FAQ on collective redundancy

1. What is collective redundancy?

If a certain threshold of dismissals is reached in an establishment within a period of 30 calendar days, this is deemed a “collective redundancy”. The answer to the question of how many redundancies constitute collective redundancy during this period depends on the size of the establishment:

- Establishments regularly employing more than 20 and fewer than 60 employees: more than 5 dismissed employees
- Establishments regularly employing between 60 and 500 employees: 10%, or more than 25 dismissed employees
- Establishments regularly employing at least 500 employees: at least 30 dismissed employees.

The key date for determining the number of regularly employed employees is the date of dismissal, i.e. the date on which notice of termination is issued or the termination agreement is concluded.

2. What are the employer's duties in the event of collective redundancy?

Pursuant to section 17 (1) of the German Act on Protection Against Unfair Dismissal (Kündigungsschutzgesetz, KSchG), collective redundancy must always be reported to the Employment Agency.

If – and only if – a works council has been formed, this works council must be involved in a prior “consultation procedure”. For this purpose, the works council must be informed not only in accordance with section 17 (2) of the German Act on Protection Against Unfair Dismissal, but employers and works councils must also consider whether and how redundancies can be avoided or limited and their consequences mitigated.

Important note: If the collective redundancy is part of a change of operations (as is usually the case), negotiations must be conducted with the works council to reach an agreement on a reconciliation of interests and a social compensation plan. The procedure for reaching agreement on a reconciliation of interests and a social compensation plan is separate and different to the redundancy consultation procedure (see point 9 below).

3. What are the legal consequences of procedural errors?

The notification duty and duty to consult are two separate procedures, each of which can give rise to an independent reason for notice of termination in the context of collective redundancy being rendered invalid.

If either of the procedures is not followed, or is carried out incorrectly, this will nullify the notices of termination or the termination agreement. Arguing that the error is only minor is rarely successful.

Therefore, great care must be taken to ensure that the information given is correct and complete.

4. What is an establishment in the context of collective redundancy?

In practice, it is often difficult to determine the relevant establishment and thus the reference entity for calculating the applicable thresholds. According to case law, an establishment is determined on the basis of the European law requirements set out in section 17 of the German Act on Protection Against Unfair Dismissal, in line with the principles of EU law, so it is possible, for example, that business units which are not regarded as separate for the purposes of works constitution law must be considered separately when it comes to notification of redundancies.

In practice, the limits of the establishment must therefore be carefully established in advance. If several establishments as defined in section 17 of the German Act on Protection Against Unfair Dismissal exist, separate notification of redundancies must be submitted to the relevant Employment Agency office. In addition – especially if the thresholds are not reached in these units – it may be advisable to include the terminations in the notification of redundancies relating to the place where the company has its registered office, on a precautionary basis. The details should be explained in a cover letter to the Employment Agency.

5. What employees count as employed persons?

The definition under EU law again applies here. External managing directors and minority shareholders acting as managing directors must be included in the notification of redundancies. Consideration should also be given to including members of the board of directors for the purposes of section 17 of the German Act on Protection Against Unfair Dismissal, as a precaution. Apprentices and trainees are also deemed employees. Temporary employees do not count towards the number of employees to be made redundant, but are to be included when determining the size of the establishment.

6. What dismissals must be reported?

All terminations of an employment relationship at the instigation of the employer are deemed dismissals. Therefore, all notices of termination given by the employer are considered dismissals. Termination agreements (including tripartite agreements relating to transfer to an interim employment company), notices of termination pending a change of contract or resignations by employees should be considered dismissals if instigated by the employer; in particular, this means cases where the employer indicates to the employee that there is no longer any option for the employee to continue working for the employer. In some cases, even dismissals on the grounds of conduct or personal incapacity must be included.

According to the current prevailing opinion, termination without notice and the failure to extend a fixed-term employment contract are not deemed to be dismissals in this sense. In the event of doubt, however, it is better to report too many dismissals than to risk the notices of termination being invalid due to reporting too few.

7. How is the 30-day period calculated?

The thresholds must be reached within 30 days. The period begins anew on each day when at least one notice of termination is issued. All dismissals within 30 days must then be added up. This also applies if notice of termination is based on a new, separate decision.

If the number of dismissals was initially below the threshold and the total number is subsequently reached within the 30-day period, the initially valid notices of termination issued will be irremediably void. Therefore, it may be advisable to stagger dismissals ("waves of redundancies") to avoid exceeding the thresholds set out in section 17, German Act on Protection Against Unfair Dismissal.

8. What is the procedure for notifying redundancies?

Notification of redundancies must be submitted in writing to the Employment Agency office in whose district the establishment is located. Internally, the company's head office is usually responsible for this. We recommend contacting the responsible Employment Agency official in good time before submitting the notification of redundancies to provide advance warning. This is also an opportunity to check on the practical details (some Employment Agency offices wish to receive advance notification by e-mail in a specific file form, etc.).

The forms for reporting redundancies that can be downloaded from the home page of the Federal Employment Agency under "Merkblätter und Formulare für Unternehmen"

are designed in such a way that they are almost impossible to use in practice (especially because in most cases many different occupational groups are affected). It is therefore often advisable to send a cover letter containing the key information to the Employment Agency. Only brief references to the cover letter should then be entered in the forms.

9. What needs to be borne in mind during the consultation procedure?

During the consultation procedure, the employer must inform the works council in writing of

- the reasons for the planned redundancies,
- the number and the occupational groups of the employees to be made redundant,
- the number and the occupational groups of the employees regularly employed,
- the period in which the redundancies are to take place,
- the intended criteria for selecting the employees to be made redundant, and
- the intended criteria for calculating any severance payments.

The employer and the works council must also in particular discuss possible ways of avoiding or limiting redundancies or mitigating their consequences.

The consultation must be conducted with the entire works council. The consultation procedure should be started when the entrepreneurial concept is ready for implementation, subject to the approval of the works council. This will normally coincide with the time at which an agreement on a reconciliation of interests is to be negotiated. The participation duties under the German Act on Protection Against Unfair Dismissal can be combined with the duties to inform and consult under the Works Constitution Act (Betriebsverfassungsgesetz, BetrVG) and performed at the same time.

Even if compliance with text form pursuant to section 126b of the German Civil Code (BGB) is sufficient (i.e. without a signature), it is generally advisable to provide the information in a signed document and to send this “consultation paper” – which contains the information required under section 17 (2) of the German Act on Protection Against Unfair Dismissal and also serves as the basis for conducting the consultation – to the works council, requesting confirmation of receipt.

The duty to consult is deemed to be fulfilled as soon as an adequate and final statement has been made by the works council regarding the intended redundancies. The employer can then submit the notification of redundancies immediately. This requires a final

statement by the employee representatives stating that the works council considers itself sufficiently informed, considers its right to be consulted to be satisfied and does not wish to exhaust the time limit set out in section 17 (3) sentence 3 of the German Act on Protection Against Unfair Dismissal. There are no specific requirements regarding the form in which this statement must be made. It is advisable, however, to include the statement in the reconciliation of interests agreement or in a separate document because the statement must be submitted to the Employment Agency in the context of notifying the redundancies.

If the works council does not issue a statement, the notification of redundancies cannot be submitted until two weeks have passed after the date on which the works council was originally informed.

Important note: It is sometimes argued that the consultation procedure must be carried out with each of the employee representative bodies required to be established by national law. As a precautionary measure, the consultation procedure should therefore also be carried out with any existing representative body for severely disabled persons and, if applicable, other employee representatives (staff representatives, youth and trainee representatives, etc.). These other employee representatives should be provided with the same information package as the works council. The same consultation process also applies.

10. When can the notices of termination be given/termination agreements be concluded?

Notices of termination may be given only after the consultation procedure has been completed and full notification of the redundancies has been received by the relevant Employment Agency office. In practice, it is advisable to wait for confirmation of receipt if possible.

Although the notices of termination can be signed in advance, they may not be handed over or sent out until the notification of redundancies has been properly submitted and the appropriate works council hearing pursuant to section 102 of the German Works Constitution Act has taken place; the dismissal notices must then be delivered within 90 days at the latest.

The conclusion of termination agreements is also not permitted until after the notification of redundancies has been submitted, although it is unclear exactly at what point in time this should be considered done. It will depend on the circumstances of the individual case.

According to section 18 (1) of the German Act on Protection Against Unfair Dismissal, the reported redundancies do not take effect until one month after receipt of the notification by the Employment Agency (waiting period). If employees have a shorter notice period or if employees are supposed to transfer before the end of the notice period (e.g. to an interim employment company), a reduction in the waiting period must be requested. The Employment Agency will decide on this matter separately, although a more extensive procedure must be carried out within the agency for redundancies of 50 or more, so decisions usually come about two to four weeks after receipt of notification of the redundancies. Consent may also be given retroactively, however.

In addition, the waiting period can be extended by the Employment Agency to two months. Employers should ask that this not be done.

11. What impact does the coronavirus crisis have on these procedures?

The coronavirus crisis does not alter the duties described above. There are also no moves at present to simplify the procedures involved. If short-time working (working reduced hours) has been introduced in the establishment or in individual departments, this does not generally prevent dismissals for operational reasons. However, no short-time allowance (compensation for reduced working hours) can be paid to employees who have been dismissed because the purpose of the short-time allowance – to prevent dismissals – no longer applies. The (permanent) loss of the employment requirement may also be called into question if the employer has indicated by applying for short-time allowance that “only” a temporary decline in employment is expected. Both measures should therefore be carefully coordinated as necessary.

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