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EU Employment and Labor Law for US Employers

The CMS Employment and Pensions Group

# EU Employment and Labor Law for US Employers

## Introduction

In some ways the European Union is like the United States. However, there is no uniform system of employment and labor law at EU level supplemented by additional state or municipal law. Each member state operates its own distinctive legal system and administers its own laws. Nevertheless Europe's employment and labor laws are becoming increasingly alike because the EU lays down, in some but not all areas, minimum standards that each member state has to legislate for in its own system. These standards are set out in “directives” which are essentially directions from the Council of the European Union to the EU member states to incorporate certain objectives or protections into their own domestic legal systems. As there are over 35 employment and labor law directives there is in some respect a strong similarity between the laws in EU countries. However, as each country has a certain freedom in the way they implement directives, there are also inevitable, often subtle, differences in areas governed by a directive and huge differences in other areas, especially regarding collective labor law (e.g. works council, role of the unions).

There are numerous differences between the US and the employment and labor laws of the EU countries. These are just key examples.

## Holidays and Working Time

A key EU wide directive covers working time. For example EU member states cannot allow the average working time for each seven day period to exceed 48 hours. The minimum paid annual leave entitlement is 4 weeks (and leave cannot be replaced by a payment except on the termination of employment).

## Whistleblowing, Privacy and Data Protection

EU employees have increasing rights to privacy. Some EU member states, such as Germany, have

privacy laws enshrined in their constitution. Employers cannot carry out random testing of employees or monitor their workstations without good reason and proper procedures. Many US employers have wide ranging ethics codes that require employees to make anonymous reports if they learn of any suspicious behaviour (usually to comply with Sarbanes-Oxley). Anonymous hotlines and compulsory reporting rules are generally avoided in Europe (especially in Germany and France). “Whistleblowing” polices across Europe are carefully regulated.

The EU also has standards (e.g. criminal sanctions) safeguarding data collected and processed about employees. Employers cannot simply transfer such data back home to the USA, but must do so in a proper manner under “model contracts” between the European and US companies which are legal agreements providing the mechanism for employers to process information in the US.

## Maternity and Paternity Law

Employees enjoy varying rights to parental leave across the EU with a legal entitlement to return to the same job post childbirth (e.g. in Germany up to 36 months post childbirth).

## Discrimination

As in the US equal treatment is a fundamental cornerstone of EU law. Several directives require that appropriate action is taken to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Although the approach differs across the EU, one needs to recognise that virtually any form of discrimination, whether it is direct or indirect, will be unlawful unless specific statutory exceptions or the legislation provides. Citizenship and nationality are covered under the race discrimination laws. This means that appointing an American to run the German branch just because he is an American could be a problem, so care must be taken in carrying out a non-discriminatory

recruitment and selection process. However, there is no system of class action and punitive damages generating damage claims comparable with those under US law.

## Restrictive Covenants

Restrictions imposed on employees after the termination of their employment are common in EU countries. In some countries they can only be enforced if combined with a regular payment during the period of restriction. In all countries they need to be limited to reasonable protection of the employer's legitimate business interests. US employers seeking to protect their business will therefore need to take specific advice on local laws.

## Compliance

In many EU member states there are criminal sanctions for employees/company officers where certain provisions of labor law are broken, notably health and safety issues. Non compliance is not just a commercial decision as it can mean that the relevant individual employees themselves incur criminal sanctions.

## Termination of Employment

EU directives do not cover the termination of employment. However, there is no equivalent of employment “at will” in any EU country. All employees across Europe are entitled to notice of the termination of their employment except in very limited circumstances. Many EU countries have minimum notice periods, or minimum termination (or “indemnity”) payments, which are calculated with reference to the employee's length of service. These can differ widely. For example a “white collar” worker who has worked for one year enjoys six month's minimum notice in Austria, but only one week's minimum notice in England. In Belgium the length of notice is determined not just by the type of work but also the salary the employee earns. In addition to notice an employee may have rights to compensation on termination or - as in Germany - to reject any compensation but claim reinstatement.

Unusual for US employers is that a termination of employment will not always be valid just because he has told the employee that he is fired. Many EU countries also have general protection from ‘unfair’ dismissals, but dismissals can be deemed void. Moreover, in some EU countries (but notably not England) an employer requires permission from a relevant authority before certain dismissals can take effect.

## Workforce Restructuring/Collective Dismissals

In case of collective dismissals (such as redundancies) there are advance notification requirements in the EU similar to those under the US Worker Adjustment and Retraining Notification (WARN) Act 1988. However there are many other requirements which must also be met. These include obligatory consultation of works councils and/or labor unions and the making of severance (redundancy) payments. Employers face financial and sometimes criminal penalties for failing to inform and consult properly.

Employees across Europe have a long tradition of involvement in the businesses at which they work. This includes the right to information and consultation over a number of issues, such as redundancies, business transfers and many other negotiated issues such as pay and benefits. There are many different types of employee forums such as trade unions, works or staff councils. Most recently employee representation on the management board of companies has been in the spotlight as the EU Cross border merger directive has increased rights of employee participation when companies merge across Europe.

## Business Transfers

The Directive on Transfer of Undertakings safeguards employees rights and imposes certain requirements where business assets are acquired from a third party, business is transferred between group companies or some aspect of the business is outsourced in Europe.

For example, employees are protected from dismissal, their terms and conditions of employment are preserved and information and consultation obligations must be carried out. Employees have strong rights and cannot simply be made redundant on the sale of a business.

## Immigration

Getting permission for a US citizen to work in one EU member state does not cover other member states. Immigration is dealt with on a national level and the national rules are different. Although EU nationals have freedom of movement across the EU the freedom to start work without a permit has not yet been accorded by all the member states to citizens of some of the newly joined EU member states. As the EU does not have a common system of taxation or social security, care must also be taken to structure a tax effective package for US employees working in Europe and indeed EU nationals who work in different EU member states.

## Contractual Rights/Mandatory Laws

US employers may be tempted to think that a contractual governing law clause, for example, stating that the employment contract is “subject to the laws of New York” means that they can ignore EU laws. But this is not the case. The Rome Convention on the law applicable to contractual obligations, which sets out a framework across Europe, states that provisions in individual employment contracts cannot deprive employees of any protection granted to them under the ‘mandatory’ rules of law in the country in which the employee works. Mandatory laws differ from country to country. Typically mandatory laws include discrimination, holidays, working time and termination laws.

## CMS Employment and Pensions Group

The Employment and Pensions group of CMS advises national and international organisations on all aspects of employment law issues that affect businesses across Europe. Our solutions are based on a broad experience in specific business environments and industry sectors.

We offer coordinated European advice through a single point of contact. Thus, clients can deal with a local firm in their own country using their own language whilst benefiting from the integrated expertise of a wide multi-jurisdictional team of more than 200 practitioners.

### Full range of employment law services

Our lawyers have particular expertise in all the legal aspects of the following areas:

- ▮ Compliance with national and international laws and standards
- ▮ Individual and collective dismissals
- ▮ Employee share/stock ownership
- ▮ Employee pension schemes
- ▮ Social security contributions
- ▮ Labour/trade union issues/disputes
- ▮ Employee and pensions aspects of mergers and acquisitions, outsourcing, nationalisation, privatisation
- ▮ Litigation to prevent employees competing with their former employer
- ▮ Drafting employment contracts, company policies and collective agreements
- ▮ Works councils at company, national and international levels