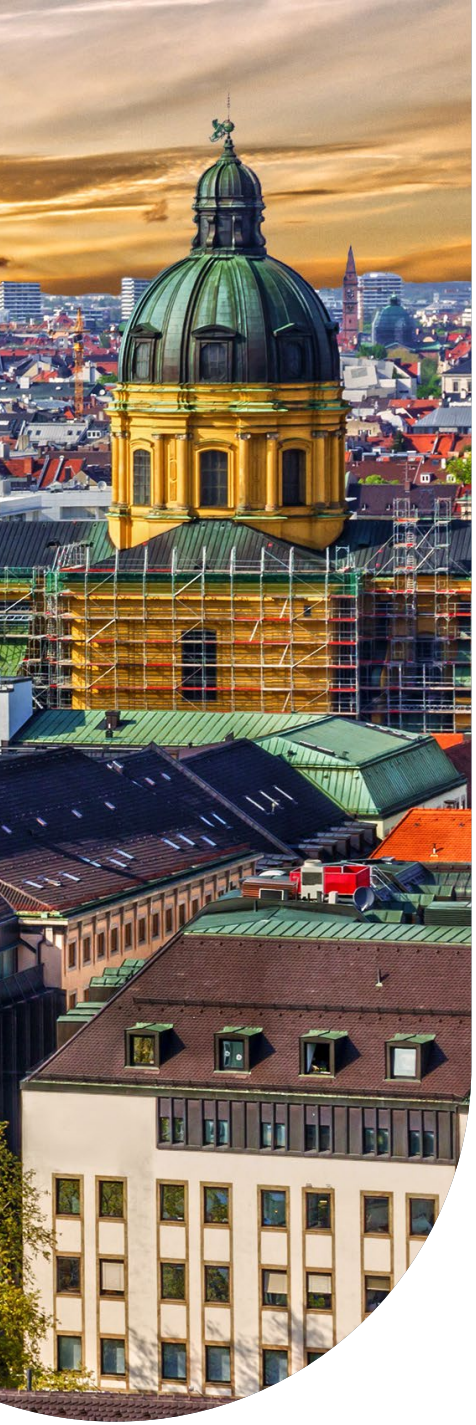
Employees are automatically transferred on the sale of a business (or part of one) to a buyer where there is a transfer of business (*Betriebsübergang*), ie a transfer of a stable economic entity that retains its identity after the transfer. Whether this test is met depends on various factors, in particular whether customers, assets and employees have transferred, and how similar the activities are before and after the transfer.

2.2. If so, in broad terms, what is the legal test for identifying which employees transfer?

Employees employed by the seller at the time of the transfer and who are "assigned" to the business or undertaking (or part) will transfer to the buyer. Whether an employee is "assigned" is determined by the intention of the parties. If such an intention is not evident either explicitly or implcitly, the assignment is determined by the employer's right of direction. The percentage of time the employee spends working in the business or undertaking (or part) will be taken into account. It may sometimes be possible to agree the assignment of employees with the works council in a reconciliation of interests agreement (although this is not a requirement).

2.3. Can employees object to the automatic transfer of their employment and what are the consequences of an objection?

Employees have the right to object to the automatic transfer of their employment relationship to the buyer within a one month period after they have received detailed information on the proposed transfer. If they object, they remain employed by the seller. However, the seller may terminate the employment of an employee for operational reasons if the employee's position at the company ceases to exist due to the transfer and there is no possibility of reassigning them to another vacant position. If the information given was incorrect or insufficient, the one month period does not start to run and employees can object to the transfer (with retroactive effect) even years after the transfer has taken place.



2.4. Do obligations to inform and consult employees or employee representatives arise on a business sale?

The seller and buyer must inform their economic committees (if these exist). They must do so early enough to enable proper consultation to take place on a proposed business sale.

A transfer of a business does not of itself trigger any consulation obligations, but the seller and buyer must inform and consult their works councils if a transfer of a business (or a part of one) triggers material changes (eg a split of the business, merger with another business, relocation or other restructuring). In this case, additional works council rights must be respected. In particular, it is necessary to negotiate a reconciliation of interests agreement and to agree on a social plan. Some German employment courts will grant the works council an injunction to delay the business sale, if the works council's rights with respect to the reconciliation of interests are not complied with.

The seller and the buyer must inform the affected employees individually and in writing (which may include by email or fax) about the proposed business transfer prior to the (planned) transfer date, if the business sale is an asset deal. Employees have the right to object to the automatic transfer of their employment relationship to the buyer within one month after they have received the information (see answer to **2.3**). Employees must be given detailed information about the date of the transfer, the reasons for it, the economic, legal and social consequences for affected employees, and any measures envisaged for the affected employees (including the individual employee).

2.5. What are the penalties for non-compliance with information and consultation obligations on a business sale?

Failure to inform/consult with the works council and/or economic committee may result in a fine for the employer of up to EUR10,000.

If the business sale triggers a material change in the business, some German employment courts will grant the works council an injunction which prevents the employer from implementing the change if it does not follow the procedures. In certain German federal states, the competent employment courts have explicitly denied the works council's right to request such an injunction. If the change is implemented in breach of applicable procedures, employees who are adversely affected may claim damages. However, the works council will not be able to prevent the business sale itself if certain requirements are met.

If the employees affected by the business transfer were not informed properly, or if the information letter contained incorrect or insufficient information, the one month objection period does not commence, so that employees may object to the transfer of their employment with retroactive effect (ie even after the business transfer has taken place).

3. Process on share sales

3.1. Do obligations to inform and consult employee representatives arise on a direct share sale (ie, on the sale of the company itself)?

The economic committee must be informed about the takeover of a company if the takeover involves the "acquisition of control". The term "acquisition of control" is not defined and there is no case law on this point. However, "control" for this purpose is assumed, in particular if at least 30% of the voting rights in a listed company or more than 50% in a non-listed company are held. The information obligation includes providing information on the potential buyer, the buyer's intentions regarding the future business activity of the company and the consequences for the employees. Where no economic committee exists, the information on a takeover must be provided to the works council. Information obligations only arise where providing information does not endanger business secrets.

The timing requirements and penalties are similar to those applicable on business sales (see answer to **2.5**).

3.2. Do obligations to inform and consult employee representatives arise on an indirect share sale (on the sale of a company's direct or indirect holding company)?

The economic committee must be informed about the takeover of a company if the takeover involves the "acquisition of control". The prevailing opinion in legal literature is that this does not apply to corporate changes at ultimate shareholder level in a group of companies. However, since there is no case law on this point, and "acquisition of control" is not defined, a cautious approach would be to inform the economic committee even in the case of an indirect sale of shares. Where no economic committee exists, the information on a takeover must be provided to the works council. Information obligations only arise where providing information does not endanger business secrets.

The timing requirements and penalties are similar to those applicable on business sales (see answer to **2.5**).

4. Process on outsourcings

4.1. Are employees transferred by operation of law in the following scenarios: (i) on an initial outsourcing of processes/services; (ii) on a change of supplier; or (iii) on an insourcing of processes/services?

Employees are automatically transferred in any of these scenarios where there is a transfer of business, ie a transfer of a stable economic entity that retains its identity after the transfer. Whether this test is met depends on various factors, in particular whether significant tangible or intangible assets or a major part of the workforce in terms of numbers and/or skills have transferred. Mere succession in the course of a business activity is not sufficient.

4.2. Do obligations to inform and consult employees or employee representatives apply in any of these scenarios?

Obligations to inform/consult with employees or employee representatives apply if any of these scenarios trigger a transfer of business or a material change in business, especially where this results in redundancies or – more likely – a split of one or more establishments (see **section 2 – Process on business sales**).

5. Process on collective dismissals

5.1. Is a "collective dismissal" (or "mass layoff") defined by law?

A collective dismissal arises where notices of termination are served or termination agreements are entered into within a 30 day time period affecting:

– six or more employees in an establishment with 21-59 employees

– 10% of employees or 26+ employees in an establishment with 60-499 employees, or

– 30+ employees in an establishment with 500+ employees.

For the purpose of these thresholds, employees must be "regularly employed" (ie employed on a continuous basis) by the company.

5.2. Do obligations to inform and consult employee representatives arise on a collective dismissal?

An employer must inform the works council "in due time" about the proposed dismissals. Collective dismissals qualify as a material change in business, so that the reconciliation of interests procedure applies (as outlined in **section 2 – Process on business sales**). If certain additional criteria are met, the employer must enter into a social plan relating to the collective dismissals. For further information on the reconciliation of interests procedure and social plan conditions, see the answer to **5.6**.

5.3. Do obligations to inform and consult the competent authorities arise on a collective dismissal?

The employer must inform the competent employment agency of collective dismissals prior to giving notice of dismissal. This must include the information provided to the works council and the works council's comments on the proposed dismissals or, if there are no comments, evidence that the works council was properly informed at least two weeks before the employment agency was informed.

5.4. When are these obligations triggered?

Obligations to consult on collective dismissals and notify the authorities arise when dismissals are "proposed". A "proposal to dismiss" means more than just contemplating the possibility of dismissals, but it must be made before any decision to dismiss has been taken.

5.5. What are the penalties for non-compliance with information and consultation obligations on a collective dismissal?

Compensation of up to 12 months' salary (which may increase to 18 months' salary depending on the employee's age and seniority) may be awarded to each employee. If the works council's rights are not complied with, it may apply for an injunction preventing the dismissals, which will be granted by certain employment courts in Germany.

Failure to inform the authorities and, in certain cases, the works council, renders dismissals ineffective. A penalty of up to EUR10,000 can be imposed if information obligations to the works council are not properly fulfilled.

5.6. Do obligations to inform and consult employee representatives and/or competent authorities arise in the context of multiple dismissals, which do not qualify as a collective dismissal, as defined by law?

The works council must be informed in detail prior to each individual dismissal and give its opinion.
Otherwise the dismissal is void. Its opinion is not binding but can still have financial consequences; if the works council objects, the employee can demand payment until the final court decision even if they lose the dismissal protection proceedings. Permission from the responsible authority is required only for the dismissal of disabled employees and employees on maternity or parental leave (see **section 6 – Process on individual dismissals**).

5.7. Does an employer have options/alternatives when it has been unable to reach agreement with employee representatives during the negotiation period?

Although the works council might delay the process, it does not ultimately have the ability to prevent the employer from implementing its decision. However, the employer must comply with all statutory negotiation steps, notably:

– The employer must engage in serious discussions with the works council as to the timing, scope and possibilities to avoid all or parts of the planned operational change (ie the "reconciliation of interests" procedure).

– If no agreement is reached, the works council or management may ask the President of the Federal Employment Agency to act as a mediator in the discussions (this step is optional and will not generally be taken).

– If no agreement is reached, the works council or management can request that a conciliation board (Einigungsstelle) be established.

– If no agreement can be reached on the size of the conciliation board and who will chair it, each party can file an application to the labour court requesting it to determine the size of the conciliation board and to appoint a chair.

In contrast to the reconciliation of interests procedure, the parties are required not only to negotiate a social plan but also reach an agreement on both the overall funding of the social compensation plan and on the criteria for distributing the funds among the dismissed employees. Otherwise the conciliation board will make a final determination on both the funding and the criteria.

Where the operational change consists only of a reduction in staff which is unrelated to other measures such as the closure of a department, the works council can only insist on a social plan if a certain number of employees will be dismissed, ie:

– in an operation with generally fewer than 60 employees, where 20% of the employees regularly employed in the operation but at least six employees are dismissed for operational reasons

– in an operation with generally at least 60 but fewer than 250 employees, where either 20% of the employees regularly employed in the operation or at least 37 employees are dismissed for operational reasons

– in an operation with generally at least 250 but fewer than 500 employees, where either 15% of the employees regularly employed in the operation or at least 60 employees are dismissed for operational reasons, or

– in an operation with generally at least 500 employees, where 10% of the employees regularly employed in the operation but at least 60 employees are dismissed for operational reasons.

6. Process on individual dismissals

6.1. Are employees entitled to a minimum period of notice on dismissal on redundancy or economic grounds?

The statutory minimum notice entitlement depends on length of service and ranges from two weeks to seven months (expiring at the end of a calendar month). Notice periods may be varied by collective agreement or extended by contract. In the case of contractual notice, a minimum notice period of four weeks (to be effective on the 15th or the last day of a calendar month) must be observed.

6.2. Does any special procedure apply when proposing to implement an individual dismissal on redundancy or economic grounds?

A dismissal must be socially justified based on operational reasons, ie redundancy. There are strict formalities for serving notice. In the case of a redundancy, the employer must conduct a social selection (pursuant to certain statutory criteria) among all comparable employees, so that those who would suffer the most from dismissal are the last to be dismissed. In principle, only employees employed in the same branch should be compared, whereas other employees of the company or the group do not have to be considered.

These rules apply if the affected employee has been employed for at least six months and if the employer regularly employs more than ten full-time equivalents (FTEs).

The works council must be informed in detail prior to each dismissal and give its opinion (although its opinion is not binding). Otherwise the dismissal is void.

Please note that, according to recent case precedents, positions held by temporary workers qualify as “vacant positions”. Employers are therefore often recommended to terminate temporary workers’ contracts before those of other employees.

6.3. Does special dismissal protection apply where dismissals are to be implemented following or in connection with a business transfer?

Any dismissal due to the transfer of business is ineffective. However, dismissal may be made for other lawful reasons such as redundancy. A redundancy may be justified provided there are urgent business needs (not based on the transfer) and there is no other work for the employee. However, the employer has the burden of proof for the actual justification if the employee challenges the validity of the dismissal before a labour court.

6.4. Are employees entitled to a minimum severance payment on dismissal for redundancy or economic grounds?

As a general rule, there is no statutory claim for severance. However, in the case of collective redundancies severance payments are typically determined by collective agreement or social plan (usually based on a formula relating to age, seniority and monthly salary). The amount usually depends on the outcome of negotiations with the works council, and therefore also on the leverage of the parties, financial circumstances, etc.

6.5. What are the penalties for non-compliance with individual dismissal procedure?

If any of the formal or material dismissal procedure requirements are not met, the employee may file an unfair dismissal claim before the employment court. If the employee's claim is successful, the dismissal is declared void and the employee can claim reinstatement and payment of salary for the period between the (invalid) date of termination and the court's decision. If the employee cannot reasonably be expected to continue with the employment relationship, they can request that the court dissolve the employment relationship (despite the dismissal being void) and order the employer to make a severance payment of up to 12 months' salary (or, in certain circumstances, up to 18 months' salary).

6.6. Is there any special legal protection or does any special treatment apply for particular groups of workers?

Some groups of employees enjoy special protection against dismissal. Notice of termination is void if given to:

– women during pregnancy and for four months after giving birth

– employees on parental leave during such leave, or

– disabled employees with a degree of disability of at least 50% (30% in some cases)

unless prior governmental approval has been obtained. Obtaining approval will take between one and three months depending on the individual case and the area in which the application for consent is filed. Therefore, the delay caused by giving notice to these groups of employees will be considerable.

Furthermore, works council members can be dismissed only by extraordinary notice for cause and only after the works council or the labour court has consented to the dismissal. However, notice can be given to works council members if an operation is closing down completely.

7. Process when implementing alternatives to redundancy

7.1. Can changes to employment terms be made with or without express employee consent?

Any changes to employment terms require an agreement with the employee or an agreement by means of a collective agreement or works agreement, unless they fall within the scope of the company's right to instruct, which would permit minor variations or variations to non-core terms. However, the change must be reasonable, based on the balance of interests of the employer and the employee. If the employee does not agree to the amendment, the employer must implement a dismissal for a change of contract which would require justification for the termination of the employment contract, and which would only become effective:

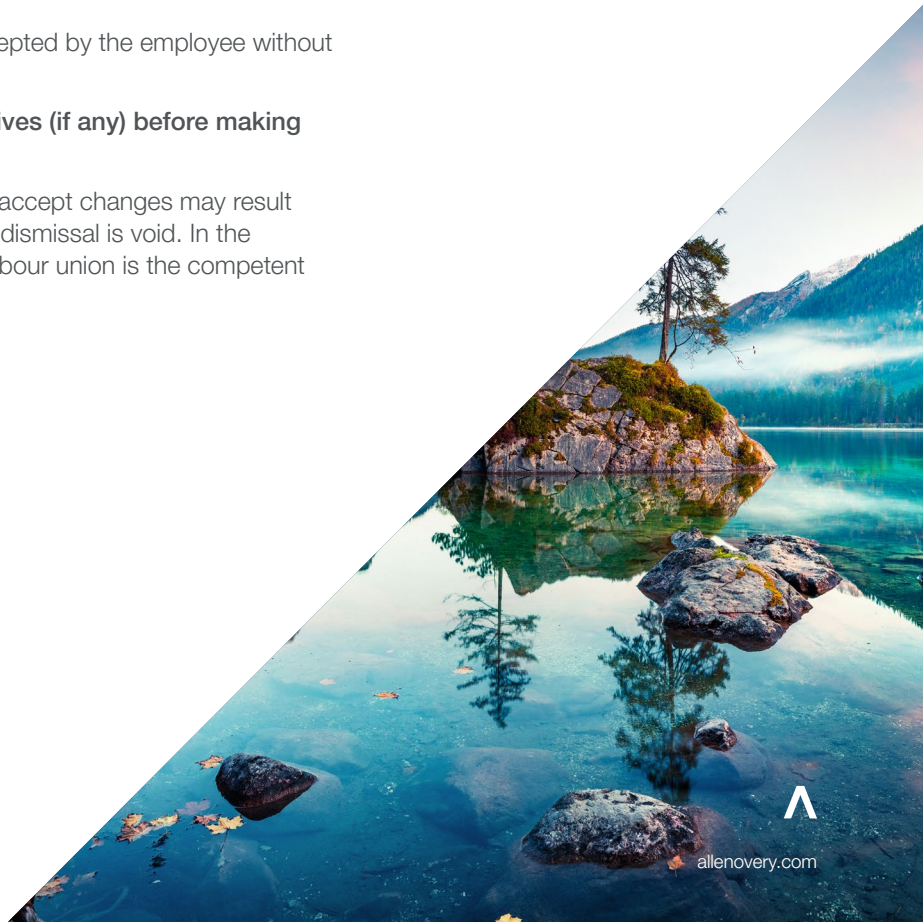
– if the employee does not challenge the termination successfully, and

– after the end of the notice period.

An agreement can, in principle, also be implied if a change is made on instruction by the employer and is accepted by the employee without protest, provided that the changes (in some cases at least in part) take effect immediately.

7.2. Must an employer consult individually or collectively with affected employees or their representatives (if any) before making changes to employment terms?

An employer should consult individually about proposed individual changes. Where the employee's refusal to accept changes may result in a dismissal for change of contract, an employer must inform/consult with the works council. Otherwise the dismissal is void. In the case of collective changes (eg regarding working time, annual compensation, etc), the works council or the labour union is the competent negotiating party on behalf of employees.



7.3. Do additional restrictions apply if changes are proposed in connection with or following a business transfer?

Changes following the transfer are permitted if they have been agreed between the employer and employee. If a business (or part of one) transfers and is continued, the works agreement will continue to be binding. If the part which transfers loses its identity (for example, on a merger), the rights and duties under works agreements are automatically incorporated into the individual employment contracts. Those terms cannot be changed to the employees' detriment for one year following the transfer. However, if the buyer has works agreements with identical areas of application, these will apply (and replace existing agreements) even if they are less favourable to employees. Similar principles apply to collective agreements.

7.4. What are the penalties for non-compliance with these procedures?

Employees could bring claims for breach of contract or constructive unfair dismissal in the event of a dismissal for change of contract. The employee could also accept the offer of changed employment terms conditionally, and bring a court action challenging the changes. In the latter case, the judge will examine whether the changes being offered are justified.

In the context of a business transfer, changes to employment terms based on a works agreement/collective agreement will be void. Even if the employee consents, a detrimental change might be regarded as an illegal circumvention of law, meaning it is ineffective unless there is a "justified" reason for it. A justified reason can only be shown in exceptional circumstances.

7.5. Do national laws promote or permit any alternatives to redundancy (eg layoff or short-time working)?

Short-time work is a measure involving the reduction of working time and labour costs, which is intended to spread a reduced volume of work over the same number of employees. During short-time work the government pays up to 67% of the difference in the amount between normal and reduced salary, and this support is normally available for up to 12 months. For a limited period until the end of 2021 the short-time work allowance is raised to up to 87% of net earnings lost, and the maximum period of eligibility is raised to 24 months. However, please note that an employer cannot order short-time work unilaterally. It must be permitted by an appropriate clause in the employment contract, works agreement or collective agreement. It can also be agreed individually in relevant circumstances (whether related to the pandemic or not).

8. Process on insolvency

8.1. Do obligations to inform and consult employee representatives arise on the sale of an insolvent business (whether share sale or business sale)?

Generally, the same obligations apply as in the case of the sale of a solvent business (see **section 2 – Process on business sales**).

However, some variations apply to give the insolvency administrator in charge more flexibility in restructuring or selling the insolvent business. These include privileges for the insolvency administrator in relation to the reconciliation of interests and social plan procedure.

8.2. Does the buyer of an insolvent business inherit employees and/or employee liabilities by operation of law?

Typically, the buyer buys the assets of the insolvent business (rather than the shares in such company), thus triggering a transfer of business and corresponding automatic transfer of employment relationships to the buyer. If the business transfer takes place after the formal opening of insolvency proceedings, the buyer does not – as a general rule – inherit employee liabilities which have arisen during past service periods before the opening of insolvency proceedings. Special rules apply with regard to vacation entitlements, old-age part-time employment relationships, social plan liabilities and company pension benefits.

8.3. Do obligations to inform and consult employee representatives arise where collective dismissals are to be implementedin an insolvent business?

The same obligations apply as in the case of collective dismissals in a solvent business (see **section 5 – Process on collective dismissals**).

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