european employment group
–more than a network

LAW
LAWYERS ASSOCIATED WORLDWIDE™

January 2016

Collective Redundancies and Reorganisations

Germany

Summary

Special statutory provisions apply in Germany to collective redundancies. Legislation prescribes that the employer must notify the local Employment Agency before dismissal. If a works council was established for the operation concerned, the employer must additionally consult with the works council. Failure to comply with these provisions can lead to all dismissals carried out on the basis of the mass layoff being void. Furthermore, the employer must prove the grounds of the collective redundancy, if the employee files an unfair dismissal claim with the labour court.

When do the provisions apply?

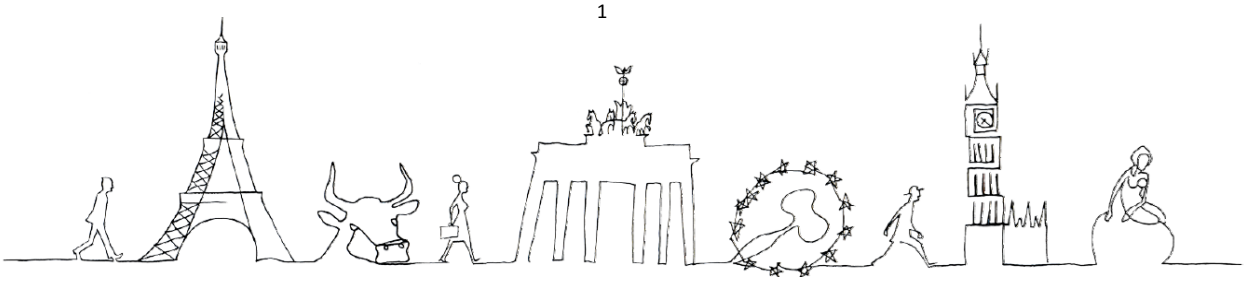
The duty to file a mass layoff notification applies if certain thresholds are met within a 30-day period, depending on the size of the establishment concerned. These are:

- 5 employees to be made redundant in an operation, where on a regular basis more than 20 but less than 60 employees are employed;
- 10 per cent or at least 25 employees to be made redundant in operations of 60 employees but less than 500; or
- 30 employees to be made redundant in operations with 500 or more employees (see section 17 German Dismissal Protection Act, *Kündigungsschutzgesetz – KSchG*).

The mass layoff notification duty can be triggered on the one hand by the employer's notice of termination and on the other hand by a mutual termination agreement or notice of termination given by the employee, if these are initiated by the employer.

What are the requirements?

Prior to a collective redundancy, an employer must file a mass layoff notification with the local Employment Agency. A notification form is available online on the homepage of the German Federal Agency for Employment. Additionally, if the employees have established a works council, the employer must undertake a formal information and consultation procedure with the works council at



least two weeks prior to issuing the dismissals and enclose in the mass layoff notification the works council's opinion on grounds of the mass layoff.

What does this information process look like?

The works council, if established, must be informed, in writing, about the grounds of the dismissals, the number of affected employees and professional groups, the amount of regularly employed individuals, the time frame of dismissals, the criteria for the selection of employees and the criteria for the calculation of potential severances payments.

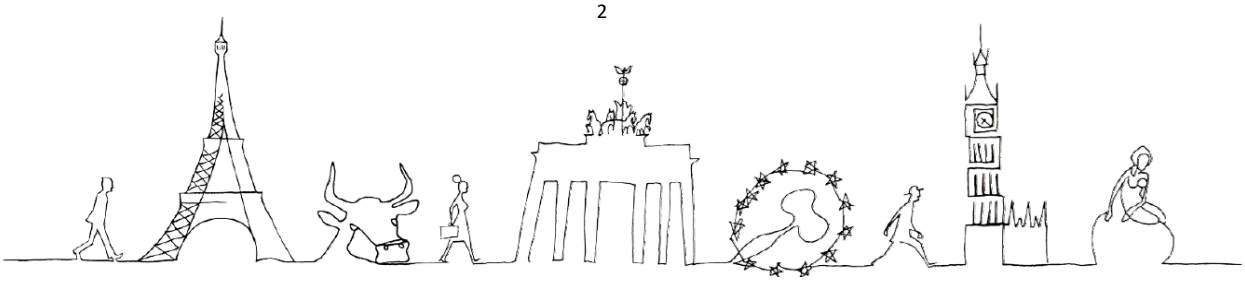
That aside, collective redundancies often trigger co-determination rights of the works council, should the collective redundancy be part of, or itself constitute, a so-called operational change (*Betriebsänderung*) according to section 111 German Works Constitution Act (Betriebsverfassungsgesetz – BetrVG). The employer must then negotiate a reconciliation of interests (Interessenausgleich) with the works council as well as a social plan (Sozialplan). In the course of this process, the employer must inform and consult with the works council about the planned measure in detail. The reconciliation of interests is an agreement on whether, how, and when the planned operational change will be implemented. The social plan shall compensate for the economic disadvantages of employees affected by the operational change (e.g. severance mutually determined by the works council and employer).

If the parties fail to mutually conclude the social plan, each party can call the conciliation committee, which is presided by a chairman, who in practice is often a judge at a Labour Court. If the parties fail to agree about a social plan, the chairman is entitled to decide the level of compensation and other benefits.

Once the decision about the collective redundancies has been made, the employer must again hear and consult with the works council about each individual dismissal pursuant to section 102 BetrVG, at the latest, one week before the dismissal is delivered. In practice, this information process can become very complicated and prone to failure.

What sanctions apply if the process is not followed?

In some regional court jurisdictions, the works council can apply for a preliminary injunction to prevent the employer from conducting the operational changes, as long as the employer refuses to negotiate the reconciliation of interests, or negotiations are still pending. Furthermore, depending on the type of failure to comply with the information process, some or all individual dismissals carried out can be invalid. For example, if the employer does not sign or fails to file the mass layoff notification, all dismissals subject to the notification obligation can be invalid.



Are certain employees protected from dismissal?

Yes. The members of the works council (and comparable employee representation committees) can be dismissed only if the entire establishment is shut down, or the employee gave reason for a dismissal for cause. Furthermore, special protection applies e.g. to disabled employees and pregnant employees, including those on maternal or parental leave.

How do I choose which employees to dismiss?

The employer is not free to select the employees to be dismissed if the employment existed longer than six months. The selection must be based on certain criteria, which are limited by law to age, seniority with the company, severe disability and duties of the employee to support dependents. However, this social selection has to be made only with comparable employees working in the same establishment. The employer's notice of termination is invalid if the employer did not or did not sufficiently consider the social criteria and an employee who required less social protection under these criteria was not subject to dismissal.

Unfair dismissal

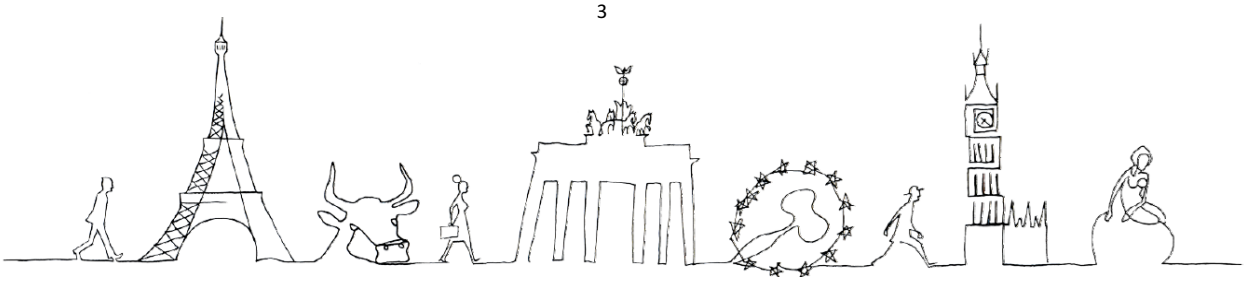
According to Section 1 KschG, the employer must prove the grounds of the dismissal if the employment existed more than six months. The grounds for a valid dismissal can be person-related, conduct-related, or in a collective redundancy, compelling operational reasons. The dismissal can be void if it is based on a prohibited discrimination or against good faith.

Can disgruntled employees bring claims?

Yes. Employees can file a dismissal protection claim with the labour court within three weeks after receipt of the written notice of termination. If the employee fails to observe the period to file the claim, the notice of termination is deemed valid. Sometimes employees only file a dismissal protection claim in order to get a higher severance package. Though there is no claim to severance, the parties freely negotiate it in the absence of statutory provisions. As a "rule of thumb", the parties often agree a severance package amounting to half salary for each year of seniority.

What will it cost?

The expenses with regard to the mass layoff notification and negotiation of reconciliation of interests and the social plan are all borne by the employer. Court fees are borne by the party losing the dismissal protection lawsuit, but are relatively low. In first instance labour court proceedings, the parties have to bear their own lawyer's fees.



Are staff required to work during the consultation process?

Employees who are under notice of termination remain obliged to work through the notice period. The basic notice period is four weeks counting back from the 15th or last day of a calendar month (Section 622 German Civil Code, Bürgerliches Gesetzbuch – BGB). Notice periods increase with the employee's seniority with the company to up to seven months to the end of a calendar month for 20 years' seniority. During a probationary period (up to six months) a short notice period of at least two weeks may apply. However, collective bargaining agreements and individual employment agreements often provide longer notice periods.

The employer cannot shorten the notice period. However, in cases of collective redundancies, the employer can release the employee from work duties, but must pay the salary until the individual's notice period expires.

Can I ask employees to sign a waiver agreement?

Termination or settlement agreements between an employer and employee can be stipulated at any time. However, the employees cannot effectively waive their right to file an unfair dismissal claim. The termination or settlement agreement must be made in written form.

Do I need consent from a public authority prior to a mass layoff?

The mass layoff notification does not require the local Employment Agency's consent, any hearing, or the like. However, the dismissal of e.g. disabled employees and pregnant employees, including those on maternal or parental leave, requires prior consent to the dismissal by the competent public authority. In practice, this administrative procedure can take up to several months.

This material is for general information only and is not intended to provide legal advice.

For more information regarding employment law in Germany please contact:
in *Hamburg,* Dr. Patrizia Chwalisz, Esche Schumann Commichau Rechtsanwälte,
at p.chwalisz@esche.de and in *Cologne*, Dr. Joachim Trebeck, Seitz Rechtsanwälte
Steuerberaterer, at j.trebeck@seitzpartner.de and Dr. Ulf Goeke at
u.goeke@seitzpartner.