

GERMANY
Prepared by
Anette Prasser
Rechtsanwälte und Notar

1. Are there any laws that govern a layoff of employees? If so, what do the laws require?

Basically there are two main laws concerning a layoff of employees:

i. Code of civil law (Bürgerliches Gesetzbuch – abbr. BGB) which rules general period of notice and form of the notice of termination:

- § 622 BGB and § 624 BGB rule the notice period depending on the duration of the employment,
- § 623 BGB rules the form of the notice of termination – written form is required,
- § 626 rules a two weeks notice period between taking notice of a cause and dismissal for this cause.

ii. Protection Against Dismissal Act (Kündigungsschutzgesetz – abbr. KSchG) which contains special rules for the protection of employees. According to § 1 KSchG this act protects employees against socially unjustified dismissal. This act applies for

- employees whose employment began on 01 January 2004 or after this date if there are more than ten employees in the establishment (exclusive of apprentices) and
- employees whose employment existed on 31 January 2003 if there were more than five employees at this time in the establishment (exclusive of apprentices) who are still employed at the layoff time, whereas the employees being employed after 31 December 2003 are not added to this amount,

after being continuously employed more than six months.

For executive/managing staff the KSchG generally applies with some exceptions.

According to §1 of KSchG employees are protected against socially unjustified dismissal. A dismissal can therefore be only legally valid if justified by:

- reasons attached to the employee himself, or
- reasons of conduct of the employee, or

- urgent business needs which are incompatible with the continuation of employment. In this case the correct social criteria for redundancy have to be respected which means that the social circumstances of all comparable employees are weighed against each other in detail, as for example continuous length of service in the establishment, age, number of dependants etc.

Moreover there are special protective laws for persons particularly in need of protection as e. g. pregnant women and mothers until the end of the fourth month after the childbirth (§ 9 of Maternity Protection Law - Mutterschutzgesetz), severely disabled persons (§ 85 of Ninth Book of Social Security Code – Neuntes Buch Sozialgesetzbuch) and others.

Also, a layoff may be considered as invalid for other reasons, e.g. if it is contrary to the public policy (§ 138 BGB) or the principle of good faith (§ 242 BGB).

According to case law, any layoff has to comply with the principle of proportionality.

2. Are there any formal requirements for terminating an employee or groups of employees?

If there is a work council in the establishment, it has to be always consulted about the intended termination, otherwise the termination is invalid (§ 102 of Betriebsverfassungsgesetz - Works Council Constitution Act). If the work council opposes the layoff and the employee files an action for unfair dismissal, the employer has to employ the employee by his request until there is a final court decision.

According to § 17 KSchG the employer is obliged to announce to the Labour Office an intended dismissal

- i. of more than 5 employees if there are 21 to 59 employees in the establishment,
- ii. of at least 10 % or more than 25 employees if there are 60 to 499 employees in the establishment,
- iii. of 30 employees or more if there are at least 500 employees in the establishment.

At the same time the employer has to inform the work council (§ 17 II KSchG).

In case of dismissal for cause the employer is, according to § 626 II BGB, obliged to dismiss an employee within two weeks after he has gained knowledge of the cause

In the case of dismissal for reasons of urgent business needs, if the employee does not file an action for unfair dismissal, he is entitled to compensation if the employer has pointed out this right in the notice of termination (§ 1a) KSchG).

3. Are there special legal requirements for a layoff caused by redundancy in the workforce?

The correct social criteria have to be respected (cf. answer to question 1)

Obligation to inform the work council according to § 7 II KSchG (cf. answer to question 2)

4. Are there employment laws that laid-off employees can use to challenge their inclusion in the layoff?

Yes, when the correct social criteria are not respected in the case of dismissal for reasons of urgent business needs, the employee can challenge the dismissal due to violation of § 1 III KSchG.

5. What sanctions or penalties may be imposed against employers for violating any of the requirements mentioned in Nos. 1-4 above?

An employee can file an action for unfair dismissal within three weeks from the day he obtains the dismissal in written form.

The court may decide as follows:

- if the action is successful, the layoff is invalid and the employment continues and the employee is entitled to his regular salary, or
- annulment of the employment according to § 9 KSchG against compensation settled by this decision when the dismissal is unjustified but the continuation of the employment unacceptable for the employee or the employer.

In practice, most actions do not end by court decision but by a compensation settlement between the parties.

6. What are the one or two most common mistakes that employers make that lead to liability for a layoff?

In case of a dismissal for reasons attached to the employee himself or for reasons of conduct of the employee, a common mistake is that the employer does not give the employee a prior warning which is in many cases required.

In case of a dismissal for reasons of urgent business needs, a common mistake is that the employer does not respect the correct social criteria.

Procedural mistakes are also common – notice period, work council hearing etc.

7. What other employment issues are likely to arise from a layoff in your jurisdiction that you have not addressed in your answers to the previous questions?

Employee layoff on a large scale may in some cases result in a reclaim of subsidies.