



# Fact Sheet: Working in Germany



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*Provided by:*

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## Working in Germany

Are you planning to work in Germany, or to employ people in Germany for your business? This summary aims to give you some points of reference from a German legal perspective for some of the particularly important questions in this regard. This includes the temporary posting of Australian employees to Germany where the Australian employer does not establish a branch or company in Germany.

### 1. Is there a residence permit that provides an entitlement to work?

Persons who want to work in Germany need a residence permit that also allows them to perform this work. Such persons would need advice to clarify this status before entering Germany and starting to work. This does not apply to persons from European Union and European Economic Association (EEA) countries.

### 2. Is the employment of a type that carries the obligation to have social insurances?

This question should be answered before you start work. Being employed generally leads to a legal obligation to have social insurances including pension insurance, unemployment insurance, health and nursing insurance as well as accident insurance. In contrast, self-employed persons are only required to have social insurances in exceptional cases.

As an employer, there are specific obligations to make social insurance contributions. Breaches of this requirement carry significant penalties and, in certain circumstances, criminal consequences. As an employee, you should be interested to know to what extent you have social insurances as part of your employment.

For pension insurance, the German-Australian Social Insurance Treaty should be the first port of call. It aims to avoid double insurance. Otherwise, employment in Germany based on a secondment that has a limited term from the outset may be an exception to the general requirement to have social insurances, as long as it is clear from the contract that the employee will return to Australia after the limited term.

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### **3. Am I required to pay income tax on my income from the employment?**

This question is critically important in weighing up the economic benefits of the employment. In this regard, the German-Australian Double Tax Treaty 2016 must be referred to. In Germany the principle of taxation of worldwide income generally applies: § 1 Income Tax Act (*Einkommensteuergesetz*, EStG). A person with their place of residence or usual abode in Germany is subject to tax on their entire income. Germany also generally claims the right to tax income from employment regardless of the place of residence or usual abode of the individual working on German territory (this does not apply to self-employment). The Double Tax Treaty aims to avoid the resulting double taxation by Germany and Australia.

### **4. Do I have to remit tax on wages as an employer?**

This must be clarified before you employ workers in Germany. As an employer in Germany you are fundamentally obliged to retain a part of your employees' remuneration and to remit it as "wage tax" – comparable to the PAYG withholding system in Australia. The wage tax (*Lohnsteuer*) serves as a prepayment of the workers' obligation to pay income tax. If wage tax is not remitted by the employer, there is a risk of significant penalties and, under certain circumstances, criminal law consequences for the employer. Employers resident outside of Germany are only subject to this obligation where they are acting as a lender in a short-term transfer of personnel.

### **5. Can there be a departure from German employment law by way of exception?**

It is fundamentally possible to select a different law to govern the employment relationship by contract. Generally however, this cannot be done to provide a lower level of protection than that afforded by the national employment law provisions in Germany. With respect to limited term secondments of employees from Australia to Germany the possibility of choosing Australian employment law together with a designation that Australian courts are to have jurisdiction over disputes should be considered.

### **6. What are the main features of German employment law - what do I need to pay particular attention to?**

Employment law in Germany is not governed by a single uniform piece of legislation. Employment law can be found in statutory provisions, collective bargaining agreements and employment agreements. Otherwise, employment law is largely judge-made law.

A distinction must be made between individual employment law and collective employment law. The former is concerned with the relationship between employee and employer, being contractual employment law. Collective employment law essentially covers the rights of employer and employee organisations and the rights of employees to have a say at an operational level.

#### **6.1 The main features of individual employment law**

##### **Employment contracts**

The minimum provisions required of an employment contract are set out in the Evidence Act (*Nachweisgesetz*). If no fixed term of employment (time limitation) is agreed upon then employment contracts are entered into for an indefinite period. The Part Time and Time Limitation Act governs the formal and material pre-requisites for a valid fixed term agreement. Time limitations without reasonable justification are only permitted for a maximum period of two years. In the Government's Coalition Agreement entered into at the beginning of this year it is anticipated that fixed terms will be more strictly regulated. The specific legislative changes remain to be seen.

At the start of the employment relationship a probationary period of a maximum of six months can be agreed, during which dismissal with a shortened notice period is possible. Otherwise, the German Civil Code governs the period of notice and the possible termination dates that must be provided by the employer, depending on the length of the

employment relationship. It can be agreed in the employment contract that each extension of the notice period also applies to the employee.

### **Employment conditions**

Minimum employment conditions arise from various laws and these cannot be contracted out of in the employment contract.

The Working Hours Act (*Arbeitszeitgesetz*) governs the maximum number of working hours and the minimum breaks.

The Holiday Act (*Bundesurlaubsgesetz*) governs the statutory minimum holidays.

The Minimum Wage Act (*Mindestlohngesetz*) sets a general minimum level of remuneration. In certain branches general binding collective agreements provide for higher levels of minimum remuneration.

For the protection of the health of the employee various, in part, public-law provisions must be complied with. These provisions contain obligations that are implied in employment contracts.

The Maternity Protection Act (*Mutterschutzgesetz*) protects pregnant women. The Parental Pay and Parental Leave Act (*Elterngeld- und Elternzeitgesetz*) grants new parents the right to take unpaid leave.

The General Anti-Discrimination Act (*Allgemeine Gleichbehandlungsgesetz*) prohibits discrimination on the basis of features that have statutory protection. These are race or ethnic origin, sex, religion or world view, disability, age and sexual identity.

### **General Security of Tenure**

Businesses that generally employ more than ten full time employees in operations within Germany must comply with the requirements of the Security of Tenure Act (*Kündigungsschutzgesetzes*) when dismissing employees. Businesses may require more than ten employees if some of those employees are part-time. In operations with a lower number of workers (small operations) the general security of tenure does not apply.

Employees are protected by the security of tenure provisions once they have been employed for longer than six months.

Under the Security of Tenure Act, dismissals are invalid if they cannot be justified socially. The employer must be able to justify the dismissal either by reference to the employee or their behaviour or to the fact that a continuation of the employment would be contrary to urgent operational requirements. For dismissals due to the employee or their behaviour, the interests of each party to the contract must be weighed against one another on a case by case basis. If the employer seeks to justify the dismissal by urgent operational requirements, then he must sufficiently consider social issues when selecting the employee to be dismissed. The social selection covers the four criteria of age, period of employment, child or family maintenance obligations and severe disability.

### **Special Security of Tenure**

There are a range of groups that have special security of tenure in Germany. It is more difficult for an employer to dismiss these groups of people. Dismissals can only validly occur under additional conditions, e.g. following consent by the relevant authority. To mention a few, these include employee representatives, representatives of the severely disabled, privacy officers, pregnant women, employees on parental leave or trainees following a probationary period. Special security of tenure applies to all businesses, even if there are fewer than ten employees.

### **Business transitions**

If a business or a significant part of a business is transferred to a purchaser, e.g. under an asset sale agreement, then section 613a(1) of the German Civil Code provides that the purchaser steps into the existing employment contract. If the employment conditions before the transition were prescribed by collective provisions (collective bargaining workplace agreements), then these – subject to applicable collective agreements in the purchaser's

business - will be part of the employment contract and cannot be changed for a period if it is to the detriment of the employee.

Before the transfer, the original employer or the new owner must inform the employees affected by the business transfer in writing of the essential aspects of the transfer, specifically the date, reason and legal, commercial and social consequences for the employees. The employees can object to the transfer within a period of one month after receipt of the complete information. A change of the employer party to the employment contract will not occur.

## **6.2 The main features of collective employment law**

### **Unions / Collective agreements**

In Germany, unions are protected by the Constitution as social-political coalitions. They can enter into collective bargaining agreements with employer associations or also with individual employers. Collective bargaining agreements have a direct and binding effect on the employment conditions, among other things, within their area of jurisdiction. Accordingly, before commencing employment in Germany, it should be clarified to what extent collective bargaining agreements are relevant.

### **Operational participation**

Business owners must comply with the statutory right of participation, to allow employee representatives in their domestic business operations. Employee representatives cannot be elected in businesses with less than five employees.

Employee representatives have a general right to be provided with all information that is necessary for the carrying out of their tasks. Employee representatives must be consulted with respect to certain social, staff and commercial matters. Employee representatives and the employer can reach work place agreements on matters where consultation occurs, which are then binding on all employees of the business.

### **Business changes**

In businesses that generally have more than 20 employees, the business owner must fully inform the employee representatives in due time of planned changes to the business which could have significant disadvantages for the workers, or a significant number of them, and must consult with the employee representatives regarding the changes. Such changes to the business include in particular the shutting down, relocation or merging of operations. Without agreement with the employee representatives covering a balancing of interests or a social plan, the business owner may not implement the planned business changes.

## **7. What current developments should I pay attention to?**

There are many new developments with respect to the privacy of employees due to the European General Data Protection Regulation, which applies from 25 May 2018 in the European Union. At the same time in Germany a new Federal Data Protection Act will take effect which has been adapted to the new legal situation. Breaches of the data protection provisions can and should in future carry significantly higher financial penalties.

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