

GERMAN LABOR AND EMPLOYMENT NEWS

A TWO-YEAR TEMPORARY EMPLOYMENT AGREEMENT VS. A TWO-YEAR PROBATIONARY PERIOD: DOES THIS REALLY CONSTITUTE A “REFORM”?

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CONTENTS

A Two-Year Temporary Employment Agreement vs. a Two-Year Probationary Period: Does This Really Constitute a “Reform”?	1
European Court of Justice Rules Against German Statute Permitting Temporary Employment Agreements for Employees Only at Least 52 Years Old	4
To What Extent Are Employers’ “Business Decisions” Subject to Judicial Review?	5
Employer Is Not Subject to a Claim of Damages if He Fails to Notify a Terminated Employee of His Duty to Register With the Local Labor Office	7

Though Germany’s situation is not as drastic as in France, where hundreds of thousands of people took to the streets in opposition to plans to introduce reforms to France’s employment laws, German politicians continue to bicker among themselves on some much-needed reforms to Germany’s employment laws.

The newly elected coalition government headed by Chancellor Merkel set forth in last year’s coalition agreement that it would introduce various reforms to Germany’s employee-friendly labor and employment laws. One concrete reform was to repeal the statutory provision permitting an employer and employee to enter into temporary employment agreements for up to two years without having an “objective reason” for such a temporary employment arrangement, in exchange for introducing a two-year probationary period (or “waiting period”) for employees.

■ REPEAL OF TWO-YEAR TEMPORARY EMPLOYMENT AGREEMENTS

The German legislature has traditionally frowned on temporary employment agreements, as it was believed that such arrangements short-changed employees of many of their statutory rights; for example, under German employment law,

employers may not terminate employees for business reasons unless the employer has gone through the often tricky process of comparing the social factors of the employees at risk of termination and subsequently terminating those employees least in need of protection, *i.e.*, younger employees without dependent children who have only limited years of service and who are not disabled. It is believed that temporary employment arrangements largely permit employers to circumvent these protections against termination, as these employment relationships automatically expire without necessitating the employer to go through the above selection process.

The funny (or actually sad) thing about the proposed amendment is that it really does not constitute a reform of any significance. Except as it relates to a few particular situations, it generally makes little difference whether an employee has a two-year temporary employment agreement or is subject to a two-year probationary period.

However, under Germany's Part-Time and Temporary Employment Agreements Act, employers may indeed enter into temporary employment agreements if there is a sufficient objective reason for entering into such agreements. (Two examples cited in the statute that qualify as sufficient reasons are temporary agreements for seasonal work or hiring a temporary replacement employee during a permanent employee's maternity leave.) With the hopes of lowering Germany's unemployment rate, the Part-Time and Temporary Employment Agreements Act also permits employers to conclude temporary employment agreements even if there is no objective reason for that type of arrangement, with the proviso that the time period for these temporary agreements may not exceed two years. As mentioned above, it is precisely this final provision that the coalition government agreed to repeal.

■ INTRODUCTION OF TWO-YEAR PROBATIONARY PERIODS

The repeal of the two-year temporary employment agreement provision, however, would be in exchange for permitting employers to subject newly hired employees to a probationary period of up to two years. (Currently, employers may impose only a six-month probationary period on newly hired employees.) During the probationary period, the employer may terminate the employee essentially without cause. Once an employee has made it through the probationary period, that employee is protected by the various employment laws, including protection against termination for business reasons as mentioned above.

■ IS THERE TRULY A DIFFERENCE?

The funny (or actually sad) thing about the proposed amendment is that it really does not constitute a reform of any significance. Except as it relates to a few particular situations, it generally makes little difference whether an employee has a two-year temporary employment agreement or is subject to a two-year probationary period. One exception may be for highly qualified employees, who may be more likely than less qualified employees to prefer an agreement with a two-year probationary period over a fixed-term agreement, as they will be more confident that they will not be terminated during these two years. (Conversely, some employees may prefer a fixed-term contract over the risk of being terminated during the two-year probationary period, since potential future employers will generally look more favorably upon an employee's agreement having expired than the employee's having been terminated during the probationary period.) Also, if the employee should become pregnant or is elected to the works council during the two-year probationary period, that employee cannot be terminated at that time; this would not be the case with a fixed-term agreement, as the agreement would nevertheless automatically expire at the end of the term. Also, the employer needs to inform the works council before terminating an employee during the two-year probationary period; this is not necessary with a fixed-term arrangement. Regardless, in most instances the employer may terminate the employee quite easily during either the two-year fixed-term period or the two-year probationary period.

Much to the chagrin of the SPD—the left-wing branch of the coalition government—Chancellor Merkel's more conservative CDU party sought to renegotiate the terms of the



This debate illuminated one of the fundamental differences among employers and employee representatives. Unions and other employee representatives argue that employees must be given strong protection against termination. Employers, on the other hand, argue that they are more likely to hire employees if they know that they can terminate those same employees relatively easily when needed, *e.g.*, if there is a downturn in business.

coalition agreement, proposing to give employers the choice of entering into *either* an employment agreement with a two-year probationary period *or* a temporary employment agreement for up to two years. Officials of the SPD stated both publicly and emphatically that they would not under any circumstances agree to such a change; they have said that unless the “reform” as set forth in the coalition agreement is introduced, there will be no change at all to this aspect of Germany’s employment laws.

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likely to hire employees if they know that they can terminate those same employees relatively easily when needed, *e.g.*, if there is a downturn in business. Even though various studies support the employers’ arguments (the United States is consistently cited as the best example, as it has comparatively low job stability but high employment growth and economic activity), the SPD was not prepared to budge on this issue.

Probably because a number of state-level elections were looming in Germany at the time, and the CDU feared that it would lose votes if it stood its ground, Chancellor Merkel’s CDU party quickly caved in on this issue. As a result, for the moment, any changes to Germany’s protection against termination provisions will constitute “reform” in name only.



EUROPEAN COURT OF JUSTICE RULES AGAINST GERMAN STATUTE PERMITTING TEMPORARY EMPLOYMENT AGREEMENTS FOR EMPLOYEES ONLY AT LEAST 52 YEARS OLD

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From a legal perspective, temporary employment agreements in Germany are the exception rather than the rule. As discussed in the previous article, temporary employment agreements are permitted only pursuant to the Part-Time and Temporary Employment Agreements Act. This statute sets forth the various requirements that must be satisfied to enter into temporary employment agreements.

If the parties initially enter into a temporary employment agreement for less than two years, they may extend the agreement, with the provisos that (i) there are no more than three extensions, and (ii) the temporary employment period may not exceed two years in the aggregate.

■ AGREEMENTS MUST BE IN WRITING

Temporary employment agreements and any extensions thereto must be in writing. If such an agreement is not in writing, it is invalid, and the law presumes that the parties entered into an arrangement for an indefinite period of time. If an employer wishes to terminate an employee with an agreement for an indefinite time period, that employer must issue a formal written notice of termination to the employee and, of course, observe the various statutes protecting such an employee against termination.

■ CONCLUSION OF TEMPORARY EMPLOYMENT AGREEMENT

Employers may conclude a temporary employment agreement with an employee only under one of the following three scenarios:

1. Objective Reason: As discussed in the previous article, an employer may conclude a temporary employment agreement with an employee if there is an “objective reason” for that type of arrangement. Examples of an objective reason include seasonal work or to replace a permanent employee, such as for maternity leave, for a temporary period of time.
2. New Employee: So long as the employee had not been working for that particular employer, German law permits a temporary employment agreement for up to two years

without requiring an “objective reason” therefor. It is important that the parties set forth the duration of their arrangement in the agreement.

If the parties initially enter into a temporary employment agreement for less than two years, they may extend the agreement, with the provisos that (i) there are no more than three extensions, and (ii) the temporary employment period may not exceed two years in the aggregate. The parties should ensure that there is no gap between the expiration of a temporary period and the commencement of any extension.

In order to promote and facilitate the formation of new companies—and hopefully create new employers to combat Germany's high unemployment rate—employers may conclude temporary employment agreements for up to four years in duration so long as the arrangement is concluded within four years of the formation of the new company. (This four-year term does not apply to companies created as part of a reorganization.)

3. **Senior Employees:** Employers may also conclude a temporary employment agreement, without having an “objective reason” therefor, if the employee at issue is at least 58 years old. The lone proviso is that the temporary employment agreement for such an employee may not be the “continuation” of an employment agreement that was not for a fixed period. The law presumes that it is not a “continuation” if at least six months elapse between the end of the previous agreement and the commencement of the temporary employment agreement. The German legislature initially sought to permit employers to conclude temporary employment agreements without having an objective reason only with employees 52 years or older, so long as the employment agreement is concluded by December 31, 2006. However, as discussed below, this did not pass muster with the European Court of Justice (ECJ).

■ DECISION OF THE EUROPEAN COURT OF JUSTICE

The ECJ held on November 22, 2005, that employers could conclude temporary employment agreements with employees at least 58 years old without having an objective reason for such an arrangement. The ECJ reasoned that to permit such arrangements for these employees would decrease the unemployment rate of older persons. The ECJ

determined that a threshold age of 58 years was reasonable and, simultaneously, that it would assist in decreasing the unemployment rate for individuals who have reached this age. The ECJ held that an age limit of 52 years was too low, as it was feared that employees between the ages of 52 and 58 would invariably suffer discrimination, receiving offers for temporary employment only, as opposed to permanent employment. Regardless, it seems that it would make sense to take criteria other than age into consideration, *e.g.*, whether that person was unemployed, and if so, for how long.

Nevertheless, the German legislature is now being forced to amend the Part-Time and Temporary Employment Agreements Act so that this statute is in line with the ECJ decision. In the meantime, employers in Germany should enter into temporary employment agreements only with employees who are at least 58 years old.

TO WHAT EXTENT ARE EMPLOYERS’ “BUSINESS DECISIONS” SUBJECT TO JUDICIAL REVIEW?

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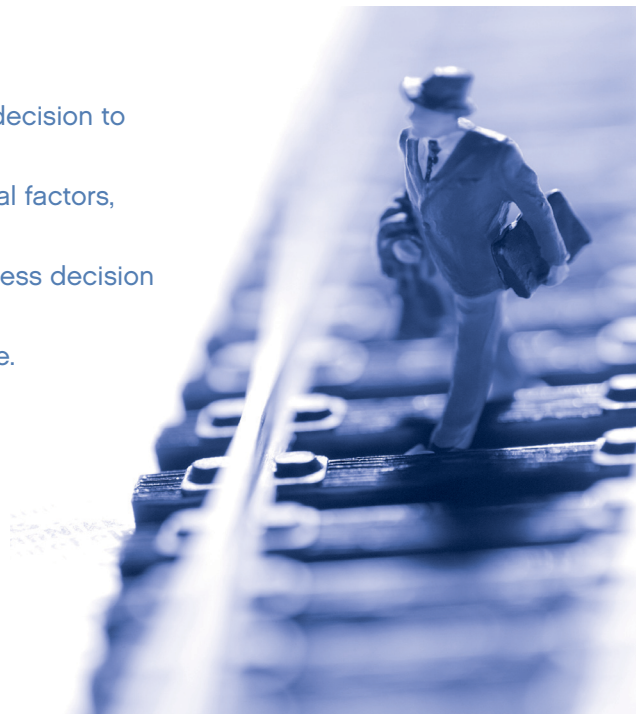
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When an employer decides to close a production plant or reduce personnel because fewer orders are coming in or because the company needs to increase its efficiency, that employer has—to use the parlance of German employment law—rendered a *business decision*. Strictly speaking, the employer also renders a business decision when hiring employees to increase the company's capacity; however, the term “business decision” is used primarily within the context of terminating employees for operational reasons.

■ WHAT CONSTITUTES A “BUSINESS DECISION”?

Business decisions enjoy a special status in German employment law because they are subject only to limited judicial review. Courts have consistently held that employers must be free to make business decisions generally as they see fit. With this in mind, a court will review a business decision only to ensure that it was not made in an abusive, arbitrary, or capricious manner and to ensure that the basis

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for the decision was not disingenuous. The court will not attempt to decide whether the decision was “correct” from a business point of view.

Because business decisions are subject only to limited judicial review, employers often understand this to mean that they are free to render any decisions without fear of review by a court. However, the termination of an employee for operational reasons cannot, in and of itself, be a business decision; instead, such a termination may only be the *consequence* of a business decision. Employers must always keep in mind that, if challenged by employees, the termination of employees for operational reasons is subject to a court's full review.

Often, however, there is no clear dividing line between what constitutes a business decision and what constitutes an act that is subject to judicial review. It is clear that if a company's orders decrease by 30 percent, the employer cannot simply terminate 30 percent of the employees involved in production. That employer may, however, decide to “reorganize” the staff so that the remaining orders are filled without having an overcapacity of employees. This decision by the employer is not arbitrary or capricious, and thus, is not subject to revision by a court. However, the number of employees actually terminated in such a case and how the employer carried out the “social selection process” are matters that are subject to judicial review.

Two decisions recently reached by employers were less clear in terms of whether they were business decisions—and thus subject only to limited judicial scrutiny—or whether they were decisions subject to a court's review.

■ COMPENSATION AS A BUSINESS DECISION

The Federal Labor Court recently faced the issue of whether an employer's decision to offer reduced wages to its existing employees and to introduce other changes to the terms of employment constituted a business decision. In this particular case, the Federal Labor Court answered the question in the affirmative.

In the case at issue, the company had been suffering losses for several years and the employer wanted to change the terms of employment for its existing employees—including paying the employees lower wages—so as to avoid having to file for bankruptcy. The court held that a decision such as this one is subject only to limited judicial scrutiny, *i.e.*, whether the decision was “obviously irrational or arbitrary” and whether the employer's decision supported the changed terms of employment the employer sought to introduce.

Whether the employer also felt that the court engaged only in limited judicial scrutiny is doubtful. The Federal Labor Court went so far as to apply the principle of reasonableness for its review, meaning it reviewed whether, and to what

extent, the changed terms of employment were reasonable vis-à-vis the employees. The court did not, however, require that the plan of reorganization “exhaust all other less drastic measures” before permitting the employer to introduce the revised terms of employment.

This decision was in line with previous court decisions setting forth that business decisions are to be reviewed only as to whether they are “obviously arbitrary or capricious.”

■ CHANGING JOB REQUIREMENTS AS A BUSINESS DECISION

In a case decided by the Federal Labor Court on July 7, 2005, an employer sought to change the job requirements for the position of director of a music school. The previous director, who did not satisfy the new job requirements, was terminated for business reasons.

The Federal Labor Court confirmed in this case that it is within the employer’s discretion to set forth the job requirements for a particular position, *i.e.*, this constituted a business decision. This decision was in line with previous court decisions setting forth that business decisions are to be reviewed only as to whether they are “obviously arbitrary or capricious.” To subject business decisions to some sort of review makes sense, as otherwise an employer could, for example, terminate a messenger of the company merely by arguing that the messenger no longer satisfied the newly created job requirements—a university degree in transportation!

The Federal Labor Court, however, added an additional limitation in this case: If the employer’s business decision and the decision to terminate an employee are based on identical factors, then the rebuttable presumption that a business decision is proper may indeed be subject to challenge. The employer must be able to provide specific information as to how the decision setting forth the job requirements for a particular position will affect the employee at issue, and to what extent it is necessary for the employer to change the job requirements.

An employer will be subject to a higher burden of proof if the new job requirements affect an employee who already

has many years of service with that employer. The court reasoned that changing the job requirements for such an employee could be seen as an abuse of a business decision.

This case shows that business decisions are not necessarily subject to review only in terms of arbitrariness or capriciousness. This becomes even more evident as employers must also be able to prove that the termination of employees could not have been avoided through less drastic measures, such as retraining or additional training. However, though this particular case was remanded to the lower court for unrelated reasons, the Federal Labor Court did hold that the employer of the music school could indeed set forth new job requirements for the position of music-school director.

EMPLOYER IS NOT SUBJECT TO A CLAIM OF DAMAGES IF HE FAILS TO NOTIFY A TERMINATED EMPLOYEE OF HIS DUTY TO REGISTER WITH THE LOCAL LABOR OFFICE

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German law requires that employers must inform terminated employees of their duty to register themselves as “job seekers” with the local labor office. If the employee fails to register himself, there is a chance that his unemployment benefits could be reduced as a result. The Federal Labor Court recently held that if an employer fails to notify a terminated employee of his duty to register himself with the local labor office, that employee may not file a claim for damages against the employer.

The Federal Labor Court reasoned that the purpose of the employer informing the employee of his duty is not to ensure that the employee receives his full unemployment benefits, but rather, to make sure that the administrative matters between the employer and the local labor office are resolved smoothly. It is the employee’s duty—and his alone—to ensure that he registers himself for any unemployment benefits to which he may be entitled. The Federal Labor Court’s holding followed the holdings of the lower courts.

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