TaylorWessing

10 pitfalls in German employment law North American inhouse counsels should know when managing workforces in Germany

Employment related matters with employees in Germany can be very tricky and might feel quite exotic for North American inhouse counsels. From drafting contracts, setting up proper on- and off-boarding procedures, implementing global policies to navigating through the specifics of German employment litigation, there are some fundamental topics with unique specifics which every inhouse counsel should be aware of when managing a workforce in Germany.

1 Always observe German employment and labor law compliance

German employment and labor laws are comprehensive and strictly enforced. The level of employee protection is significantly higher than in most other jurisdictions, including a broad range of statutory minimum rights such as statutory notice periods, minimum wage, vacation entitlements and continued remuneration in case of sickness. Inhouse counsels managing a workforce in Germany should therefore stay up to date, especially on laws and regulations related to hiring practices, employment contract drafting, working hours, vacation entitlements and termination procedures.

2 Don't make mistakes when it comes to hiring and on-boarding

Strict rules also apply to equal treatment and non-discrimination within the hiring process. HR professionals must always ensure fair and unbiased hiring procedures by complying with anti-discrimination laws and the like. The Federal Employment Court (Bundesarbeitsgericht – "**BAG**") has always restricted the employer's right to ask questions during job interviews to the effect that the employer may only ask questions that are necessary for the establishment of an employment relationship. Contrary to the practice in the United States, general background checks are not typically carried out in Germany as they are only permitted in very exceptional cases. Due to the high standard of privacy protection in Germany, an employer is generally required to obtain any and all information relevant to the selection process directly from the respective applicant.

3 Don't forget the written employment agreement

Under the new Evidence Act (Nachweisgesetz – "**NachwG**"), every employee is entitled to, and will expect, a wet-signed written summary of key terms and conditions of employment prior to their first working day. To speed things up, using DocuSign or issuing the familiar short US style offer letter as part of the onboarding process is fine, as long as this written confirmation by the employer follows in a timely manner. It is also important to note that certain provisions are

only enforceable if they have been agreed in writing. The benefit to employers is the ability to include certain provisions into the agreement, particularly related to IP rights, confidentiality and non-compete covenants. However, several obligations and rights arising under German law may override contractual agreements.

4 Think twice before hiring contractors

Hiring a contractor is often an attractive and rather straightforward way for foreign clients to start their business in Germany without having their own employees on the ground. This approach carries significant risks if not done properly. German legal practice has developed various criteria to determine whether a contractual relationship is to be considered an independent contractor relationship or an employment relationship. To minimize any risks, any agreement must be carefully drafted and handled in such a way that (i) it fulfils the criteria indicative of an independent contractor relationship (freies Mitarbeiterverhältnis) and (ii) the characteristics of a dependent employment relationship (Arbeitsverhältnis) are avoided. Failure to do so may result in misclassification issues that have serious costly and personal consequences. If it turns out that a purported contractor is in fact an employee, the employer faces a number of risks regarding the protection against dismissal, social security and tax issues and even possible criminal charges.

5 Implement your global policies and handbooks properly

Even though policies and handbooks are not required under German law, such policies and handbooks are a standard should-have for international companies, in particular in order to maintain the global footprint and to see whether there are extra entitlements the company wants to grant the employees beside the comprehensive statutory entitlements under German law. The global handbook should be customized for the German workforce, or at least a German addendum provided.

6 Does the EOR model make sense for your business setup?

The EOR model does not work as smoothly in Germany as it does in other jurisdictions. In Germany such model qualifies as employee leasing (Arbeitnehmerüberlassung) under German law. Employee leasing is highly regulated and subject to strict formal requirements, which are set out in the German Employee Leasing Act (Arbeitnehmerüberlassungsgesetz – "**AÜG**"). These regulations need to be closely observed in order to minimize risks and undesirable consequences such as unwanted employment relationships, IP issues or an undesirable taxable presence in Germany. Thus, it should always be considered whether a less risk related direct hire is an option.

7 Comply with the termination procedure

German law sets high standards for the employer to terminate an employment relationship. Generally, an employment relationship can be terminated by mutual agreement, through expiry of a fixed-term contract or through a termination notice by one of the parties. Employers, who employ more than ten (10) employees in Germany are bound by the Act Against Unfair Dismissal (Kündigungsschutzgesetz – "**KSchG**"). The KSchG requires a legally "fair" reason (operational, personal or misconduct of the employee) for the dismissal of an employee, who has been employed for more than six months. In the event that the KSchG does not apply, no reason for dismissal is needed at all. In any case, a dismissal needs to be in line with the applicable notice

period and must comply with the principles of good faith and good morals. Certain groups of employees (e.g. pregnant employees and young mothers, employees during parental leave or severely disabled) enjoy an additional layer of protection against unfair dismissal with the requirement of a prior approval of the competent state authorities to be obtained.

8 Don't be afraid of employment litigation

German (employment) litigation is somewhat different from litigation abroad and often uncharted territory for foreign clients. For instance, every employee is entitled to contest a termination of the employment relationship before a labor court, irrespective of the employer's opinion that the termination is effective. Litigation in Germany is usually driven by the goals to have speedy proceedings and to quickly find a mutual solution. Labor court proceedings are not designed for exhaustive deposition procedures. The worst-case scenario when losing a dismissal claim in court is the reinstatement of the terminated employee and payment of outstanding remuneration for the time in between, but no compensation or damage payments. German courts usually do not grant large amounts to employees in discrimination claims and payouts in excess of five (5) figures are rather the exception than the rule.

9 Works councils are not mandatory in Germany

Works councils are not mandatory for companies in Germany, but can be established by initiative of at least three (3) electable employees in an operation with at least five (5) employees entitled to vote. Once established, works councils have broad information, consultation and determination rights, such as the right of having to be consulted before any dismissal of an employee, the failure of which to do so would lead to the dismissal being void. Further, council members, spare members of the works council, election candidates for the works council and election board members can be only terminated (i) for extraordinary causes and (ii) after the approval of the works council has been obtained. However, the establishment of a works council requires the initiation of an election by employees and it is not the standard in Germany, especially not in the Tech sector.

10 Post contractual non-compete and non-solicitation provisions are allowed in Germany

In contrast to other jurisdiction, post-contractual non-compete and non-solicitation provisions are allowed under German law subject to certain requirements. Employment contracts usually contain detailed non-compete restrictions. The enforceability of such non-compete restrictions can only be achieved if and to the extent such clause is reasonable, the restriction is limited to two years upon the termination of the employment relationship and a compensation for the duration of the restriction is paid to the employee by the employer, which shall be at least 50% of the last received remuneration including benefits in kind. It always should be well considered if such clauses are necessary as once agreed such an agreement is binding and can be only uniliterally terminated with a long grace period.

Taylor Wessing's Employment & Pensions Team

The Employment & Pensions practice area of Taylor Wessing comprises about 100 lawyers. Some 30 recognised specialists work at our German offices. What makes our consultancy different is our in-depth familiarity with the challenges and concerns of the industries of tomorrow:

- Technology, Media & Communications
- Life Sciences & Healthcare
- Financial Institutions & Insurance
- Energy & Infrastructure
- Logistics & Transport

In addition, we are of course fully up-to-date on the particularities of many other industries and offer the full range of advice on all employment-related issues there as well.

Flexible, reliable project management is one of our key strengths. Based on our partner-led approach we will build a team of experts tailored to your individual requirements and managed by a responsible partner who will be available to you at all times.

Contacts

Dr. Christian Maron
Partner, Munich
+49 89 21038-257
c.maron@taylorwessing.com

Dr. Benedikt Groh
Senior Associate, Munich
+49 89 21038-414
b.groh@taylorwessing.com

Larissa Burger, M.A.
Associate, Munich
+49 89 21038-323
l.burger@taylorwessing.com

Stefan Radovanovic
Associate, Munich
+49 89 21038-221
s.radovanovic@taylorwessing.com

We're a global law firm that serves the world's most innovative people and businesses. Deeply embedded within our clients' sectors, we seek to challenge expectation and create extraordinary results. We work closely together with our clients to crack complex problems, enabling ideas and aspirations to be successful.

By shaping the conversation in our sectors, we enable our clients to unlock growth, protect innovation and accelerate ambition.

taylorwessing.com