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National Labour Law Profile: Federal Republic of Germany

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General legal framework

The German constitution was adopted on 23 May 1949 and is referred to as the Basic Law. With its amendment by the Unification Treaty of 31 August 1990 and the Federal Statute of 23 September 1990, the Basic Law has become the Constitution of the unified West and East Germany (former Federal Republic of Germany and German Democratic Republic).

Persuant to the Basic Law, Germany is a democratic and social federal state, in which basic rights are guaranteed (Art. 20 para. 1). The Basic Law implements the separation of powers and binds the executive and judiciary powers by law and justice (Art. 20 para.3). Basic rights must be observed by all state powers (Art. 1 para. 3). The head of State is the President, whose function is limited mainly to the representation of Germany at home and abroad (Art. 58). The President cannot be a member of the government or any legislative body.

Germany is a federal state made up of 16 states (Bundesländer), to which self government is guaranteed except as otherwise provided by the Basic Law. Federal law takes precedence over state law (Art. 31). According to Art.70 (and following) of the Basic Law, the States have the right to legislate, except on subjects for which the Federal State enjoys exclusive legislative power (for example on foreign affairs and defence). Civil law, law of association and labour law are inter alia matters which the Basic Law has left under the concurrent legislative power of the Federal and State legislatures. The States thus have law making power to the extent that the Federal legislature has not exercised its right to legislate. In Practice, civil law, law of association and other labour laws are entirely governed by Federal Law. The States nevertheless influence the adoption and amendment of the above-mentioned Acts, because they take part in the legislative procedure.

Legislative power at the federal level is vested in the Senate (Bundesrat) and the House of Representatives (Bundestag). The latter body's members (with 669 seats at present) are elected in general, direct, free, equal and secret elections to four-year terms, under a system combining direct and proportional representation. In order to gain representation, a political party must win at least 5% of the national vote or three direct mandates. Any federal bill must be adopted by the House of Representatives to become law, while the participation of the Senate varies according to the issue covered. Within the Senate, which is composed of members appointed by the State governments, each State has at least three votes; States with more than two million inhabitants have four, States with more than six million inhabitants five, and States with more than seven million inhabitants six votes. The current total number of votes in the Senate is 69.

The executive power is vested in the government, which is composed of the Chancellor and the Ministers. The latter are appointed by the President upon the Chancellor's proposal. The Chancellor, as head of the government, is elected by the House of Representatives upon the President's proposal.

The judicial power is vested in the judges who are independent and subject only to the law. It is exercised by the Federal Constitutional Court, which safeguards the keeping of the Constitution, as well as by federal courts and State courts.

Labour law

The Basic Law guarantees freedom of association (Art. 9 para. 3) as well as free choice of occupation and prohibition of forced labour (Art. 12). It also establishes the principle of equal treatment and in particular obliges the state to support the effective realization of gender equality (Art. 3).

The major sources of labour law are Federal legislation, collective agreements, works agreements and case law. There is not one consolidated Labour Code; minimum labour standards are laid down in separate Acts on various labour related issues, which are supplemented by the government's ordinances.

The following Acts may be considered key:

- The Civil Code adopted on 18.08.1896 and last amended on 02.11.2000 defines the employment relationship. However, matters like dismissals, illness and holidays are treated in the specific Acts mentioned below.
- The Works Constitution Act adopted on 23.12.1988 and last amended on 19.12.1998 regulates co-operation between employers and employees.
- The Act on Collective Agreements adopted on 25.08.1969 and last amended on 29.10.1974 governs collective agreements.

Other labour legislation:

- *Employment relationships:* Federal Paid Leave Act; Employment Promotion Act; Employment Protection Act, Act regulating the Payment of

Wages and Salaries on Public Holidays and in case of sickness; Protection against Dismissal Act; Act on the Commercial Transfer of Employees;

- *Occupational training:* Occupational Training Act; Act on Part-Time and Fixed-term
- *Occupational safety and health, and conditions of work:* Maternity Protection Act; Ordinance on Maternity Protection at the Workplace; Young Workers Protection Act; Working Time Act; Act on the Payment of Child Raising Benefit and Child Raising Leave; Insolvency Ordinance
- *Individual Dispute settlement:* Labour Court Act; Code of Civil Procedure

Labour legislation is interpreted by labour courts. Some matters, especially strike regulation, are partly or even totally left to case law.

Collective agreements (Tarifverträge) are legally binding as long as they keep in line with the statutory minimum standards. They are usually concluded at the branch level by the appropriate trade union and employers' association and hence cover one branch (or parts of it) and either a region or the entire country. However, sometimes collective bargaining also takes place at the enterprise level. In 1999, 8% of employees in Western Germany and 11% of those in Eastern Germany fell under an enterprise-based collective agreement (source: IAB Betriebspanel). Collective agreements are always binding for members of the relevant trade union and employers' association. Provided certain conditions are met, the binding power can be extended to all employees of the branch in the respective region. In 1999, 65% of employees in Western Germany and 46% of those in Eastern Germany were covered by a branch-level collective agreement (source: IAB-Betriebspanel).

In practice, the *establishment* (Betrieb) also plays an important role. The establishment is the organizational unit where particular working objectives are pursued. At this level, conditions of work such as those determined in the Works Constitution Act may be or in certain cases must be laid down in *works agreements* (Betriebsvereinbarung). These are written agreements concluded between the employer and the works council (a body representing the employees of the establishment).

The various labour laws are available on-line in German. An English version of the Works Constitution Act is also available.

English version of the Civil Code is available though some Sections have since been amended. For the latest amendments you need to refer to the German version.

Because of the German membership in the European Union (EU), labour law is strongly influenced by EU legislation and case law. EU Directives must be implemented and EU jurisprudence has legal binding power.

Contract of employment

Permanent and fixed-term contracts of employment

As a rule, the contract of employment is concluded for an unlimited period (see sec. 620 para. 2 of the Civil Code). It is, however, possible for the employer and the employee to conclude a contract of a limitted period. In 1999, 14% of East German employees and 8% of West German employees, including trainees, had a fixed-term employment contract. Any fixed-term contract must be consistent with the Act on Part-Time Work and Fixed-term Employment Relationships, which came into force on 01 January 2001 and replaced the Employment Promotion Act of 1985 and its further amendments.

The duration of fixed-term contracts must be set according to objective conditions such as a specific end date, the completion of a specific task, or the occurrence of a specific event.

It must also in principle be based on the justification which are laid down in sec. 14 para. 1 which comprises motives like the temporary requirement of a certain type of work, a limitation in order to make the worker's access into professional life easier or the replacement of an ill employee. However, a fixed-term contract may be also lawful without justification, if it falls under one of two exceptional cases:

- the contract is concluded for a limited period of up to two years but does not follow any other contract with the same employer (sec. 14 paras 2);
- the contract is concluded with an employee who is at least 58 years old.

If the employee wants to claim the ineffectiveness of a limitation, he/she must take legal action within three weeks after the agreed ending of the employment contract. An employee who is employed for a fixed-term must be given treatment equal to that given full-time employees employed to do similar work (sec. 4 para. 2, sec. 3 para. 2).

Probation

When concluding a labour contract the parties often agree on a probationary time of up to 6 months. During this period, the employee can be dismissed with notice of only 2 weeks (sec. 622 para. 3 Civil Code). Alternatively, the parties may enter the employment relationship by agreeing on a contract that is limited up to 6 months. The necessity of mutual testing is a justifying reason of the above-mentioned sec. 14 para. 1.

Special contracts of employment

Part-time work is governed by the Act on Part-Time and Fixed-term Employment Relationship. It is defined as any work week of fewer hours than the weekly hours worked by full-time workers (sec. 2). The number of people who work part-time in Germany is not negligible but is below the OECD average. In 1998, 16.6 % of all German employees worked part-time. The OECD average was 18.5 % of all employees (source: OECD Employment Outlook 1999).

Every full-time employee who has been employed for at least 6 months in the same establishment can request to work part-time (sec. 8 para. 1). The employer shall accept this request unless he/she regards the request as not feasible in view of operational reasons such as when the reduction of working time may have negative impact on the organization, work flow or safety, or would lead to excessive costs. Other acceptable reasons for refusal may be specified by collective agreements.

Part-time workers who want to work full-time must be given preference in case of a vacant full-time post. Employers are also obliged to inform employees who want to change their working time, as well as the works council, about vacant full-time or part-time jobs within the company and about opportunities to participate in training measures.

Part-time employees must be given treatment equal to that given full-time workers, provided that there are no legally justified reasons for unequal treatment (secs. 5 and 4 para. 1). As part-time work is mainly done by women, differential treatment of part-time and full-time workers also often leads to indirect discrimination on the grounds of sex. In 1998, 32.4% of all German female employees worked part-time, compared to only 4.6% of males (OECD Employment Outlook 1999). The matter of indirect discrimination on grounds of sex is prohibited by Art. 3 paras. 2 Basic Law as well as sections 611a and 612 para.3 Civil Code.

Temporary employment exists when a business (namely a temporary work agency) employs an individual on a permanent basis and dispatches him/her temporarily to another employer (the user enterprise). The employee works during this period under the supervision and in line with the instructions of the user enterprise. If the dispatching of employees is not only occasional but on a long term basis, which is assumed in case of a dispatching period longer than 12 months, it is considered commercial. Commercial dispatching is permitted only under the strict preconditions of the Act on the Commercial Transfer of Employees. First, the business of the temporary work agency needs permission by the Federal Institute of Employment. Secondly, the dispatched worker must be employed on a permanent basis except for under particular circumstances when a non-renewable fixed-term contract is justified. Dispatched employees are entitled to maternity protection, parental leave, continued payment of remuneration in case of sickness, 24 days of holiday (including Saturdays), social insurance and statutory redundancy provisions.

Home work **:** Home workers enjoy to a large extent the same rights as other employees, as provided for by the Home Work Act adopted on 14 March 1951 and last amended 16 December 1997. For example, home workers are represented mainly by home work committees, which consist of three members each of employers and home workers and a chairperson appointed by the competent labour authority. A home work committee supports the conclusion of collective agreements. If a trade union does not exist in certain fields of activity, minimum standards for remuneration and working conditions are set by the home work committee (sec. 19).

Vocational training contracts that primarily intend to train young people in a profession are not considered contracts of employment. They are governed by the Occupational Training Act, which, however, provides in sec. 3 para. 2 that the rules and principles governing the contract of employment must be applied, unless the Act expressly states an exception, or when the application of labour law would not be compatible with the nature and aim of the vocational training being undertaken.

Suspension of the contract of employment

When employees are on a legal strike or the employer decides on a justified lock out, the mutual duties under the contract of employment are suspended, so that employees do not have to work and the employer is not obliged to pay wages. During industrial action, trade union members normally receive strike assistance, which is paid by the trade union and of which the amount is 2/3 of the gross income. Other employees who are directly affected by the strike receive social security payments from the State.

In case of temporary lay off (*e.g.* lack of orders or bad weather), the mutual contractual duties are not entirely suspended, but collective agreements or work agreements may provide for short-time work with corresponding wage reductions. However, such a measure cannot be unilaterally ordered by the employer.

Pursuant to sec. 1 of the Employment Protection Act, the mutual duties of the contract of employment are also suspended during military and alternative service.

Termination of employment

The major sources of regulation of this issue are the Civil Code and the Protection Against Dismissals Act. However, the latter applies only to establishments regularly employing more than five full-time employees (not counting vocational trainees and *marginal* part-time workers). Also, a worker must have completed a qualifying period of six months work without interruption to be eligible for protection under this law (Sections 1 para 1 and 23 Protection against Dismissal Act).

German labour law makes a distinction between ordinary termination (with notice), whereby the employment relationship is ended when the period of notice expires (sec. 622 Civil Code), and extraordinary termination (without notice).In the latter type of termination, the notification effects the immediate cancellation of the employment relationship (sec. 626 Civil Code). In both cases, termination at the initiative of the employer is limited by law.

Periods of notice are stipulated by the law. The minimum statutory period is four weeks, and it is increased by one month each time the worker has completed his/her 5 th, 8 th, 10 th , 12 and 15 th year of working for the same employer. The maximum entitlement is seven months, after the worker has completed 20 years of service. However, years of service before the employee is 25 years old are not taken into consideration to calculate his/her entitlement to notice. Collective agreements may specify longer or shorter periods of notice, whereas individual contracts of employment may only specify longer periods of notice. As of 1st May 2000, notice must be given in writing in order to have legal effect.

Extraordinary dismissal is legally possible where there is an important reason which makes it, in good faith, unacceptable to continue the employment relationship until the end of the notice period, or in the case of a fixed-term contract of employment, the contractual date for its expiration. Typically it applies to serious misconduct, and is only possible within two weeks as of the moment when the notifying party learns about the facts that are decisive to terminate the employment relationship. In case of litigation the same party will be required to prove the facts on which the extraordinary termination is based.

Where there is a *works council*, the employer is obliged to consult it before every case of dismissal either with or without notice, even though the council's response is not binding on the employer. The works council has a period of three days, in case of summary dismissal and one week in case of ordinary termination to agree or declare reservations in writing, otherwise agreement is presumed by law. Termination without proper hearing of the works council is ineffective.

A worker who intends to challenge the validity of his/her termination must file a submission before a labour court within a time limit of three weeks as of the date he/she has received his/her notice. If the court is not convinced that either the ordinary termination is *socially justified*, or the extraordinary dismissal is for important reasons, it may order the worker's reinstatement, with back pay, unless it feels that such a measure is impractical, in which case it may order the employer to pay compensation, normally equal to one month pay per each month of service, with a maximum of twelve months, or eighteen months when the worker is aged more than 55 years old and has twenty or more years of service.

Special rules apply to collective redundancies in establishments employing more than twenty employees, which call for the consultation of the works council and the drawing of a *social plan*.

For more detailed information on termination procedures, and remedies in case of unjustified termination please see the Termination of Employment Digest.

Some groups of employees benefit from particular protection against ordinary and extraordinary dismissal due to certain individual circumstances. These specially protected groups include disabled workers, pregnant women (see below) and *works council members*.

Hours of work

Protection of working time is governed by the Working Time Act (WTA), the Maternity Protection Act (MPA) and the Young Workers Protection Act (YWPA). The protection applies to white collar workers, blue collar workers and vocational trainees.

In general, working time is defined as the time from the beginning until the end of work without breaks (secs. 2 para1 WTA and 4 para.1 (YWPA). The legal working time is 8 hours per day, except for Sunday and statutory holidays, which are normally foreseen as a resting period (secs. 3 and 9 WTA). The statutory weekly working time is thus 48 hours but in many cases it is reduced to between 38,5 and 35 hours by collective agreements. In 1999 the average agreed working week was 37.4 hours in West Germany and 39.2 hours in East Germany(Source: Federal Ministry of Labour). The daily working time of 8 hours must not be exceeded, if it concerns expectant and nursing mothers (sec. 8 MPA). The same applies to employees or trainees under 18 years (sec. 8 YWPA). There is also a ban on young workers working on Saturday (sec. 16 YWPA).

In all other cases, the regular daily working time may be extended up to 10 hours, only if the mean of the daily working time in the following 6 months is 8 hours per day (sec.3 WTA). This encourages flexibility of working time, even though 11 hours of uninterrupted rest after daily work must be guaranteed (sec. 5 para. 1 WTA). Also night work is legally permitted only under some strict preconditions (see secs. 6 and 7 WTA).

Paid leave

This issue is regulated by the Federal Paid Leave Act, and by collective agreements. The statutory minimum leave entitlement is 24 days per calendar year, not counting Sundays and public holidays (sec. 3 paras. 1 and 2). Saturdays are thus included in the calculation. Further days of paid leave may be added by the particular collective agreement. In fact, a period of 4 up to 6 weeks per calendar year is usually granted by collective agreements. For those employees whose employment relationships fall under the scope of any collective agreements reached in 1999, 80% of West German employees and 55% of East German employees can claim paid leave of 6 weeks or more. Compared to the period from 1974 until 1999 an increase can be noticed. (Source: Federal Ministry of Labour)

Maternity protection and maternity leave

Maternity protection is governed by the Maternity Protection Act (MPA), which is supplemented by the Ordinance on Maternity Protection at the Workplace.

As a general duty, the running of the work and the workplace must be orgaqnized in favor of the pregnant and nursing employees (sec.2 para. 1 MPA). This protection applies as soon as the employer has been informed about the existent pregnancy. A ban is then put on heavy physical work or piecework as well as on work with dangerous materials (sec. 4 paras. 1, 2 and 3 MPA and sec. 1 of the Ordinance). In cases of the employer's misconduct he is punished for a regulatory offence or even for a criminal act (sec. 21 paras. 1- 4 MPA). Protection is safeguarded by the supervisory authority, which must be informed about the existent pregnancy.

During pregnancy and until 4 months after childbirth, the employee is additionally protected against any dismissal either with or without notice (sec. 9 MPA). The same absolute protection applies to the period of child-care leave (Act on the Payment of Child Raising Benefit and Child Raising Leave). During a period of 6 weeks prior to the birth of the child until 8 weeks after the birth, the pregnant and nursing mother must not be occupied by the employer. In cases of premature or multiple birth, this ban lasts until 12 weeks after birth. During this period of maternity leave, the employee is paid maternity allowance out of a statutory health insurance fund and a supplement by the employer. A ban on employment may apply

even earlier than 6 weeks prior to the birth. If a doctor certifies that the pregnant employee must partly or even entirely stop working to avoid a risk to herself or the unborn child's life or health, the employer must partly or even entirely release her from work. She is then paid a maternity wage, which amounts to the previous average earnings.

Other leave entitlements

Sick leave is regulated under the Act on Payment of Wages and Salaries on Public Holidays and in Case of Sickness, the latest amendment of which was adopted on 19 December 1998. If the employee has been employed for at least 4 weeks and he/she was not to blame for his/her incapacity for work, continued payment of wages can be claimed for a period of up to 6 weeks (sec.3 para. 1). The employee is thus currently entitled to claim 100% of the average income (sec. 4 para. 1).

Another entitlement for continued payment during leave of absence is laid down in sec. 616 of the Civil Code. Wages can thus be claimed if the employee is prevented from working for personal reasons such as e.g. death, birth or funeral and the absence is for an insignificant period. In fact, the employee is not always entitled to entirely claim such leave, because sec.616 of the Civil Code may be, and in practice often is, limited or even unrecognised by collective or contractual agreements.

Child raising leave is governed by the Act on the Payment of Child Raising Benefit and Child Raising Leave. The claim to such leave can be made by female as well as male employees but is inadmissible whilst the ban on occupation under the Maternity Protection Act applies. During child raising leave, the mutual duties laid down in the employment contract are suspended (established Federal Labour Court ruling). This leave is granted without pay, and ends when the child reaches 4 years of age (sec. 15).

Minimum age and protection of young workers

The employment of children is forbidden according to the Young Workers Protection Act. This applies not only to children under 15 years but also to those who are older and still obligated to attend full-time schooling (secs. 5 para. 1, and 2 paras. 1 and 3). In very exceptional cases, the above-mentioned children can be employed, for instance for the purpose of occupational therapy (sec. 5 para.2). However, the work must be suitable for the child. Any employment of children is supervised by the industrial inspectorate of each State (Bundesland).

Workers under the age of 18 may perform their apprenticeship or traineeship. The employer then must observe a special protection also laid down in the above-mentioned Act. The daily working hours must be not more than 8 and any occupation between 8 pm and 6 am is forbidden. During work, breaks of suitable duration must also be ensured and Saturdays as well as Sundays are, apart from very exceptional cases, foreseen as a time for rest. Moreover, there is a ban on dangerous work, piecework, time-based work and on underground mining work.

Equality

The principle of equal treatment is laid down as a basic right of the Basic Law (Art. 3 paras. 1, 2 and 3 and Art. 9 para. 3). Any discrimination on grounds of sex, race, nationality, handicap, religion, political opinion and trade union activities is inadmissible. This basic right was taken over by jurisdiction as a fundamental principle of labour law, the so-called principle of equal treatment under labour law. Unjustified unequal treatment of employees is thus unlawful. However, in favour of contractual freedom, this prohibition does not apply prior to the establishment of an employment relationship.

In order to fulfil the obligations arising from EC (EU) directives, sections 611 a and 611 b of the Civil Code were enacted in 1980. Direct and indirect discrimination on grounds of sex, also prior to the establishment of an employment contract, have thus been prohibited by law. A statutory prohibition is also on sexual harassment. The employer is obliged to protect female as well as male employees (see sec. 2 para. 1 of the Employees Protection Act). If the employer does not take suitable measures, the employee may refuse to work without losing his/her claim to wages (sec. 4 para. 2).

Pay issues

Actual pay is determined in the individual contract of employment, but cannot be lower than the minimum wage established in the relevant collective agreement. Unlike many other countries, there is not a statutory minimum wage in Germany.

In general, wages must be at the employee's disposal. This principle may be restricted, but only in observance of the applying statutory protection. The two most relevant cases are attachment of wages governed by the Code of Civil Procedure and wage guarantee in the event of insolvency, governed by the Insolvency Ordinance.

Wages may be attached if the employee has not met his/her financial obligations *vis a vis* third parties, and the creditor has obtained an executory title (court judgement) against the employee. A base amount of the worker's wage is, however, exempted from attachment.

If an insolvency proceeding has been opened over the employer's assets, the employee's claim to wages is generally treated with priority. Due wages rank highest during the insolvency proceedings. Outstanding wages for the last 6 months prior to the opening of the insolvency proceedings rank after legal costs and administration expensives. Compensation for outstanding wages of the last 3 months prior to the opening of the insolvency procedure is guaranteed by the employment office. The same guarantee covers claims made by workers in case the opening of the insolvency proceeding has been refused because the employer has not left enough assets to make such a proceeding worthwhile.

Trade union and employers' association regulation

Freedom of association of both workers and employers is guaranteed as a basic right of the Basic Law (Art. 9 para. 3). This includes the right of individuals to form associations, to join an existing association, to participate actively in an association, to leave an association or not to belong to

any association. It also contains the association's protection against any influence of the state or any attack of an individual.

An association within the meaning of the Basic Law is a voluntary permanent joining together, which must not be limited to one firm. Additionally, any association must regard itself as a representative of either the employees or the employers and must explicitly work towards the conclusion of collective agreements.

Trade unions

There is no trade union law in Germany. Even though trade unions are generally defined as associations with no legal capacity, they are legally entitled to collectively bargain as well as to take legal action or to be taken to court (sec. 2 para 1 Act on Collective Agreements and sec. 10 Labour Court Act). The duties and rights of trade union members are laid down in the relevant trade union's constitution. Even though the constitutions may vary between different trade unions, they traditionally establish similar essential duties and rights. Members are obliged to pay union dues, of which the amount is based on the individual wage level. At the same time, they are entitled to support in labour disputes as well as to legal advice. The membership only ends by termination at the worker's initiative or by exclusion on the basis of the trade union's decision, which must be in accord with its constitution.

Most collective agreements are negotiated at the branch or industry level. On 19 March 2001, the world's largest industry-based federation, the German Unified Services Union "ver.di" was founded. It unifies three million members and is a merger of five trade unions: the German Union for Salaried Employees (DAG), the German Post and Telecom Trade Union for Public Services (DPG), the Trade Union for Commerce, Banking and Insurance (HBV), the Trade Union for Public Services, Transport and Traffic (ÖTV) and the Industry Trade Union for Media, Printing and Paper, Journalism and Arts (IGMedien). Ver.di is, together with seven other industry based federations, e.g. the Metalworkers Union (IGMetall), a member of the German Confederation of Trade Unions (DGB). The DGB is the most important central confederation. Trade unions of the public service and privatized service sector mostly join the German Civil Service Federation (DBB), a much smaller umbrella organization.

Employers' associations

Employers' associations are generally defined as associations with legal capacity.

Many of the regional associations are industry-based and the same branch is finally merged in an association at Federal level. The Federal associations of the different branches are unified in the two most important central confederations, the Confederation of German Employers' Associations (BDA) and the Federal Union of German Industry (BDI). The BDA represents the enterprises' interest as an employer, whereas the BDI seeks to further their economic and political interests.

Collective Bargaining and Agreements

Collective bargaining is regulated by the Act on Collective Agreements, which, however, does not mandate a given structure of collective bargaining.

The legal capacity to collectively bargain is possessed by the trade unions on the one hand and the employer's associations as well as the individual employer on the other (sec. 2 para. 1). In fact, collective bargaining mostly takes place at the branch level, even though, in some cases, trade unions may also bargain with the individual employer, provided that it is permitted by their constitutions. A prohibition of the employer's organization against individual collective bargaining of its members does not affect the validity of the collective agreement but results in the employer's duty to pay damages.

Collective agreements have three characterizing functions:

- the protective function (setting minimum labour standards),
- the rationalizing function (putting working life in order and alignment);
- and the peacekeeping function (as long as the collective agreement remains in force new demands and labour disputes about included topics are absolutely banned (*industrial peace*)).

Any collective agreement is a contract, which consists of two parts (sec. 1 para. 1). The first part, *part under the law of contracts*, deals with rights and duties of the contractual partners. The two main obligations of the partners are industrial peace and the duty to use all means available to ensure that their members abide by the agreement. An arbitration agreement (explained under *Strike and lock outs)* may also be added. The second part of the collective agreement sets rules related to labour contracts, to operational questions and to the works constitution within the meaning of the Works Constitution Act. This distinction is important for the collective agreement's period of validity. Generally, a collective agreement ends when the period of time expires for which the agreement was concluded. It may be terminated earlier at one party's legal initiative or by mutual agreement. In any case, the part under the law of contract necessarily ends at the same time. Unlike this, the legal norms setting part stays in force until it is replaced by either an individual contractual agreement or a works agreement or in particular by legal norms of a new collective agreement (sec. 4 para.5).

Concerning personal validity, a collective agreement is basically binding for those who, at the time of its coming into force, are members of the relevant trade union and employers' association. Its rules are thus applicable to the individual employment relationship, if the employee as well as the employer are bound (sec. 3 para. 1). However, the employer's commitment is sufficient for the application of legal norms related to operational questions or to the works constitution (sec. 3 para. 2).

A collective agreement may be declared as generally applicable to all employment relationships within its geographical scope, whether or not the employer or the employee are members of the parties to the agreement. This is done by the Ministry of Labour, if at least 50 per cent of the

employees who come under the agreement's geographical scope are hired by employers already bound by the agreement. It also requires the accordance of both industrial partners and must be of *public interest*.

Workers' representation in the enterprise

Workers' representation in the enterprise is governed by the Works Constitution Act. This Act is decisively based on the term *establishment.* An establishment is the organizational unit in which the entrepreneur alone or together with his staff pursues particular working objectives. In an establishment regularly employing five or more employees, its employees may decide to elect a works council, of which the period of office is four years (sec. 21). In practice, works councils are set up especially in medium size and big enterprises, and much more rarely in small enterprises: In 1999, works councils were organized in 97.5 per cent of establishments employing more than 1,000 workers, but only in 4.2 % of establishments employing from 5 to 20 employees.

The number of members of a works council is determined by the number of workers normally employed in the establishment. It varies from 1 member in establishments occupying from 5 to 20 workers, to 31 members in establishments occupying from 7001 to 9000 employees. In establishments with more than 9000 workers the number of members of a works council is increased by two members for every additional 3000 workers. Manual and non-manual workers have separate representation on a works council.

The works council has rights of participation as well as of co-determination. The right of participation includes the right to be informed and to make recommendations. The right of co-determination is by far of much more practical consequence, because it entails the possibility of blocking a decision of the employer which is dependant on the works council's agreement. It covers subjects such as work rules, working time including overtime and holiday roster, methods of pay, the introduction and use of technical devices for monitoring employees' conduct and performance, accident prevention and health protection, fringe benefits and the provision and withdrawal of company-owned housing. However, wages must never be determined at the establishment level (Secs. 87 para. 1 and 77 para.3).

The works council and the employer agree within the limits of an applying collective agreement often by concluding a written works agreement (sec. 77 para. 2). They must co-operate on the basis of mutual trust (sec. 74). Industrial action is thus prohibited in the event of a disagreement. Any dispute must be settled by legal proceedings either leading to a court order or resulting in a decision of a conciliation committee. The conciliation committee is set up in case of disagreements in matters of co-determination. It is composed of an independent chairperson and an equal number of employer's and employees' representatives.

Another essential duty of the works council and the employer is to supervise the equal treatment of all employees in the establishment. This includes the prohibition against discrimination against the works council members, who are furthermore safeguarded against dismissal by special provisions.

Workers' representation may also exist at the *enterprise* level via a central works council, that deals with enterprise related matters. Its setting up is mandatory if the enterprise has several establishments with existing works councils. This body is composed of representatives of manual and non-manual workers who are sent by the affected works councils. Its period of office is unlimited.

Provided that legally independent enterprises are merged into a combine, even a combine works council may be created, in so far as the central works councils decide to have one.

Co-determination at managerial level

Employees are granted co-determination at managerial level, which is separate from the works council, but only in companies with a legal personality of their own, namely joint stock companies (AG), limited partnerships on shares (KGaA), limited companies (GmbH) and cooperatives on acquisition and commerce. Co-determination is ensured by the membership of the employee's representatives on the company's supervisory board. This body, which is composed also of shareholder's representatives, controls the company's management, and its amount of influence depends on the legal character of the company.

The extent of the workers' representation and impact within the supervisory board is governed by 4 different acts, namely the Co-determination Act of the Coal, Iron and Steel Industries, the Coal, Iron and Steel Co-determination Amendment Act, the 1952 Works Constitution Act and the 1976 Co-determination Act. They differ in their scope of application and in their regulations. However, they all assure limited voting rights of the employees' representatives on the supervisory board. If the company is part of a combine led by another company, where co-determination is not legally mandated, the employees' participation in decision making is nevertheless safeguarded.

Strike and lock outs

Industrial action can be carried out by employees as well as by employers. It is not regulated by any act but ruled by case law, especially through decisions of the Federal Labour Court. Strikes of employees are generally recognized industrial actions. There might be an all-out strike, which hits the whole branch of industry, or only selective strikes, which are concentrated on key firms or key departments.

Employers may react by refusing workers who are willing to work access to work, which is known as a lock-out. According to Federal Labour Court rulings, a lock out is unlawful, except if it is used as a defence against partial and selective strikes.

A strike can be called exclusively by a trade union. It can be used only as a last resort when other means for reaching agreement, especially the arbitration procedure, have been exhausted (principle of commensurability). For the most part, trade unions and employer's associations have voluntary agreed on the duty of taking part in an arbitration procedure before any industrial action, even though a compulsory state arbitration does not exist. For such a procedure, a neutral person is appointed who is charged with the harmonizing of the controversial demands.

The preparation of a strike also must be in line with guidelines set by most of the trade unions, namely the DGB as a confederation and the DAG. Key elements of these guidelines are firstly strike ballots before passing a strike resolution and secondly strike pickets, which at any rate must not prevent the work of those who are willing to work.

Strikes must never be directed against those collective agreements that are still in force. They also should be aimed at the conclusion of a new collective agreement. Employees therefore may strike only for objectives, which in principle can be part of a collective agreement (prohibition on *e.g.* political strikes). It must also apply the rules of a fair fight. Maintenance and emergency work thus have to be carried on during a strike.

Any illegal industrial action results in a duty to pay damages to the persons or enterprises affected. In case of an illegal strike, the employee may also risk of extraordinary (i.e. without notice) dismissal.

Labour Courts

The employment law jurisdiction, which includes also trade union disputes, is governed by the Labour Court Act. There are three instances, namely Local Labour Courts, Regional Labour Courts and the Federal Labour Court as the final instance.

Any Local Labour Court is composed of one professional judge, who is chairman, and two honorary non-paid judges with the equivalent legal powers. Each of the latter is appointed from the ranks of employers and employees. In comparison, Regional Labour Courts have some chambers and each of them is composed similar to a local labour court.

The Federal Labour Court consists of senates being composed of three professional judges and two lay judges, one from the employee side and one from the employer side. For the purpose of harmonization of decisions the Federal Labour Court can establish a *common senate*, made up of one professional judge from each senate of the Federal Labour Court, and three lay judges, respectively from the employees' and the employers' sides.

Disputes in terms of works constitution law are part of another proceeding. They are leading to a court order, which permits only restrictively amicable settlements. Proceedings concerning an individual employment relationship or any appeal of one by either side of the dispute lead to a judgement. They always start with a conciliatory hearing, because the Local Labour Court's first intention is an amicable settlement of the case. Proceedings for protection against dismissal are also given priority in the first instance (sec. 61a). For any details, please refer to the publication, *Termination of Employment Digest*.

Official Gazette

Germany's official gazette of federal law is the Bundesgesetzblatt. It consists of two parts, *Teil I* and *Teil II*. The first part deals with domestic laws, while the second part, with treaties.

Links

General Information

- Encyclopedia Britannica

Constitutional Information

- Basic Law (English version)
  Basic Law (French version)
  Bundestag (House of Representatives) (English web site)
- Bundesrat (Senate)

Labour Law Texts

- German version of all labour laws. Published by the Ministry of Labour and Social Affairs
- Works Constitution Act (English version)

Government and other relevant organizations

- Federal Ministry of Labour and Social Affairs:
  English version
  French version
- Federal Labour Court: (German version)
- German Confederation of Trade Unions (DGB):
  English version
  French version
- German Unified Services Union (ver.di) (English version)
- Confederation of German Employer's Associations (BDA)

ILO

- ILO Conventions ratified by Germany
- Comments of the ILO Supervisory Bodies on Germany

- NATLEX ILO Database of National Legislation

Selected Publications

Publications in English

Co-determination: Co-determination at the board level and works constitution, Ministry of Labour and Social Affairs, January 1998. (Available on-line free of charge)

Publications in German

- Prof. Hans C. Nipperdey (ed.): **Nipperdey I: Arbeitsrecht**, (Munich, C.H.Beck, 2000).
  Collected texts of all Federal labour laws.
- Prof. Reinhard Richardi and Prof. Otfried Wlotzke (eds.): **Münchener Handbuch zum Arbeitsrecht**, in three volumes, (Munich, C.H. Beck, 2000).
- Prof. Thomas Dieterich, Prof. Peter Hanau, and Dr. h.c. Günter Schaub (eds.): **Erfurter Kommentar zum Arbeitsrecht**, (Munich, C.H. Beck, 2001).
- Prof. Rainer Ascheid, Prof. Ulrich Preis and Ingrid Schmidt (eds.): **Großkommentar zum Kündigungsrecht**, (Munich, C.H. Beck, 2000).
- Hans Joachim Spiegelhalter (ed.): **Beck'sches Personalhandbuch, Band I, Arbeitsrechtslexikon**, (Munich, C.H. Beck, 2001).
- Dr. h.c. Günter Schaub: **Arbeitsrechts-Handbuch**, (Munich, C.H. Beck, 2000).
- Prof. Bernd Müller: **Arbeitsrecht im öffentlichen Dienst**, (Munich, C.H. Beck, 1998).

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