

Germany

Selection of employees for (collective) dismissals

Phase	Works Constitution Act; Employment Protection Act
Native name	Betriebsverfassungsgesetz; Kündigungsschutzgesetz
Type	Selection of employees for (collective) dismissals
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Article

95, 102 (Works Constitution Act); 1 III-V (Employment Protection Act)

Description

Under the Employment Protection Act, the employer may dismiss on operational grounds only those employees who cannot be voluntarily transferred to another department or establishment of the same employer even if they receive further training. The following social selection criteria have to be applied: tenure, age, family responsibilities, severe disability. Guidelines for selecting individuals in the framework of individual or collective dismissals (within 30 days, dismissals of at least 6 employees in companies with 21-59 workers, at least 10% (or 26) in companies with 60-499 workers, or at least 30 dismissals in larger firms) require the agreement of the works council. In companies with more than 500 employees, the works council can request that guidelines for social selection are set up. If no agreement is reached, a mediation body decides.

When selecting employees for redundancy, a pool of comparable employees must first be identified before specific selection criteria are applied. The employer may in general only dismiss those employees who score the lowest marks when those criteria are applied. The social selection shall exclude employees rated vital to the further existence of the company because of their skills, competencies or performance.

Under the Works Constitution Act, the works council has co-determination rights regarding the establishment's guiding HR principles of hiring and firing. In companies with more than 1,000 workers the works council may demand that such guidelines are set up. The works council has information and consultation rights in cases of planned individual and collective dismissals; additional co-determination rights can be set up via a works agreement between the management and the works council.

The works council is not involved in the social selection, but is consulted on the list of potentially affected employees and may object to individual workers being on the list if the council finds that these do not to meet the criteria of social selection.

If an agreed social plan provides a list of selected workers, these workers do not hold the right to file a complaint under the Employment Protection Act.

Commentary

Following ECJ rulings from 2015 (Rivera and Balkaya-Kiesel), fixed-term workers, CEO and interns are also covered by the collective dismissal regulation.

Generally speaking, the implied social basis of the mechanism tends to protect more vulnerable workers. This may be in conflict with the aim of regaining economic viability through restructuring, a goal which may be shared by the works council in its endeavour to preserve jobs. Negotiations on restructuring are centred on a compromise between social and economic perspectives, and on designing the legal mechanisms by which the agreed outcome can be achieved.

Additional metadata

Cost covered by	Employer
Involved actors other than national government	Works council
Involvement (others)	None
Thresholds	Affected employees: No, applicable in all circumstances Company size: 10 Additional information: No, applicable in all circumstances

Sources

- Knuth, M. (2010), National background paper Germany, Anticipating and managing restructuring in enterprises: 27 national seminars, ARENAS Report, European Commission, Brussels~~~ Storrie, D. (2005), Collective Dismissals in Belgium, France, Germany, Sweden and the UK: Some legal, institutional and policy perspectives, Working paper from the MIRE project~~~ [Works Constitution Act](#)~~~ [Betriebsverfassungsgesetz](#)~~~ [Hensche.de \(2015\), Massenentlassungsrichtlinie und Arbeitnehmerbegriff – befristete Beschäftigte](#)~~~ [Kündigungsschutzgesetz](#)~~~

Citation

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