

Labour Policy and Fixed-Term Employment Contracts in Germany

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I. General overview of fixed-term employment in the German labour market

“Traditional Employment Relationships in Flux – Normal Employment Relationships in Retreat”

Part-time employment increasingly widespread.

Ever-increasing fixed-term employment

2008: 85.4 per cent indefinite term contracts
14.6 per cent in fixed-term employment

Below the OECD-average (15.4 per cent), but far more common than, for instance, in Great Britain (5.3 per cent) or the US (4.2 per cent)

Accelerated growth of “atypical” employment over the last couple of years

Fraction of fixed-term workers increased from 4 per cent in 1996 to more than 6 percent in 2006

In 2001 only 32 per cent of new employment contracts represented fixed-term

In 2006 the according number jumped to 43 per cent

II. Historic development of the regulation of fixed-term contracts

Section 620 of the Civil Code:

An employment contract ends when the period of time prescribed by the parties to the contract has come to its end

Deliberate decision by the legislator to leave the task of closing possible loopholes in the legal protection of workers to the courts

Great Senate of the Federal Labour in 1960:

A fixed-term contract can be legally valid only if the fixing of the term does not amount to an “objective evasion” of statutory provisions of dismissal law (in particular the provisions of the Act on Dismissal Protection)

Requirement of an „objective ground”

In 1985: „Short term“ contracts admissible without the need of an „objective ground“

III. Present regulation of fixed-term contracts

Part-Time and Fixed-Term Employment Act of 21.12.2000

Implementation of Council Directive 1999/70/EC of 28.06.1999 concerning the framework agreement on fixed-term work

III. Present regulation of fixed-term contracts

1. General Remarks

Legal Aim

Prerequisites of fixing the term of an employment contract
(section 14)

Assessment that a fixed term contract of employment should be an exception rather than the normal case

Legal Definitions

Employment contract with a term fixed according to the calendar

Employment contract with a term limited by purpose

Employment contract concluded under a condition subsequent

“Undocking” of the Fixing of Terms from Dismissal Protection

Restrictions on the fixing of terms apply irrespective of whether or not a worker falls within the area of application of the Act on Dismissal Protection

III. Present regulation of fixed-term contracts

1. General Remarks

Section 4:

A fixed-term worker may not be treated worse than a respective person working under an unlimited term contract, provided that no sound reason exists to do so

A fixed-term worker has a claim to pay for a given assessment period in accordance to the fraction of work provided by him during that period (so-called pro-rata-principle)

The prohibition of discrimination is particularly relevant in the area of yearly allowances

III. Present regulation of fixed-term contracts

3. Lawful Fixing of Terms

Section 14(1):

Requirement of an “objective ground”

Statutory Examples

- ▶ the need for certain manpower is only temporary (no 1),
- ▶ the term is fixed in order to make it easier for an apprentice or post-graduate to get subsequent employment (no 2),
- ▶ a worker is employed in order to substitute for another worker (no 3),
- ▶ the nature of work justifies the fixing of the term (no 4),
- ▶ the fixing of the term serves the purpose of testing the worker (no 5),
- ▶ grounds which are related to the person of the worker justify the fixing of the term (no 6) ...

III. Present regulation of fixed-term contracts

3. Lawful Fixing of Terms

In particular: The need for certain manpower is only temporary (no I)

“Prognosis decision” based on facts

It must be sufficiently likely that an existing need for certain manpower will cease to exist in the future

It is NOT sufficient an employer is uncertain about what future business developments will look like

III. Present regulation of fixed-term contracts

3. Lawful Fixing of Terms

In particular: A worker is employed in order to substitute for another worker
(no 3)

Prognosis decision with regard to the likely ceasing of the need for a replacement in the future due to the fact that the substituted worker will return

It is NOT required that the fixed-term worker directly or indirectly substitutes the worker being on leave.

- ▶ The employer is free to reorganise the work and to reallocate the according tasks.
- ▶ The employer has to substantiate, however, how the work load was spread between different workers and, in particular, that the allocation of work to be performed by the fixed-term worker is due to the work tasks redefined.

III. Present regulation of fixed-term contracts

3. Lawful Fixing of Terms

Section 14(2):

Admissibility of Fixing of Terms without “objective grounds”

Duration of the contract must not exceed two years

Within the period of two years such contract may be extended three times at most

“Extension” of the existing contract vs conclusion of a new contract

“Prohibition of follow-up”: A fixing of the term of a contract without objective ground is not admissible if sometime in the past (!) an employment contract existed between the parties concerned

III. Present regulation of fixed-term contracts

3. Lawful Fixing of Terms

Section 14(2a):

Contracts concluded by newly established enterprises

It is admissible to fix the term of a contract according to the calendar without objective grounds up to a period of four years from the date when a company was established.

III. Present regulation of fixed-term contracts

3. Lawful Fixing of Terms

Section 14(3):

Contracts concluded with Older Workers

A fixed-term contract can be concluded for five years at most without objective grounds if the worker is older than 52 and has been unemployed for at least four months immediately before conclusion of the contract.

III. Present regulation of fixed-term contracts

4. Agreement on Fixing the Term in Writing

Section 14(4):

The agreement on the fixing of the term of an employment contract must be in writing.

Only the agreement on the fixing of the term and not the contract as such needs to be in writing, however.

III. Present regulation of fixed-term contracts

5. End of Fixed-Term Contracts

Section 15(1):

A fixed-term contract ends automatically as soon as the end of the period of time agreed-upon by the parties has been reached.

Section 15(2):

A contract of employment with a term limited by purpose ends as soon as the purpose has been achieved
but no sooner than two weeks after the employer has informed the employee about the purpose being achieved.

Section 15(3):

A fixed-term contract can be terminated ordinarily if the possibility of an ordinary dismissal has agreed-upon by the parties to the contract or can be derived from an applicable collective agreement

(Apart from that a fixed-term contract can be terminated extraordinarily according to the general rules)

III. Present regulation of fixed-term contracts

5. End of Fixed-Term Contracts

Section 15(5):

If a fixed-term contract is sustained beyond the fixed date or the achievement of the purpose respectively

it is presumed to have been extended for an indefinite period of time

if the employer does not object immediately or does not inform the employee immediately about the achievement of the purpose.

III. Present regulation of fixed-term contracts

6. Legal Consequences of Invalid Fixing of Terms

Section 16:

In case that the fixing of the term of an employment contract is inadmissible, the contract is deemed to be concluded for an indefinite period of time with all other terms of the contract remaining unaffected.

The contract may be terminated ordinarily by the employer not before the intended end of the contract unless an ordinary termination is possible at an earlier time under the terms of the contract.

III. Present regulation of fixed-term contracts

7. Legal Proceedings

Section 17:

If an employee claims that the fixing of the term of an employment contract is invalid, he must lodge his claim at the competent labour court within three weeks after the agreed-upon expiration date of the fixed-term contract.

After the lapse of that period the employee is precluded from filing a claim.

III. Present regulation of fixed-term contracts

8. Other Provisions of the Act

Section 18:

The employer is obliged to inform fixed-term workers about possible opportunities to get employment of unlimited duration.

Section 19:

The employer is in principle obliged to facilitate access by fixed-term workers to appropriate training opportunities.

III. Present regulation of fixed-term contracts

9. Co-determination Issues

- ▶ Fixed-term workers are taken into consideration in calculating the threshold above which works councils may be constituted in the establishment
- ▶ They enjoy both the right to elect a work council and the according right to be elected.
- ▶ The works council has to be informed if the employer wants to recruit new staff members even temporarily only.
- ▶ There is no co-determination right if a fixed-term contract comes to its end due to expiration of the intended period of time
- ▶ The employer must inform „employees´ representatives“ about the number of fixed term employees and the fixed term/unlimited term-ratio in the establishment as well as in the company.

IV. Evaluation of the Present Regulation and Future Prospects

- ▶ „Objective ground“ (not) needed: Advantages and disadvantages of a „mixed system“
- ▶ Possible alternative to loosening of the rules on fixed-term contracts:
Making the application of the Act on Dismissal Protection dependant on two years continuous service with the employer
- ▶ Strictness of the law
“Prohibition of follow-up”
Rigid interpretation of “extension” of an existing fixed-term contract by the courts
Rigid application of the requirement of the written form

Domo arigato gozaimashita
and
Vielen Dank!