

law governing collective agreements

general equal treatment

minimum wage

protection against dismissal

company codetermination

works constitution law

employment agreements act

working time directive

data privacy

immigration and posting of workers

Position Paper on the Labor Market

Ten Requests for an Employment-Friendly Labor Market



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**A Position Paper Presented by the
Social and Labor Affairs Committee
of AmCham Germany ^{*)}**

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Introduction

The impacts of the financial crisis on the labor market are grave: a drop in orders, short time work (*Kurzarbeit*), bankruptcies.

Putting employees on short time work has, up to now, proved to be a useful method of preventing a drastic increase in unemployment. Employers have largely retained their workers. The short time work system is, however, expensive for employers and is not sustainable over a long period.

In addition, many regulations and too much bureaucracy in labor and employment law keep employers from creating new jobs. This jeopardizes companies' international competitiveness and hinders long-term employment growth. The regulations providing protection against termination of employment for the newly-hired should be relaxed, especially for smaller businesses.

The new German government provides a chance to now set the right course and to implement reforms in order to increase labor market flexibility. It is important for Germany to remain attractive for investors in the future. Investors, not politics, create jobs. Foreign companies highly value Germany as an attractive location for investment, according to the findings of the annual survey the AmCham Business Barometer. Germany has the highest concentration of American investment in Europe: approximately €30 billion in investment and 800,000 directly related jobs. Additional reforms in favor of investment and jobs after the election of the federal parliament are essential for commercial success, companies' competitiveness and job security.

In this paper, AmCham Germany presents ten requests for a flexible and employment-friendly labor market.

1. Protection Against Dismissal

The protection of employment based on the Act for the Protection against Unfair Dismissal, with its complicated case law, which is unique in Europe, still proves to be an impediment to employment. This is especially true considering that Germany is the country with the longest notice periods in Europe and collective bargaining agreements in some cases rule out normal dismissal of older employees (e.g. as of 40 years of age in the collective bargaining agreement for civil servants (*TVöD*)).

It is hardly possible for employers to predict the outcome of unfair dismissal lawsuits. The imponderability of court rulings and the lengthy proceedings before German labor courts, posing the one-sided risk of back pay, force employers to conclude settlement agreements even if their case is justified. Contrary to the language of the statutory

law, it is the rule and not the exception, that employees exit in return for severance pay. The employment of workers in Germany must become predictable again. For this reason, AmCham Germany calls for:

- An expanded or general possibility of ending employment by way of court decision at the request of an employer in return for severance pay. An employer must be in a position to bring an employment relationship to an end, even in the event of an invalid notice of termination and without additional preconditions, in return for calculable severance pay. The amount of the severance pay constitutes effective employee protection.
- General protection against dismissal should apply only to business establishments in which at least 20 workers are employed. Alternatively: Make contractual provisions to this effect possible.

2. Works Constitution Law

Employee representation in business establishments (codetermination) in Germany is also unique in Europe and considerably disadvantages Germany as a business location and influences investment decisions. The implementation of entrepreneurial decisions is particularly difficult with regard to the time factor. Codetermination procedures in business establishments must be substantially accelerated in order to at least partially compensate for existing disadvantages. This applies particularly to negotiations to reach an agreement on a reconciliation of interests and a social compensation plan (§111-§113 of the Works Constitution Act (*BetrVG*)), but also to all conciliation procedures. The absence of any time limit is detrimental to the freedom of affected businesses to act. For this reason, AmCham Germany calls for the following:

- Section 113 of the Works Constitution Act should again provide for a time limit for attempts to bring about a reconciliation of interests (two months maximum); after that, an attempt should be deemed as having failed.
- Proceedings before the conciliation board should generally be limited in time to two months.
- Employers' possibilities of making preliminary decisions even without the approval of works councils should be expanded.
- The complex codetermination structures and procedures in business establishments should be simplified.

Time-consuming and costly procedures do not benefit employee interests, but merely impede the implementation of entrepreneurial decisions and encumber economic

efficiency. Therefore, they constitute a disadvantage for Germany as a location for investment that is disproportionate to their benefit. For this reason, AmCham Germany calls for:

- A reintroduction of previous thresholds (e.g., number of works council members released from normal working duties).
- The requirement that employee representatives must personally be in attendance for codetermination in business establishments should be abolished because this requirement no longer corresponds to reality in the age of electronic communication. Businesses that have the technical capabilities must also be allowed to use them in the context of codetermination.
- It must be possible for the partners in an establishment to adapt works council structures to the needs of the establishment. The provision that their new structures can normally only be implemented by way of a collective bargaining agreement should be abolished.
- It must also be possible to hold works council and supervisory board elections electronically in the future, for example, via intranet.
- There should be a requirement that one-third of the employees must participate in the vote for the establishment of a works council.

3. Law Governing Collective Agreements

It has been shown in the past that alliances for work (*betriebliche Bündnisse für Arbeit*) can contribute significantly to securing the competitiveness of businesses in Germany and thus to preserving jobs. However, trade unions in too many sectors continue to refuse to include such escape clauses in applicable collective agreements. Under applicable law, this makes alliances for work impossible in these sectors. For this reason, AmCham Germany stipulates:

- The inclusion of a statutory escape clause to deviate from the favorability principle (deviation from collective bargaining agreements for employee's benefit) by way of works agreements in §4 of the Act on Collective Agreements (*TVG*).
- The elimination of the proviso regarding collective bargaining agreements in §77(3) of the Works Constitution Act, or at least a more flexible structure.
- Priority of codetermination in the establishment with regard to social plans over union-supported industrial action for company social plans.

4. Company Codetermination

The German system of dualistic codetermination in a business is unique in Europe and must urgently be reviewed with regard to European conformity.

Rulings of the European Court of Justice on freedom of establishment (“Centros”, “Überseering”, “Inspire Art”) and the directives on the European stock corporation and on cross-border mergers more strongly promote the competition of different systems of corporate law. Businesses that have a choice will look for ways to avoid company codetermination. In order to remove the existing disadvantage for investments Germany, AmCham thus calls for:

- Employee representatives on supervisory boards should be employees in the establishment as a sign of the direct partnership between employees and employers.
- The election procedure should be simplified – election by direct vote rather than the time-consuming and bureaucratic election of employee representatives by delegates (*Delegiertenwahl der Arbeitnehmer*).
- No legal heteronomy – abolishment of the exclusive right of unions to make proposals with the effect of strengthening the employee representatives’ legitimacy.
- Introduction of a statutory escape clause making it possible for employees and shareholders to structure employee representation themselves. This could help create the necessary latitude for the inclusion of foreign employees’ interests.

5. Working Time Directive

On the European level, the recent ECJ ruling on the Working Time Directive makes a revision of this directive imperative. The case law of the ECJ on the issue of on-call time should be rectified to the effect that the inactive part of on-call time is no longer considered working time.

In recognizing the inactive part of on-call time as working time, the ECJ and the subsequent adaptation of the German Working Hours Act (*Arbeitszeitgesetz*) imposed the burden of higher costs or of avoiding such higher costs by lowering the quality of service owing to reduced staff in companies in which on-call duty plays an important role. It is extremely gratifying that the Council of European Employment and Social Ministers has now recognized that this burden is too great for those businesses.

An amendment to the Working Time Directive following the compromise reached in

the Council could result in a repeal of the provisions in the German Working Hours Act and an elimination of the high costs for the businesses. Moreover, the Council's compromise includes another important finding: the so-called "opt-out" provision must be retained indefinitely. This means that, although the weekly maximum working time of 48 hours is to continue to apply, the member states should still be given the opportunity, existing since 1993, to opt out by way of national law. Especially in smaller and medium-size businesses, this could be a way to counterbalance business fluctuations and secure jobs. Especially, in economically difficult times, the flexibility of the labor market must be increased. The exception mentioned here is an important instrument for responding to fluctuating demand. It is also important, however, that the applicability of the "opt-out" is not unnecessarily complicated, so that it and the opportunities it affords can be used in practice as a response to the economic situation. This will benefit both the companies, with regard to economic issues, and the employees, with regard to the flexibility of their organization of working hours, and strengthen the labor market. For this reason, AmCham Germany calls for:

- A rectification of ECJ case law by revising the Working Time Directive.
- Inactive on-call duty is not working time.
- The "opt-out" provision must be retained indefinitely.

6. Immigration and Posting of Workers

It remains imperative, in light of the current economic crisis, to open the labor market for foreign specialists. Despite the present economic downswing, the lack of specialized workers will become more acute in coming years for demographic reasons. The recent reformation of immigration law was thus a step in the right direction – but it is not adequate.

Globally-integrated companies need more flexibility to reassign their workers within the businesses as well. It would raise the competitiveness of German businesses and thus secure jobs in Germany if visas and work permits were issued more quickly. Germany should advocate an easier international exchange of personnel on the European level as well as on the national level.

AmCham Germany stipulates:

- A repeal of the German transitional rule concerning a general and comprehensive restriction of the freedom of movement of workers in the European Union.
- A further reduction of the minimum income for highly qualified workers from abroad and unlimited recognition of immigrants' foreign university degrees.

- In the medium term, the introduction of a point system based on need and qualification, making flexible and non-bureaucratic immigration possible.

Following the American “blanket petition” model, the procedures for an international exchange of personnel should also be simplified and accelerated for businesses in Germany by means of a certification for a limited time.

7. Employee Data Privacy

The scandals regarding the protection of employee data privacy involving prestigious companies have shaken the relationship of trust between staff and management in many companies. The misconduct of a few decision makers should, however, not lead to the result that a separate employee data privacy law imposes an excessive burden on companies and further restricts their ability to act.

It would be detrimental to Germany as a location for corporate investment, in an international comparison, if Germany were to go it alone, which would again increase bureaucracy. The new federal government should add to the already existing regulations in the Federal Data Privacy Protection Act (*Bundesdatenschutzgesetz*) proportionately and thus increase legal certainty. In doing so, it must be warranted that:

- Company data can be legally transferred both within Germany and across borders.
- A change to the law protecting the privacy of employee data does not result in a restriction of the tracking of employee performance data.
- It is possible for companies and the like to prevent criminal acts and corruption also in the future by way of data collation.

8. Minimum Wage

AmCham Germany considers neither general minimum wages nor sector-specific minimum wages in Germany to be useful and necessary.

General minimum wages are a basic problem: if they are too high, they wipe out jobs and harm Germany’s competitiveness. If they are too low, they have no effect. Apart from that, a factual minimum wage level already exists on the basis of Unemployment Benefit II (*Arbeitslosengeld II*).

Sector-specific minimum wages are, at best, appropriate only in exceptional cases. It is generally up to the parties with collective bargaining agreements, however, to agree on minimum employment conditions in the individual sectors. The autonomy

of collective bargaining should not be undermined. Sector-specific minimum wages that are set by way of an act of state (statutory instrument) on the basis of the German Posted Workers Act (*Arbeitnehmerentendegesetz*) are thus problematic. Moreover, they make German labor law, which is already confusing, even more complicated. The Posted Workers Act is also not suitable as a means of coping with the minimum wage issue: in itself, it serves as protection from social distortions based on wage competition from foreign posted workers receiving wages below the rate provided for in collective agreements and should not be used by the government to set minimum wages in all possible sectors regardless of the existence of any problems with posted workers.

9. General Equal Treatment

Two and a half years after the introduction of the General Equal Treatment Act (*AGG*), those who apply the law draw the conclusion that legal uncertainty is widespread and that companies have been forced to expend both bureaucratic and financial efforts.

The symbolic legislation of the antidiscrimination directives and their German implementation, exceeding the directives in terms of content and scope, created a bureaucratic and legal challenge for employers, whose expenditures for statements of grounds and argumentation came to € .73 billion already in the initial months in which the General Equal Treatment Act was applicable. Despite expenditures of this amount, it is practically impossible for employers to comply with these unnecessary regulations, which interfere with the principle of contractual freedom. The legal uncertainty caused by the General Equal Treatment Act is too great in Germany currently, also with respect to rulings of lower courts on advancement. Previously rendered court rulings can also rectify the situation in isolated cases, provided that they are consistent. This uncertainty is even fuelled by the European Court of Justice itself: according to the ECJ, discrimination can be present even if nobody has been discriminated against (C-54/07) or employees themselves have not even been obstructed (C-303/06). This opens the floodgates for an abuse of rights by so-called "AGG hoppers" or antidiscrimination associations with the support of the General Equal Treatment Act.

Apparently blinding itself to these effects, the European Commission is even planning an expansion of the scope of the directives within the framework of the proposed "Social Package". The federal government is now requested to stick fast to its negative position on this in order to prevent this from happening and to avoid exacerbating the situation brought about by the General Equal Treatment Act.

10. Employment Agreements Act

German labor law is fragmented and non-transparent, which causes unnecessary risks and costs in practice. Companies must invest a great deal of time and money to find their way through the “forest of laws”, without such laws achieving positive effects on the employment situation. It is not only international companies, however, that need legal certainty and transparency, which can be achieved in the medium term only by way of a simple, accessible, and above all a comprehensible law on employment agreements.

For this reason, AmCham Germany calls for:

- A systematic compilation of all applicable statutory regulations concerning employment agreements (including case law) in one codified law concerning employment agreements. A bundling of existing provisions would not be adequate.

11. About AmCham Germany

The American Chamber of Commerce in Germany e.V. (AmCham Germany) represents the interests of American and German companies in all economic sectors engaged in transatlantic business. Moreover, AmCham Germany functions as the voice of American companies in Germany, which account for approximately 800,000 jobs and over 130 billion Euros in direct investment. Since our founding in 1903, we have dedicated our efforts to promoting trade relations on both sides of the Atlantic. With nearly 3000 members, we are now the largest bilateral business association in Europe

Social and Labor Affairs Committee

The Social and Labor Affairs Committee supports the cause of deregulation of the labor market and more flexible legislation, as well as the development of a transparent legal framework with the goal of maintaining an investor-friendly climate. Its members exchange ideas with policymakers in Berlin and Brussels on a regular basis. The committee also serves as a platform for an exchange of experience and opinions for globally operating companies in Germany.

>> Access Your Global Network.

AmCham Germany's mission is expanding business networks not only between Germany and America, but also promoting further development of international investment, business networking, and unrestricted trade globally.

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