



Germany soon to loosen dismissal protection for top earning employees in banks?

On March 2, 2018, the member base of the social democrats voted in favour of the party's participation in a government with Angela Merkel's Christian democrats. The Coalition Agreement, which sets out the political agenda for the next four years, does not only contain plans to amend the laws on fixed-term employment.

In the relatively harmless-sounding section entitled "Financial Market and Digitisation" lurks another labour law bombshell, of which the probability of political implementation was publicly said to be "around zero" by experts in this field a mere six months ago.

What is planned?

The relevant section in the Coalition Agreement reads as follows:

"We will aim to achieve an attractive general environment in the financial sector in Germany and will further strengthen the digital infrastructure for the financial markets. In view of the upcoming departure of the United Kingdom from the EU, we aim to make Germany more attractive for financial institutions. For this reason, we will make it possible to put the risk takers, as defined in Section 2 para. 8 of the German Remuneration Ordinance for Institutions (which implements the CRD IV remuneration restrictions into national German law), on an equal level – in the law on protection against dismissal – with executive employees if their regular basic annual remuneration exceeds triple the contribution assessment ceiling applying to pension insurance."

Who will actually be affected?

Under the Coalition Agreement, bank employers are scheduled to be able to dismiss such risk takers – and only them – under eased requirements. Risk takers are employees whose professional activities have a material impact on an institution's risk profile as further defined by means of qualitative and quantitative criteria in the Delegated Regulation (EU) No. 604/2014 (can be downloaded [here](#)).

But, in order to be covered by the planned eased dismissal regime, such staff must also draw a fixed salary of currently at least EUR 234,000 annually.

The limitation that only risk takers as defined in the German Remuneration Ordinance for Institutions are to be affected could be understood that in general only the staff of a bank seated in Germany can be concerned. We believe that the Coalition Agreement should not necessarily be taken literally at this point, since the aim of the coalition partners is expressly stated to be to make "Germany more attractive as a location for financial institutions". This can certainly be understood to mean that banks based in other EU countries are to be attracted in particular, for which the German Remuneration Ordinance for Institutions does not apply at all if they conduct business in Germany through branches.

Accordingly, it should be expected that the new dismissal regime for top earners is to apply in general to financial institutions, irrespective of where they have their headquarters and, above all, irrespective of whether they are major or non-major institutions.

What is the status quo and how does the planned reform look like?

Under German law an employer can unilaterally only part ways with an employee if the dismissal stands a legal test in the courtroom or – which happens rarely – remains uncontested by the fired employee. If a dismissal is contested successfully by the employee, which is all too often the case, the default consequence is that the employee is reinstated and the employment relationship continues.

Reality looks a bit different though: In more than 90 percent of unfair dismissal claims the employment relationship terminates nevertheless, but not by operation of law but as a result of a severance agreement that is reached between employer and employee. The size of the severance package is up for negotiations and usually reflects the size of the employee's current pay package, but also the years of service, and sometimes the employee's age.

If the plans in the Coalition Agreement become reality, the basic reinstatement concept will remain in place. What is new however is that instead of having to negotiate a severance agreement as a result of an invalid dismissal, the employer could simply ask the labour court to dissolve the employment relationship. It will have to be dissolved then and the employee is awarded a severance payment by the courts in accordance with a set legal frame.

This very concept is already in place in Germany for executive employees (*leitende Angestellte*). Problem is, however, that virtually no employee in Germany qualifies as such.

If the dissolution concept for risk takers shares the same frame for severance compensation as the dissolution concept for executive employees, the maximum severance compensation will be eighteen monthly salaries, calculated on a total comp basis. This maximum amount is reserved for employees aged 55 and above with at least 20 years of service whereas a risk taker with only five years of service might only be awarded a severance compensation worth three to five monthly salaries, again calculated on a total comp basis.

Are there legal concerns about the planned concept?

To limit the dismissal protection only for top earners in the banking industry might be tricky with view to the constitutional principle of equality. This is undoubtedly an aspect which must be examined in depth.

However, we believe that the planned legislation should equally be regarded from a practical viewpoint: A reform of the out-dated German dismissal law as planned would be nothing else than an acknowledgement of what is courtroom practice already anyway. We see this as definitely being a step in the right direction. It should be borne in mind that the continuation of employment after ineffective dismissal as foreseen as default consequence under current dismissal laws is usually extremely unsatisfactory, not only from the perspective of the employer but also for the employee, who, in the worst case, suddenly has to show up in the office in full view of all his colleagues months after having had to clear his desk.

For employer and employee, court rulings on the termination of employment with severance pay mean certainty of future planning from the onset, in terms of both finance and scheduling. For when the termination of employment by dismissal is equally as predictable as the applicable severance compensation, it can be expected that bank employers may well no longer issue their top earners with a dismissal notice, but will offer an amicable termination with severance compensation from the start; this is likely to be accepted if the employee realizes that he or she will have to go in return for the same exit package anyway, even after a won unfair dismissal case.

What happens next?

The plan to reduce protection from job dismissal should not be put on the back burner by the new German government. After all, the decisions by banks about moving jobs away from London – for which the general legal situation relating to job dismissal at alternative locations is naturally of major significance – will be taken in the course of this year at the latest.

So it is high time for the German legislator to take action, especially since Macron's government has already promoted Paris as an alternative to London as a financial centre by instigating a comprehensive labour market reform in the autumn of 2017. For details, see our [Information Letter](#)

[“The New France” dated 5 September 2017](#) which is only available in German language though.

Your contacts at GGV:



Thomas Schrotberger
Partner
Lawyer

WestendGate
Hamburger Allee 2-4
60486 Frankfurt am Main
Germany

T: +49 (0) 69 979611-12
schrotberger@gg-v.de



Dr. Jens Jensen
Of Counsel
Lawyer, Specialist in Labour Law,
Diplom-Finanzwirt (FH)

WestendGate
Hamburger Allee 2-4
60486 Frankfurt am Main
Germany

T: +49 (0) 69 97961-156
jensen@gg-v.de



Sandra Hundsdörfer
Partner
Lawyer

12, rue d'Astorg
75008 Paris
France

T: +33 1 44 51 70-15
hundsdorfer@gg-v.net

www.gg-v.com
