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# Labor Law Implications of the Restructuring of Enterprises in the Federal Republic of Germany

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The current recession in the Federal Republic of Germany has forced many enterprises to take drastic restructuring measures, including the relocation of manufacturing facilities, the closure of plants or parts of plants, and substantial reductions in personnel.[1] When a German subsidiary of a foreign parent company finds itself compelled to take such measures, the parent company's management often has little or no knowledge of the problems it faces under Germany's labor law. Moreover, in the author's experience the management of the German subsidiary itself may not have sufficient experience in evaluating and implementing the steps mandated by German labor law when planning plant closings and reductions in personnel.

In Germany the Workers' Council (*Betriebsrat*) is entitled to participate in the implementation of restructuring measures. The Workers' Council must be involved in negotiations in relation to a compromise settlement between the plant and its employees (*Interessenausgleich*), and a social plan (*Sozialplan*) must be concluded with the Workers' Council. Only after a company takes these measures can the actual restructuring and reduction in personnel take place. This article provides an overview of the problems relating to the process of settlement, the negotiation of a social plan, and the implementation of a reduction in personnel.



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1. According to one estimate, German industry has lost approximately half a million jobs in the past two years. *Der grosse Kehraus*, MANAGER MAGAZIN, Oct. 1993, at 108, 110.

## I. The Role of the Workers' Council

In the Federal Republic of Germany most large companies have a Workers' Council.[2] Workers' Council members are required to be employees of a particular plant[3] and are elected by the employees of the plant for a four-year term,[4] pursuant to the provisions of the Works Constitution Act (*Betriebsverfassungsgesetz*). Third parties, in particular external union representatives, may not be elected.

The function of the Workers' Council should not be confused with that of a trade union in the United States. In particular, Workers' Councils in Germany are not entitled to negotiate or to conclude collective agreements (that is, particular conditions of employment and of remuneration), or to initiate or conduct industrial disputes (that is, strikes).[5] Thus, a Workers' Council in Germany is not comparable to the unionization of a company in the United States. But while Workers' Councils do not have any union rights and must abide by the restrictions imposed by industrial relations legislation, many can and do allow union representatives to advise them on their rights to participate and to exercise those rights on their behalf. The union representatives may then participate in the negotiations between the Workers' Councils and the employer.

The primary function of the Workers' Council is to represent the workers of a plant in relation to the assertion of specific operational rights. In particular, Workers' Councils have the right to participate in the implementation of restructuring measures and in substantial reductions in personnel.[6] In such cases the law entitles the Workers' Council to be involved in negotiations relating to a compromise settlement. Additionally, the employer must conclude a social plan with the Workers' Council.[7]

### A. Obligations of Management Toward the Workers' Council

If an employer intends to make an operational change (*Betriebsänderung*), the law requires it to fulfill the following obligations towards the Workers' Council: (1) The employer must inform the Workers' Council of the measures planned (such as restructuring or a reduction in personnel); (2) the employer must consult the Workers' Council about the measures to be taken; (3) the employer must conduct negotiations with the Workers' Council in order to reach agreement on

2. For a description of the Workers' Council in English, see Norbert Horn et al., German Private and Commercial Law 319-20 (Tony Weir trans., 1982); Manfred Weiss, Labour Law and Industrial Relations in the Federal Republic of Germany 149-71 (1989). For a comprehensive discussion of Workers' Councils in German, see Gerhard Röder & Ulrich Baeck, Interessenausgleich und Sozialplan (1993).

3. Betriebsverfassungsgesetz [BetrVG] §§ 7-8. An English translation of this law may be found in 4 Business Transactions in Germany app. 10 (Bernd Rüster ed., 1992).

4. BetrVG § 21.

5. *Id.* § 74(2).

6. *Id.* §§ 111-112(a).

7. *Id.* §§ 111-112.

the measures to be taken (this is known as the compromise settlement); and (4) the employer must conduct negotiations with a view to concluding a social plan that serves to mitigate or to eliminate the economic effects on the employees of the measures taken.[8]

## B. Operational Change

In order for these rights to enter into effect the employer must intend to make an operational change in one of its plants. The Works Constitution Act lists five categories of situations that constitute an operational change of this nature: (1) reduction of operations or closure of an entire plant or substantial parts of a plant; (2) relocation of an entire plant or substantial parts of a plant; (3) merger with other plants; (4) fundamental amendments to the organization of a plant, to the objective of the plant, or to the equipment used in a plant; and (5) introduction of completely new working practices and manufacturing processes.[9]

In practice the most significant category is the first: reduction of operations or closure of an entire plant or substantial parts of a plant. The closure of a plant or parts of a plant involves the abandonment of the objective of the plant, the discontinuation of the organization of the plant as a unit, and the dismissal of the employees for a period of time that, in economic terms, is substantial, all of which measures are effected upon the basis of a final decision made by the employer.[10] The sale of a plant (asset deal) to a purchaser does not constitute closure of a plant. In such a case all contracts of employment are transferred by operation of law to the acquirer of the plant.[11]

Reduction of operations or closure of substantial parts of a plant may occur as a practical matter when an employer decides to close or to relocate abroad particular departments of an operation (for example, to have particular products manufactured abroad rather than at its German plant for reasons of cost). Moreover, a reduction in personnel suffices in itself to constitute a reduction of operations, as the case law of the Federal Labor Court (*Bundesarbeitsgericht*), Germany's highest court in labor law matters, makes clear.[12] In this context "reduction in personnel" means not closure of particular departments of an operation or relocation of the manufacture of particular products, but rather reduction of the

8. *Id.*

9. *Id.* § 111.

10. 2 Rolf Dietz & Reinhard Richardi, Betriebsverfassungsgesetz 1798-99 (6th ed. 1982); Karl Fitting et al., Betriebsverfassungsgesetz 1460 (17th ed. 1992); Röder & Baeck, *supra* note 2, at 34.

11. *See* Bürgerliches Gesetzbuch [Civil Code] [BGB] § 613a. This amendment was added on August 13, 1980, to bring the Civil Code into line with European Community labor law.

12. Judgment of May 22, 1979, BAG; Judgment of May 22, 1979, BAG; Judgment of Oct. 15, 1979, BAG; Judgment of Dec. 4, 1979, BAG; Judgment of Jan. 22, 1980, BAG. These cases can be found in Arbeitsrechtliche Praxis Nos. 3-7 to § 111 BetrVG 1972.

personnel alone by a certain proportion, although the remainder of the plant retains its existing form.

In such cases the decisive factor in determining whether or not an operational change has taken place is the extent of the reduction in personnel as indicated by the ratio between the number of employees regularly employed in the plant and the extent of the planned reduction in personnel. In view of case law an operational change is said to have taken place if an employer reduces the personnel by the following numbers:

| *Number of employees in plant* | *Reduction in personnel* |
|---|---|
| 21-59 | 6 or more |
| 60-499 | 10 percent or more |
| 500-599 | 30 percent or more |
| Over 600 | At least 5 percent[13] |

In order to calculate these figures the law regards all persons employed other than managerial personnel, managing directors (*Geschäftsführer*), and members of the board (managing directors of limited liability companies and directors of public limited companies) as employees. Additionally, the law accords part-time employees the same status as full-time employees.

An operational change within the meaning of category (1) is also said to occur if the reduction of operations or the closure relates to a substantial part of a plant only. In particular this category includes those cases in which an employer makes a decision to relocate the manufacturing of a major product from Germany to a foreign country, and as a consequence dismisses the employees concerned with that product. The percentages shown above are also used to determine whether a substantial part of a plant is concerned. If, for example, a major employer with 1,000 employees decides to relocate one of its manufacturing departments, such action will constitute an operational change if it affects more than 5 percent of the personnel, that is, if the number of employees is to be reduced by more than 5 percent of the personnel (fifty in this example) as a consequence of the restructuring.

### C. Right of Participation

Once it has been determined that the measures to be taken constitute an operational change, the next question is whether the Workers' Council, if one exists, has a right of participation. In order for a Workers' Council to have a right of participation in an operational change, a plant must have at least twenty employees who are eligible to vote.[14] In this context the law grants part-time employees

13. *Id.*; Röder & Baeck, *supra* note 2, at 36.
14. BetrVG § 111. All employees of at least 18 years of age are eligible to vote.

the same status as full-time employees. Only certain managerial personnel and members of corporate bodies such as the board of directors are not included.

As far as these obligations are concerned, German labor law takes into consideration the number of personnel employed in the individual plants rather than the number of personnel employed by an employer as a whole.[15] Therefore, a major corporation that intends to institute an operational change for only a small plant within its operations, such as to close a small factory with fewer than twenty employees, is not obligated to reach a compromise settlement or to conclude a social plan.

The right of a Workers' Council to participate exists only in those plants in which one has been established. In cases where a Workers' Council has not been established, the employer is free to implement an operational change, because employers without a Workers' Council are not obligated to reach a compromise settlement or to conclude a social plan. An employer has no obligation to reach a compromise settlement or to conclude a social plan if, at the time the employer announces a planned operational change, no Workers' Council exists, but one is established as soon as the plans are made known.[16] The principle underlying this rule is that an employer that has made a decision quite legitimately without the participation of a Workers' Council should not have the basis upon which the decision was made challenged by a Workers' Council elected after the fact.

## D. Obligations of the Employer

The employer must inform the Workers' Council in advance of a planned operational change, which includes providing it with detailed information on the causes and reasons for the change, its extent and effects, as well as the reasons why the action is appropriate.[17] The obligation to provide such information enters into force as soon as a managerial measure fulfilling the requirements of an operational change is planned.[18] Drawing a distinction between a managerial measure of this kind and preliminary internal discussions within the employer, which do not give rise to an obligation to inform, is sometimes difficult. In order for the duty to inform to arise, the employer must have made a decision in principle to make the operational change. As soon as a decision in principle of this nature has been made, an obligation arises to inform the Workers' Council, to become involved in consultations, and to initiate negotiations regarding a compromise settlement and a social plan.

The obligations imposed under the Works Constitution Act apply to the management of the respective subsidiary, but not to the shareholders, that is, the foreign

15. Fitting, *supra* note 10, at 77; 1 Manfred Löwisch & Rolf Marienhagen, Kommentar zum Betriebsverfassungsgesetz 81 (6th ed. 1982); Röder & Baeck, *supra* note 2, at 29.

16. Judgment of Oct. 28, 1992, BAG, 1993 Der Betrieb [DB] 385.

17. *See* BetrVG § 111; Röder & Baeck, *supra* note 2, at 6.

18. Röder & Baeck, *supra* note 2, at 4.

parent company. In the case of affiliated companies, however, the law is not yet clear as to the legal consequences if the parent company makes a final decision and presents the management of the subsidiary with a fait accompli instructing it to implement the measures immediately (for example, to relocate the manufacture of a particular range of products from Germany to another country).

An obligation for the employer and the Workers' Council to engage in comprehensive consultations is associated with the obligation to inform.[19] During these consultations a balance must be struck between the conflicting interests of the employer and the employees. This balance will create the basis for an agreement between the two parties.

The consultations should also deal with the question of why implementation of the operational change is genuinely necessary, as well as the conditions under which the operational change should be implemented and the social and personal consequences resulting from it. In practice, Workers' Councils vary considerably in their application of these rights to consultation. Some are content to accept relatively little information, whereas others better versed in such matters demand a great deal of detailed information and thus make even the consultation stage time consuming and complicated.

## II. Compromise Settlement (*Interessenausgleich*)

After the duty of information and consultation has been fulfilled, the next stage involves the negotiation of a compromise settlement between management and the Workers' Council. The Workers' Council and the management must conduct negotiations on whether, how, when, and under what conditions the planned operational change is to be implemented.[20] These negotiations are to be conducted with a view toward reaching an agreement acceptable to both parties concerning the measures to be taken (for instance, relocation of a manufacturing facility and reduction in personnel) and the manner in which those measures are taken.

The Workers' Council cannot, however, force an agreement upon the employer, since in effect labor legislation leaves managerial decisions to the employer alone. The only obligation incumbent upon the employer is compliance with the procedures described here. For this reason reference is often made to an obligation to attempt to reach a compromise settlement with the plant's Workers' Council.

If the Workers' Council and the employer are unable to reach agreement during the negotiations on a compromise settlement, the law obligates the employer to appeal to a conciliation board (*Einigungsstelle*), which will then negotiate the unresolved issues in connection with the compromise settlement process.[21] The

19. *Id.* at 7.

20. BetrVG § 112; FITTING, *supra* note 10, at 1466.

21. Judgment of Dec. 18, 1984, BAG, 1985 DB 1293; Judgment of July 9, 1985, BAG, 1986 DB 279.

conciliation board is a form of arbitration body, with an equal number of members nominated by the employer and by the Workers' Council. Generally, a person not associated with the plant presides over the board, usually a labor court judge. The negotiations on whether, how, and when the operational change is to be implemented are held before this conciliation board.

The conciliation board, however, does not vote or make rulings on the implementation of the operational change. The only obligation incumbent upon the employer is to substantiate once again before this board the action it has taken and to enter into corresponding negotiations with the Workers' Council.[22] Once this has occurred the compromise settlement procedure is concluded, and the Workers' Council cannot prevent implementation of the planned entrepreneurial measures (operational change).

In practice, Workers' Councils rarely succeed in effecting substantial amendments to the operational changes originally planned. The negotiations can, however, delay the planned restructuring substantially. Accordingly, careful forethought and planning are absolutely essential.

## III. The Social Plan

### A. Social Plan for Operational Changes

In the event of an operational change a social plan must also be negotiated.[23] The purpose of a social plan is to mitigate or eliminate any economic disadvantages that may accrue to the employees because of the operational change.[24] As far as a reduction in personnel is concerned, the essential element of a social plan is the calculation of compensation for the employees laid off. The Works Constitution Act does not provide any tangible guidelines for the level of compensation to be included in a social plan or, therefore, for the cost of a social plan. The cost and content of a social plan depend entirely upon the negotiations between the Workers' Council and the management.

In practice, various formulae for compensation have been developed for use in social plans. The compensation paid generally depends upon the length of service, age, and final gross monthly earnings of the employees to be laid off. The funds allocated to the social plan also depend upon the general economic condition of the employer. However, because the law intends the social plan to be negotiated between the management and the Workers' Council, and legislation does not provide for any specific formulae upon which calculations should be made, in practice the negotiating skills of those involved in the negotiations play a major role. In relatively uncomplicated social plans for small companies, compensation typically ranges from one-fourth to one-and-a-half times the prod-

22. BetrVG § 112(2)-(3); Röder & Baeck, *supra* note 2, at 12, 17.
23. *See* BetrVG § 112.
24. Judgment of Apr. 28, 1993, BAG, 1993 DB 2034; Röder & Baeck, *supra* note 2, at 10.

uct of the number of years of service and the gross monthly salary. That is, for a worker employed ten years and earning DM5,000, the compensation could range from DM12,500 to DM75,000.

The following formula is often used in practice for plans involving major reductions in personnel:

$$\frac{\text{years of service} \times \text{age} \times \text{gross monthly salary}}{\text{divisor}}$$

The costs of a social plan are therefore higher if a low divisor is used. The divisors used with this formula range from 50 to 120, depending on the age of the employee affected and the economic situation of the company. Social plans may also include a multitude of other provisions, including ones regarding special payments (Christmas bonuses), anniversary bonuses, occupational pension schemes, compromise settlement of pension claims, early retirement programs, and the like.

If, during negotiations, management and the Workers' Council find it impossible to reach agreement on the content of and the funds for a social plan, both parties may appeal to the conciliation board.[25] In contrast to the procedure that applies to a compromise settlement, the conciliation board may make a binding ruling on the social plan. Even for the conciliation board, however, few specific statutory criteria exist for determining the costs of the social plan. However, the law requires the conciliation board to take into consideration the economic condition of the employer when making its decision.[26]

The fact that the conciliation board may make a binding ruling means that it may impose the social plan against the will of the employer. The board may decide the level of compensation or other benefits that the employer must pay to the employees to be dismissed or reduced by termination agreements and may also specify the criteria upon which such compensation and benefits are to be calculated.[27] An important element of the manner in which the conciliation board makes its rulings is that any binding ruling requires a majority of the votes of all of its members.[28] It is not, therefore, possible for the chairman of the conciliation board alone to approve any social plan he may choose.

What often happens in practice is that the chairman makes a proposal that gains the support of one of the factions on the conciliation board (that is, of either the employer's or the employees' representatives) and is then approved. Grounds for appeal against a social plan that has received the approval of the conciliation

25. BetrVG § 112(2).
26. *Id.* § 112(5).
27. RÖDER & BAECK, *supra* note 2, at 18, 100.
28. BetrVG § 76(3).

board are very limited. Any such appeal must be lodged within two weeks of notification of the ruling—a relatively short period of time.[29]

### B. Social Plan for Simple Reductions in Personnel

The figures that apply in the case of a social plan drawn up in the event of a simple reduction in personnel are different from those that apply to an operational change and the compromise settlement that follows from it. A simple reduction in personnel occurs if the operational structure of a plant remains the same, with the reduction in personnel being the only change. In such an event a social plan is required only if the employees are affected in accordance with the following scale:

| *Number of employees in plant* | *Reduction in Personnel* |
|---|---|
| 1-59 | 20 percent, or a minimum of 6 |
| 60-249 | 20 percent, or a minimum of 37 |
| 250-499 | 50 percent, or a minimum of 60 |
| 500 or more | 10 percent, or a minimum of 60[30] |

A simple reduction in personnel may therefore require negotiation of a compromise settlement, but not conclusion of a social plan. If the procedure for a compromise settlement is not completed, however, employees may assert claims to compensation for any economic disadvantage that may have accrued to them.[31] Therefore, the exemption from concluding a social plan that is provided by law in such cases would be forgone if the procedure for a compromise settlement were, in error, not carried out and the individual employees were able to demand further compensation by asserting claims based upon the economic disadvantage they had suffered.

## IV. Consequences of Failing to Follow Mandated Procedures

Pursuant to the Works Constitution Act an employer may implement an operational change only after it has gone through the procedure described above for a compromise settlement. Relocation of manufacturing functions, closure of parts of a plant, or announcements of dismissals may therefore be effected only after the compromise settlement procedure has been finalized. If this requirement is not satisfied, two possible legal sanctions exist, along with another practical consequence.

29. *Id.* § 76(5); *see* Röder & Baeck, *supra* note 2, at 125-27.
30. BetrVG § 112a(1).
31. *Id.* § 113; Röder & Baeck, *supra* note 2, at 21, 35.

### A. Claim to Compensation

Those employees affected by an operational change taken before a compromise settlement procedure has been finalized may claim compensation for economic disadvantage suffered.[32] Such compensation can amount to a maximum of eighteen months' gross earnings, depending on the length of service and the age of the employee concerned.[33]

### B. Preliminary Injunctions

Workers' Councils frequently attempt to obtain preliminary injunctions from the labor courts in order to restrain the implementation of measures by the employer until such time as the compromise settlement procedure has been finalized. The practice of the courts varies widely in respect to such preliminary injunctions. The German Federal Labor Court has ruled that preliminary injunctions of this kind may not be granted,[34] but many of the courts of appeal that are required to make rulings on the preliminary injunctions do not abide by this precedent.[35] Thus, researching previous rulings by the labor court that has jurisdiction in a particular case as to whether it grants such preliminary injunctions is of the greatest importance.

### C. Other Negative Effects

Failure to observe the procedures discussed above often has negative effects on the atmosphere within the plant, which in turn may detrimentally affect the productivity of the workers. One of the greatest motivations for the employer to follow the complicated procedures for a compromise settlement is the knowledge that although the Workers' Council cannot prevent the implementation of the operational change, it can delay it through legal challenges, with a negative effect on the productivity of the work force in the plant. Thus, the employer will benefit from strict compliance with the procedures for negotiating a compromise settlement and implementing a social plan, onerous though they may be. Nevertheless, in some instances time pressure leads companies to take the risk of not complying with the legal procedures.

## V. Implementing a Reduction in Personnel

Even after a social plan has been concluded, the employer must still fulfill a number of legal requirements before a reduction in personnel (whether a simple

32. BetrVG § 113(3).
33. Jobst-Hubertus Bauer & Gerhard Röder, Kündigungsfibel 130-31, 176-79 (2d ed. 1991).
34. Judgment of Aug. 28, 1991, BAG, 1992 DB 380.
35. *See* Röder & Baeck, *supra* note 2, at 23.

reduction or one brought about by an operational change) can be implemented. The procedure described above that leads to conclusion of a social plan only satisfies the company's legal duties towards the Workers' Council. A number of other legal hurdles still must be overcome before a company may lay off employees.

### A. Protection Against Unlawful Dismissal

In the Federal Republic of Germany dismissal may be effected only if particular grounds justify it. Briefly, grounds that justify dismissal include major breaches of contract, significant periods of sickness, and the fact that certain jobs have ceased to exist (operational reasons).[36] Thus, rationalization measures, lack of orders, or relocation or closure of the business that lead to a loss of jobs constitute a valid legal ground (operational reason) for the dismissal of workers.[37] While the case law on this point is complex, it is clear that a loss of jobs caused by poor economic conditions does justify dismissals. In practice proving this in court is usually possible.

Foreign parent companies often do not realize that even if valid grounds exist for reducing the work force, an employer is not necessarily free to select those employees who are to be dismissed. The German Termination of Employment Act (*Kündigungsschutzgesetz*) requires that the employees to be laid off be selected on the basis of social criteria from comparable employees in a particular plant. This selection is based on such criteria as length of service, age, and maintenance for dependants.[38]

The persons least worthy of protection under these criteria will be the first to lose their jobs. Consequently, during a crisis, employers are frequently required to retain older employees who have been in their jobs for a long time, while they have to dismiss younger employees who are often more efficient. This principle is particularly disadvantageous for employers during periods of crisis, as is the rule that an employee's performance may be taken into consideration only in exceptional circumstances.[39]

### B. Notice Periods

In the event of reductions in personnel, it is essential for employers to observe the appropriate notice periods in order for a dismissal to be effective. Notice

36. Kündigungsschutzgesetz [KSchG] § 1.

37. *See* Bauer & Röder, *supra* note 33, at 62; Alfred Hueck et al., Kündigungsschutzgesetz 175 (11th ed. 1992).

38. KSchG § 1(3); Judgment of Apr. 25, 1985, BAG, 1986 Betriebsberater [BB] 1159; Judgment of Feb. 26, 1987, BAG, 1988 BB 630; Fitting, *supra* note 10, at 1122; Hueck, *supra* note 37, at 200.

39. KSchG § 1(3)(2); Judgment of Mar. 24, 1983, 1983 BB 1665.

periods may be those provided by law,[40] by a collective bargaining agreement, or by an individual's employment contract. In practice, notice periods generally vary between one month and seven months.

An employee is entitled to receive his salary for the entire duration of the notice period, even if the employer releases him from performance of his duties during that time. The compensation provided for by the social plan constitutes an additional payment above and beyond the payment of the worker's salary. Compensation under the social plan is subject to a special tax reduction.[41]

### C. Obligations towards the Labor Office

In the event of substantial reductions in personnel an employer must, in addition to completing the procedures and fulfilling those obligations that relate to the Workers' Council, fulfill certain obligations towards the local or state Labor Office (*Arbeitsamt*).[42] This formal procedure for disclosure to the Labor Office of the reasons for the dismissals and the number of employees who are to be dismissed does not mean that the Labor Office is entitled to examine the validity of the dismissals or hinder substantially the implementation of the reduction in personnel. Nor do these obligations towards the Labor Office present any essential problem in terms of the implementation of a reduction in personnel, provided that those involved are conversant with the procedure.

### D. Practical Tips

The following paragraphs include some practical advice to be kept in mind by an employer when implementing a reduction in personnel.

The authorities do not, as a matter of course, carry out an assessment to see whether the conditions for a valid dismissal have been fulfilled. An assessment of this nature is carried out only if an employee files an action for protection against unlawful dismissal with a labor court. Such actions must generally be filed within three weeks of the receipt of notification of dismissal.[43]

As a general rule it is very often possible to reach termination agreements with employees affected by the reduction in personnel when a social plan is concluded. An employee cannot, however, be forced to accept an agreement of this nature. In cases where the parties conclude termination agreements, no

40. Röder & Baeck, *supra* note 2, at 60. The new Kündigungsfristengesetz [Law Regarding Notice Periods] that went into effect in October 1993 contains a unified schedule of between four weeks and seven months of notice for both blue and white collar workers, depending on the years of service with the company.

41. Einkommenssteuergesetz [Income Tax Law] § 3(9).

42. *See, e.g.*, Arbeitsförderungsgesetz [Promotion of Work Law] § 8, which requires that a reduction in personnel be reported to the Labor Office (*Arbeitsamt*) as soon as it is perceptible by the employer; KSchG § 17, which requires the reporting of mass layoffs. *See also* Röder & Baeck, *supra* note 2, at 25.

43. KSchG § 4.

obligation to abide by the provisions of the Termination of Employment Act exists. Such termination agreements remain valid, even if they do not comply with the conditions of the Termination of Employment Act.

Many employees are prepared to accept dismissal (that is, they do not file actions for protection against unlawful dismissal) or to conclude a termination agreement if the social plan concluded by the Workers' Council provides for appropriate compensation. Social plans generally include provisions stating that compensation will not be paid while legal proceedings are pending before the labor court in relation to the validity of a dismissal or to the termination of a contract of employment.

In practice, the question of whether Workers' Councils encourage dismissed employees to file actions for protection against unlawful dismissal assumes considerable importance. The progress and outcome of negotiations with the Workers' Council determine whether encouragement of this nature is given. Thus, the practical importance of the acceptance of social plans by Workers' Councils should not be underestimated.

Finally, in order to conclude an appropriate social plan, it is important that the negotiations with the Workers' Council be well-prepared and begun at the appropriate time. Additionally, the attorneys in the negotiations should be experienced in the practice of negotiating complex labor agreements with Workers' Councils.

## VI. Conclusion

Any company faced with a restructuring of its operations in Germany should be aware of the complex requirements that must be fulfilled under German law. In particular, a foreign parent company, which may be accustomed to a "hire and fire" system with few or no legal restrictions on its ability to reorganize its business operations, can quickly find itself embroiled in protracted and expensive labor litigation if it does not comply with these requirements.

If one is familiar with the legal requirements for dealing with Workers' Councils, it is generally possible to implement the necessary restructuring measures within an appropriate time. Before implementing any such measures, a compromise settlement procedure must be negotiated and a social plan must be agreed upon. A compromise settlement entails reaching an agreement with the Workers' Council regarding whether, when, and how the planned entrepreneurial measures are to be effected. The employer must participate in this procedure; once it has done so it is free to implement the planned entrepreneurial measures, even if the Workers' Council does not agree. Thus, the Worker's Council cannot prevent such restructuring measures.

The next step is negotiation of a social plan. A social plan generally includes termination payments, the cost of which depends on negotiations with the Workers' Council.

A reduction in personnel under a social plan is often carried out by contracts to cancel the employment relationship, which the employer cannot be forced to conclude, or by notices of termination. Grounds for issuing notices of termination must be proved by the employer, which must make a selection among the workers based on social criteria. If an appropriate social plan is reached, implementing a reduction in personnel is often possible notwithstanding the restrictions on layoffs under German law.