



JONES DAY  
**COMMENTARY**

## WHAT CHANGES WILL THE NEW GOVERNMENT INTRODUCE TO EMPLOYMENT LAWS IN GERMANY?

Germany had its federal elections on September 27, 2009. As is generally the case in Germany, none of the five major parties was able to win a majority vote, meaning the parties needed to form a coalition government in order to gain a majority in Germany's Parliament. After a bit of wrangling, the Christian Democratic Union (CDU), the Christian Social Union (CSU), and the Free Democratic Party (FDP) formed a right-of-center coalition government. Angela Merkel, Germany's Chancellor, is a member of the CDU party.

During the coalition agreement negotiations, the FDP pressed for the introduction of a few fundamental changes to Germany's pro-employee Termination Protection Act. But because the other coalition parties refused to accept these proposals, the changes will not be introduced during this legislative period. Nor will a general minimum-wage law, long a source of contention in Germany.

The following is a summary of some of the more significant points included in the coalition agreement as they apply to employment-law matters.

### HIRING A FORMER EMPLOYEE AS A TEMPORARY EMPLOYEE

Currently, an employer may hire an employee temporarily for up to two years without having a reason for entering into a temporary employment relationship rather than a permanent one, provided the two parties did not have a previous employment relationship with one another. This means, for example, that if an employer enters into a three-year temporary employment agreement (without having a legally accepted reason for doing so), the employment relationship, by law, is automatically permanent.

The rigid two-year restriction sometimes causes more harm than good. For example, a person who worked as a temporary employee while in college cannot enter into a temporary employment agreement with the same employer following graduation unless there is a recognized reason for entering into such a temporary relationship.

The new coalition agreement calls for an amendment to the respective statute providing that as long as there is a one-year “waiting period” between the end of the former employment relationship and the beginning of the new one, the parties are free to enter into a temporary employment relationship for up to two years without having a specific reason therefor.

## NO UNIFORM FEDERAL MINIMUM WAGE

Germany’s constitution sets forth that parties are free to conclude collective bargaining agreements, including wage levels—a provision that takes precedence over a uniform, federal minimum wage. This has been the reason for past rejections of a federal minimum wage. It also makes it more difficult to declare a collective bargaining agreement “generally applicable” (*i.e.*, the collective bargaining agreement may apply to certain industries, even though they may not have specifically agreed to it).

Under current law, Germany’s Federal Ministry for Labor and Social Affairs may declare collective bargaining agreements (including wage collective bargaining agreements) generally applicable for entire industries and specific geographic regions. The consequence of such general applicability is that provisions such as statutory minimum requirements apply not only to employers who are expressly covered by a collective bargaining agreement, but also to those not specifically subject to a collective bargaining agreement. The coalition agreement calls for Chancellor Merkel’s cabinet to be responsible for general applicability, with the proviso that the respective committee must approve such with a majority vote.

## PROHIBITION OF LOW WAGES

The coalition parties have specifically stated that one of their goals is to “act effectively against socially unacceptable conditions in individual sectors.” That is why case law prohibiting unethically low wages is to be codified into statutory law.

Germany’s Civil Code sets forth that employment agreements calling for unethically low wages are invalid. On April 22, 2009, Germany’s Federal Labor Court issued an opinion as to whether certain wages are unethically low. The court’s holdings are summarized as follows, but it remains to be seen how this decision will specifically be codified into statutory law:

- If a wage is less than two-thirds of the average wage in that particular sector and geographic region, then there is a clear discrepancy between the work performed and the compensation earned (commonly referred to as the “two-thirds threshold” test).
- An “acceptable” wage pursuant to a collective bargaining agreement can be determined only if at least 50 percent of the employers in the business sector are subject to a collective bargaining agreement or if the employers subject to the collective bargaining agreement employ at least 50 percent of the business sector.
- If the typical compensation is below the wages set forth in a collective bargaining agreement, then there is a presumption that this is the common wage level of that business sector.
- Only regularly paid wages (*i.e.*, special payments are not considered) are to be compared, although special circumstances may call for the inclusion of special payments.
- The determination as to whether wages are too low is subject to continuous scrutiny because if the compensation is not adjusted for developments involving the general wages, then it may be determined that unethically low wages are being paid as of a certain time period.

## PROMOTION OF “MINI-JOBS”

In an effort to combat unemployment, Germany introduced the concept of “mini-jobs” a number of years ago. “Mini-jobs” are defined as jobs that pay less than €400 (approximately US\$285) per month; the employee is exempt from paying taxes and making social security contributions from his earnings, while the employer makes reduced health insurance and pension contributions on the employee's behalf but does not contribute anything for unemployment and disability insurance. Germany's new government is looking to promote mini-jobs by possibly increasing the €400 threshold and extending eligibility to employees who have additional sources of income.

## OLDER EMPLOYEES

Since the country's population is aging, the coalition agreement states that the employment of older employees in Germany needs to increase. Accordingly, the new government intends to make “early retirement” less financially attractive. For example, the agreement did not extend the program, which was set to expire December 31, 2009, by which older employees working only 50 percent earned approximately 75 percent of their former income, with the government making up the 25 percent difference. In addition, mandatory retirement ages will be reexamined and possibly repealed (with the added argument that they may actually constitute discrimination based on age).

## ETHICS CODES FOR WORKS COUNCILS

Ethics codes of conduct are to be of relevance not only to management, but also to works councils. The coalition agreement lists by way of example the disclosure to employees of the expenses borne by the company for works council members.

## EMPLOYEE DATA PRIVACY

The coalition agreement sets forth that the new government intends to include a separate chapter regarding employee data privacy in Germany's Federal Data Privacy Act. This chapter is to provide increased protection for employees, particularly with respect to “monitoring” by employers. One other topic is an increased restriction on the employer's ability to collect and transfer employees' personal data.

## LAWYER CONTACT

For further information, please contact your principal Firm representative or the lawyer listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com](http://www.jonesday.com).

**Friederike Göbbels**

+49 89 20 60 42 200

[fgoebbels@jonesday.com](mailto:fgoebbels@jonesday.com)

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