unyer GLOBAL ADVISORS

Employment Law
Newsletter

FIDAL

Luther.

Pirola Pennuto Zei

Content

Editorial

Dear readers,

we are very pleased to present you with this issue of our first unyer Employment Law Special Newsletter.

Together with the French law firm FIDAL, we launched the global organisation unyer in May 2021. Four months after its formation, unyer had already expanded into Italy and welcomed the renowned Italian law firm Pirola Pennuto Zei & Associati as a new member. The global organisation of leading international professional services firms is open not only to law firms, but also to other related professional services, particularly from the legal tech sector, enabling advice to be provided on all matters and across all jurisdictions under one international umbrella brand.

In this first issue of our unyer Employment Law Special Newsletter, we are focussing on the EU Directive on transparent and predictable working conditions and describe the progress made in Germany, France, and Italy.

On 23 June 2022, the German parliament approved the draft law transposing the EU Directive on transparent and predictable working conditions in the European Union in the area of civil law. The law came into force on 1 August 2022 and has led to an acute need for action on the part of employers in Germany. It also continues to pose major challenges for many companies three months after it came into force. In this issue, Dr Eva Rütz therefore looks at the initial practical experience gained in implementing the new law and takes stock. In doing so, she provides recommendations for action to be taken by companies regarding issues that are relevant in practice.

In his contribution, Xavier Drouin of Fidal presents the legal situation regarding the implementation of the requirements of the EU Directive in France. In contrast to Germany, no new legal regulations have come into force in France. However, the existing law already substantially reflects the requirements of the Directive. In his contribution, Xavier Drouin presents the key regulations.

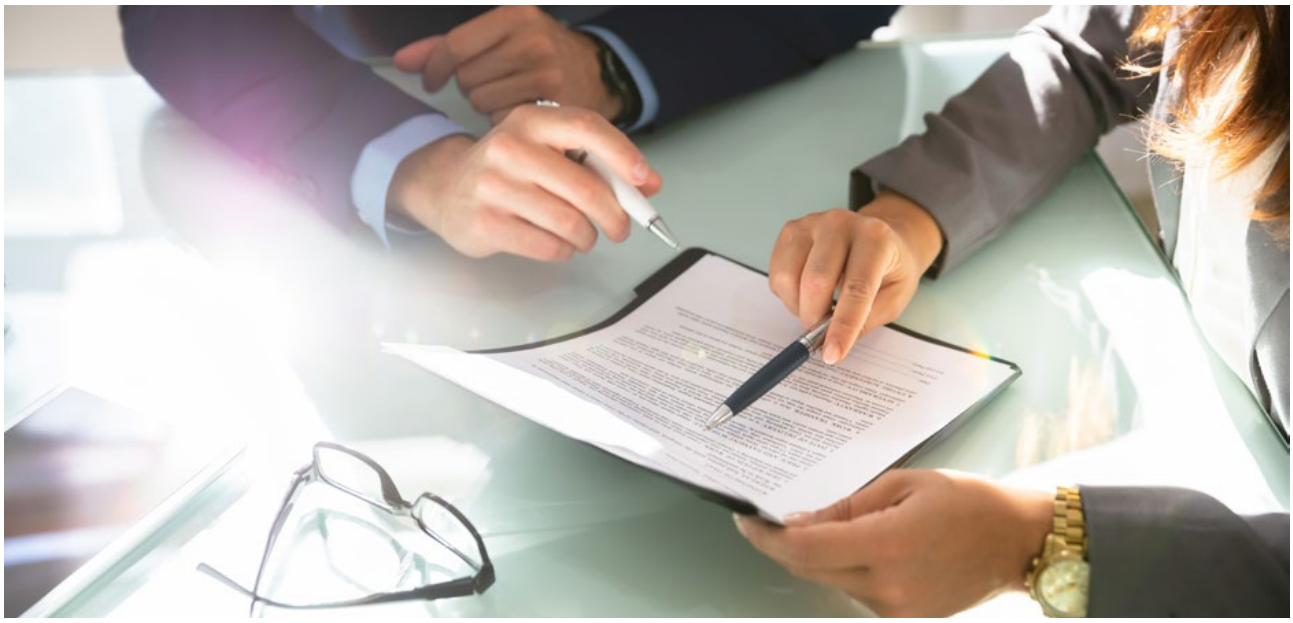
Marco Di Liberto's article sheds light on the legal situation in Italy. Here too, as in Germany, the national legislator has transposed the requirements of the EU Directive into a new law. Marco Di Liberto presents the main provisions of Legislative Decree No. 104 of 27 June 2022 implementing Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union.

We hope that our unyer special newsletter meets with your interest and look forward to updating you on employment law developments and topics from unyer in the future using this new format.

As always, we look forward to receiving your feedback on our topics. Please feel free to contact our authors directly if you have any suggestions or questions. We hope you enjoy reading this issue!

Yours
Achim Braner

Directive on transparent and foreseeable working conditions (ABRL)



Basics:

The ABRL was issued by the European Union on 20 June 2019, and was to be implemented by member states by 1 August 2022. In contrast to the German government, which approved a corresponding draft law on 23 June 2022, which in particular provides for amendments to the Nachweisgesetz and the Teilzeitbefristungsgesetz, the French legislature let the deadline pass. The reason for this can be seen, on the one hand, in the presidential election held at the end of June, but also in the fact that the French legislature has already enacted a not inconsiderable proportion of the amendments adopted in the directive. This means that the implementation of the directive has been given a low priority by the French side. The following examples are intended to illustrate this.

Art. 18 ABRL Protection against Dismissal and Burden of Proof

Art. 18 I ABRL provides that a dismissal by the employer is not valid if the employee has made use of the rights provided for in the Directive. According to Art. 18 II, in such cases the employee may demand that the employer state these reasons in sufficient detail. This must be done in writing.

In the case of employment contracts of indefinite duration, the "Code du travail" pursuant to Art. L. 1232-6 generally requires a letter of termination. Likewise, a legitimate motive is required, which must be stated. This can be a personal or an economic reason. The personal reasons are not listed in the law due to their nature, however, reasons such as poor performance or breach of duty from the employment relationship are to be understood. Only these reasons listed in the termination letter are to be considered as relevant reasons of the employer. Since the employee is here asserting his rights granted by the EU Directive, this motive of the employer cannot be subsumed under the personal grounds for termination of the "Code du travail". The termination would be judged unfounded.

Conclusion: It can therefore be concluded that it does not appear necessary to implement Art. 18 of the ABRL or that the French legislator has already taken fundamental measures that go beyond this.

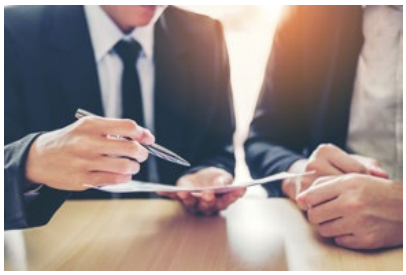
Permanent employment contracts in France

According to Art. 4 and 5 ABRL, the employer has to communicate certain information in writing to the employee within a period of seven days after the first working day. There is no such provision in the "Code du travail". An oral employment contract for an indefinite period is possible in principle. In such cases, the pay slip provides information. In practice, this is very rarely the case. Usually, this information must be provided in accordance with the collective wage agreements. Nevertheless, the French legislator should demand that the information be specified here.

As an absolute exception, a written form is required for the probationary period

Art. 8 I ABRL requires a probationary period of a maximum of six months. The probationary period in France according

to Art. L. 1221-19, depending on the case, between two and four months or eight months in the case of a one-time recurring probationary period for executive employees. This exceeds the maximum probationary period of six months required by the Directive. However, the Directive again permits a longer probationary period than six months in exceptional cases in Art. 8 III ABRL, provided that this is justified by the nature of the activity or is in the interest of the employee. This means that executive employees could be regarded as an exception in the sense of Art. 8 ABRL. Thus, Art. 5 I ABRL also appears to be fulfilled.



Fixed-term employment contracts in France

Art. 4 II e ABRL requires the statement of the end date or the expected duration of the employment relationship in the case of fixed-term employment relationships. While the "Code du travail" even requires both for the employment contract without alternative, in addition to the written form requirement. Contrary to the permanent employment contracts, the information required in Art. 4 ABRL, according to Art. L. 1242-12 of the "Code du travail" has to be included in the contract. Within a period of two working days after the employment, the employment contract with this information must be handed over to the employee. Thus, the obligation of Art. 5 I ABRL, according to which the information about the necessary data must be communicated between the first working day and the seventh calendar day at the latest, is fulfilled.

With regard to the probationary period, Art. L. 1242-10 of the "Code du travail " also provides for a calculation of the probationary period in proportion to the expected duration of the contract.

Likewise, Art. 12 of the ABRL requires that employees should be able to request a form of employment with predictable and safe working conditions from their employer after completing their probationary period and provided they have been employed by the same employer for six months.

In France, on the other hand, a fixed-term employment relationship is possible only in rare cases. According to Art. L. 1242-1 of the "Code du travail", one of six factual reasons must be given (e.g. seasonal work or substitution of another employee).

Multiple employment/ Art. 9 ABRL

In France, an exclusivity clause is often included in the employment contract, according to which the full-time employee may not work for another employer without authorisation.

The French Court of Cassation allows the validity of an exclusivity clause if it is indispensable for the protection of the legitimate interests of the company, justified by the nature of the task to be performed and proportionate to the objective pursued.

Nevertheless, the "Code du travail" does not expressly provide for the validity of exclusivity clauses.

Thus, unless an exclusivity clause intervenes, multiple employment as provided for in Art. 9 I ABRL applies. Furthermore, Art. 9 II ABRL mentions the possibility for the Member States to lay down conditions according to which such a clause may be applied for objective reasons, e.g. because of business secrets or in order to avoid conflicts of interest.

This means, therefore, that an interpretation in conformity with the Directive is quite conceivable, even if the scope for including the clauses in the employment contracts is limited.

Conclusion: In one way or another, the French legislator has thus already implemented the measures required by the directive in law. There are still some gaps, but one should not pay too much attention to these gaps.

Author

Xavier Drouin
Fidal

Legislative decree no. 104 of 27 June 2022, "Implementation of Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union"

1. Scope and exclusions

The Decree extends the reporting obligations also to workers employed under 'non-standard' contracts. Therefore, employers who have entered into occasional employment or quasi-employment contracts (coordinated and continuous collaboration contracts) are required to comply with these obligations.

On the other hand, the new rules do not apply to employers who have entered into employment relationships with professionals as referred to in Articles 2222 and 2229 of the Italian Civil Code, short-term relationships, agency and commercial representation contracts, as well as employment relationships with the employer's spouse, blood relatives and in-laws (up to the third degree of kinship) cohabiting with him.

2. Content of the information requirements

2.1. Minimum requirements relating to working conditions

Below are the main information requirements under the decree:

a. Place of work
b. Employer's registered office or address for service
c. Employment level and position
d. Start date of work
e. Type of work relationship
f. Right to employer training
g. Amount and possibility of using paid leave in addition to holidays
h. Planning of regular working hours and terms and conditions of overtime in the event of wholly or partly predictable organisation of work
i. If the working activities cannot be planned beforehand, the information on the organisation of work and the possible changes in work planning, on the minimum number of guaranteed hours and the relevant remuneration as well as on the hours and days on which work must be carried out and the minimum advance period of notification by the employer of the performance of work.
j. Mention of the social security and insurance authorities to which contributions are paid.

2.2 Use of automated decision-making or monitoring systems

In addition to the above, workers shall be provided with information on the possible use of automated decision-

making or monitoring systems for the purposes of coordination, control and management of the employment relationship. The introduction or modification of this shall be the subject of specific information rights for company trade union representatives or, failing that, for the comparatively more representative national trade union associations.

3. Manner, form and deadline of the notification

The employer will have to fulfil the information obligations under the decree in a clear and transparent manner, in paper or digital form.

3.1. For work relationships entered into effective 13 August 2022:

a. Upon establishing the work relationship (or signature of the work contract), and before the start of working activities, the written work contract or a copy of the digital notice of establishing the work relationship shall be delivered.
b. Any information not yet provided at the time of employment will have to be supplied in a subsequent written document as follows:
   - Information on the identity of the parties and the workplace: within seven days of establishing the work relationship
   - all other information: within a month of establishing the work relationship

3.2. For work relationships entered into before 1 August 2022:

The information obligations also apply to employment relationships started before 1 August 2022, but only upon the written request of the employee; the employer must provide the information listed above (updated to the date of the request), in paper or electronic form, free of charge and in a transparent, clear and complete manner, within 60 days of receiving the request from the employee concerned.

3.3. "Changes" in the working conditions previously stated

The employer must inform workers of 'any changes' to the terms and conditions covered by the information obligations no later than the first day on which such changes enter into force in the manner described above, with the sole exception of the case where the information provided can be derived from laws, regulations or collective agreements that have been amended (in which case, there will be no obligation on the employer to inform the worker).

4. Obligation to keep proof of the notification of the information

The employer is required to retain proof of transmission or receipt for a period of five years after termination of the employment relationship.

5. Minimum requirements relating to working conditions

As mentioned above, the provisions below do not apply to employment contracts only, but extend to self-employment contracts under Article 409(3) of the Code of Civil Procedure and Article 2(1) of Legislative Decree No. 81 of 15 June 2015.

5.1. Probationary period

The decree confirms that the probationary period may not exceed six months, unless national collective labour agreements provide for a shorter period.

Moreover, in the event that the employment relationship is suspended (such as absence due to illness, absence due to an accident, compulsory parental leave), the probationary period will be extended by a period of time corresponding to the duration of the employee's absence.

The new rules introduced for fixed-term employment relationships concern the proportionality between the duration of the probationary period and the duration of the contract and the express provision that there will be no probationary period in the event of the renewal of a fixed-term contract for the performance of the same tasks.

5.2. Additional employment relationships

The decree introduced the possibility for workers to perform another job (within the limits of the duty of loyalty set out in Article 2105 of the Civil Code), provided that the working time of this other job does not coincide, even partially, with the agreed working time of the first job.

In this case, the employer may not treat the employee less favourably or oppose his or her performance of additional work, unless this would lead to (a) a risk to health and safety (including non-compliance with the rules on the length of rest periods) and/or (b) the risk that a public service would not be carried out in full and/or (c) a conflict of interest with the main work activity.

5.3. Minimum predict ability of working activities

For work relationships where neither the working hours nor the place of work have been determined and where the working schedule is principally established by the employer, the latter may not compel the worker to carry out his or her working activities unless the following conditions are concurrently met:

a. Work is carried out within pre-established working hours and days, and
b. The worker is informed reasonably in advance by the employer about the task or job to be carried out.

Lacking either condition, the worker may refuse to do the job without consequences for him or her (including disciplinary measures).

5.4 Transition to a more predictable, secure and stable job

A worker with not less than six months' seniority with the same employer or principal and who has completed any probationary period may request in writing, if available, a form of employment offering more predictable, secure and stable conditions.

Within one month of receiving such a written request, the employer or principal shall provide a reasoned written response. In the event of a negative response, the employee may submit a new request after six months.

In the event of repeated requests by the worker, companies with fewer than fifty employees may reply orally if the reason for the reply remains unchanged. Companies with more than fifty employees will still have to provide a written answer.

5.5 Training obligations

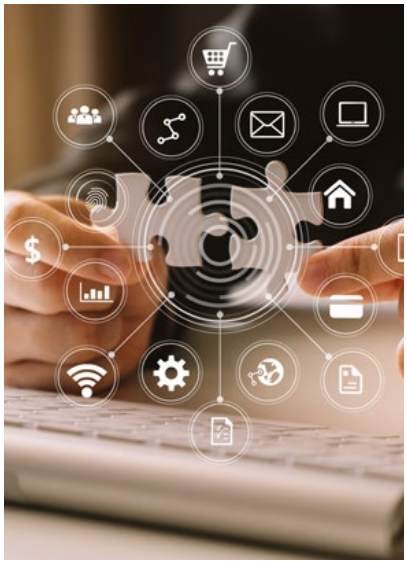
Should employers be required to provide workers with the training necessary to perform their duties, such training will be provided free of charge and will be regarded as working time and, if possible, will be carried out during such time.

6. Workers' protection

6.1 Quick dispute resolution methods

A worker claiming a violation of his or her rights under the decree as described above, will have the possibility to:

a. attempt the conciliation before the territorial offices of the National Labor Inspectorate;
b. apply to the conciliation and arbitration boards;
c. apply to the arbitration chambers set up within the certification bodies pursuant to article 76 of legislative decree no. 276 of 2003.



6.2. Report of punitive or harmful conducts to the National labor Inspectorate

Workers and their representatives may report to the National Labor Inspectorate if they believe they have been subjected to punitive or damaging behaviour following the filing of a complaint or of having initiated proceedings, including out-of-court proceedings, for the protection of the rights enshrined in the Decree and in Legislative Decree No. 152 of 1997. 152 of 1997.

6.3. Protection against dismissal or termination by principal and burden of proof

Dismissal and retaliation against a worker who has exercised the rights established by the Decree and Legislative Decree No. 152 of 1997 is prohibited. 152 of 1997.

Dismissed workers or recipients of equivalent measures taken against them by the employer or principal may expressly request to provide the reasons for such measures.

The employer or principal is required to provide the reasons within seven days of the worker's request.

If a dismissed worker files a complaint with the court in this regard, the employer or principal has the burden of proving that the dismissal or equivalent measures taken against the worker are not retaliatory in nature.

7. Fines

In the event of failure to comply with the above-mentioned information obligations, the employer is liable to a fine of between EUR 250 and 1,500 for each employee involved.

On the other hand, failure to comply with information obligations relating to the use of automated decision-making or monitoring systems will result in a fine of between EUR 100 and EUR 750 per month, with the sanctions increasing in proportion to the violations per number of workers.

Author

Marco Di Liberto
Pirola

Report on the experience gained regarding amendments to the Act on Written Evidence of the Essential Conditions Applicable to an Employment Relationship

The legislator had taken advantage of the summer recess to enact amendments to the Act on Written Evidence of the Essential Conditions Applicable to an Employment Relationship (Nachweisgesetz, NachwG) that entered into force as of 1 August 2022. The main new features were an extension of the scope of application to include (almost) all employees (including those employed for a short period; in principle also trainees), a comprehensive expansion of the list of conditions that need to be proven and the introduction of a fine of up to EUR 2,000 per violation.

The last point in particular, the fine per violation, had caused a great deal of unrest at first glance – especially at companies with large numbers of employees. Nevertheless, our message – after having spent a lot of time on providing detailed advice this summer - is that "things are not as bad as they seem!" and above all: "Don't panic!"

Ultimately, the situation can be summarised as follows. There is a new legal regulation in the form of a pure extension of the scope of the law that results in particular in additional administrative expenditure of a temporary nature. Admittedly – this is a nuisance and sometimes, depending on how seriously the company has taken the already existing requirements of the NachwG, also time-consuming. However, it is – now the good news - a legally solvable problem.

Furthermore, a sense of proportion must certainly be kept with regard to the form of implementation. The new law should not be applied in too much detail, especially as there is no specific case law on key points.

We would like to present the most important points to be considered, which have emerged as advisory focal points in the past months.

Amending the employment contract vs. notification letter

The starting point for discussions with clients where they want to incorporate the new legal requirements was always the discussion of the question – shall we amend all employment contracts? Do we use this as an opportunity to revise them anyway? Or do we switch overall to a one-page notification letter outlining the essential working conditions set out in the new list of conditions that need to be proven?

In the case of very conservative companies, where all employment contracts, including supplementary and amendment agreements, are concluded in writing anyway, the decision was usually made to incorporate the key adjustments directly into the employment contracts, whereas companies that were, for example, strongly digital and

"only" signed their employment contracts digitally (except for fixed-term employment contracts) (e.g., via DocuSign) tended to develop a detailed sample notification letter that was then delivered to employees in the required written form (where necessary with electronic proof of delivery with regard to the response). A power of attorney is possible in the case of such a notification letter; the original of the power of attorney document does not have to be attached because it is a declaration of knowledge and not a declaration of intent. It cannot therefore be rejected.

Both approaches have their advantages and disadvantages. If the required changes are integrated into the employment contract, the contract will be up to date. We do not share the fear regarding restrictions of the right to issue instructions due to the amendments to the NachwG, because these clauses can also be formulated in such a way (e.g., with regard to working time) that the right to issue instructions is not restricted even by the descriptive provision in the employment contract. The only thing that needs to be ensured is that amendments and supplement agreements are also concluded in writing (this is particularly important in the case of salary increases, which must be communicated in writing in any case). The advantage of the notification letter is that it provides the option of unilaterally submitting a pure declaration of knowledge (without being legally binding, but which certainly would have a factual and procedural binding effect). Management of the process of the administrative conversion lies with the company; Only proof of receipt must be ensured. Furthermore, it is possible to work on a centralised basis with a sample letter that can be adapted in each case (depending on the type of contract and job descriptions).

Relevant amendments that are key in practice

Some specific cases have emerged that represent the key points relating to the amendments to the employment contract (or focus in the notification letter). This relates to the description of the remuneration components, the possibility of and conditions for ordering overtime and the description of the termination process. Otherwise, the other points have typically already been formulated in a relatively comprehensive manner in the employment contracts – at least from the point of view of compliance with the requirements of the NachwG.

We are currently opting for a restrictive approach with regard to the description of the termination process (description only of the written form, the time limit – without "copying the text of the law", mention of the deadline for bringing an action), because a great deal is still currently acceptable at least now (which is ultimately relevant for the question of the imposition and the amount of the fine). This description should be kept as streamlined as possible and, in our opinion, should also only be given for the action for unfair dismissal variant (and not the action to terminate a fixed-term employment contract).

Otherwise, in the case of one point, it may be advisable as an exception to even use a separate notification letter for reasons of practicality - simply because of the volume of text. According to the inquiries we have received, this relates in particular to the point regarding the description of a shift system, insofar as this is complex and, as an exception, is not governed in a works agreement.

Please note with regard to company pension schemes that explanations only have to be provided in this case, if a pension fund is used. In all other cases, the employer is not subject to the obligations to provide written information, because they require the pension provider itself to do so under insurance law aspects.

References should be used extensively where possible to avoid having to provide lengthy explanations. This is also possible to a large extent – especially in the case of existing collective bargaining arrangements. However, in cases that touch cross-border issues (especially overseas postings), please note that the possibility of using a blanket reference is then severely limited.

Dealing with old cases

All advice provided by us has mainly dealt with cases where new employees have joined the company from 1 August 2022 onwards, solely because of the time urgency involved. It should be noted above all in this regard that we consider uniform notification at a single point of time (and not in a possible staggered form, as the law would generally allow) to be practicable; all the more so if notification is provided via the written employment contract. Written information provided at different points in time only creates superfluous additional work; the environment will also thank you for streamlining the process.

If a notification letter has been used, it is a good idea to use it for old cases as well, i.e., for existing employees who now need to be notified under the amended NachwG. It may therefore also be advisable to draft such a notification letter in addition to an amended employment contract as a precautionary measure for these cases.

However, in our opinion, it should be considered from a cost perspective as to whether such a notification letter

should be drafted in addition to amending the employment contract only because of the existing employees. At any rate, we are not aware of any case to date in which an employee has actually made such a request under the new legal regulation. If he/she did so, the employer would nevertheless have to comply with this request within seven days. It is possible that such a wave of information requests could be triggered, for example, by works councils or trade unions. We have not yet been able to identify this in practice; especially since the works council elections have in any case taken place in the meantime for the current election period in most cases in a legally unassailable manner. This request for information from existing employees is probably more of a theoretical threat.

Other to-dos

One should also not expect the formal procedure too hastily in the event of a request to become a permanent employee or for a change in working time or an application from a temporary worker to conclude an employment contract. Ultimately, in these scenarios - as is otherwise known from part-time and fixed-term employment law or also from the Temporary Employment Act – requests are not deemed to be granted (Fiktionswirkung) if certain deadlines or justification requirements are not met. If the company is faced with such a request for the first time, it will be sufficient to address this issue then, rather than out of anticipatory obedience.

In our opinion, only one material question will be relevant: which probationary period is appropriate for a fixed-term employment relationship. This must be reasonable, otherwise the probationary period is invalid; which, of course, still does not eliminate the requirement of the six-month waiting period for the applicability of the Protection against Dismissal Act (Kündigungsschutzgesetz - KSchG). If the probationary period were unreasonably long, the only consequence would be that the regular notice period would apply instead of the shortened probationary period notice period. This is a manageable "penalty."

There are therefore two rules of thumb to keep in mind: The easier the job, the shorter the probationary period must be. In the case of a fixed-term contract without a material reason, which can be agreed for a maximum of two years, a probationary period of six months is only justified in the case of the maximum fixed-term period (and in any case if the work is of a certain complexity). We consider a maximum of three months to be appropriate for a fixed-term contract (initially) of one year. In our opinion, anything with a duration less than that should have a probationary period of one to two months at the most - but two months only for somewhat more complex activities.

Conclusion

Please remain calm in particular and only make preparations for those points that have to be immediately dealt with from a legal perspective. This is essentially the question of how to deal with new hires. In our view, the request for notification from existing employees is secondary. Concrete preparations regarding templates etc. should only be made here when this request is actually made. In all other respects, sample texts, e.g. for requests from temporary staff to become permanent employees, requests from employees under fixed-term contracts to become permanent employees, etc., are also desirable, but are not mandatory given the fact that in the event of violations by the employer requests are not deemed to be granted. At most, employers should be concerned about the question of the appropriateness of the agreed probationary period in the case of fixed-term contracts, because in the event of termination, a shorter period is significantly more favourable from an economic point of view.

Author

Dr Eva Rütz, LL.M.
Luther

Authors of this issue

Fidal

Xavier Drouin
Partner
Strasbourg
T + 33 (0)3 90 22 63 30
xavier.drouin@fidal.com

Luther

Achim Braner
Lawyer, Certified Specialist in Employment Law, Partner
Frankfurt a. M.
T +49 69 27229 23839
achim.braner@luther-lawfirm.com

Dr Eva Rütz, LL.M.
Lawyer, Certified Specialist in Employment Law, Partner
Dusseldorf
T +49 211 5660 27048
Cologne
T +49 221 9937 0
eva.ruetz@luther-lawfirm.com

Pirola

Marco Di Liberto
Lawyer, Certified Specialist in Employment Law, Associate Partner
Milan
T: +39 02 66951
marco.di.liberto@studiopirola.com

Legal information

Published by: unyer (a Swiss Verein) based in Zurich, Switzerland, is a global association of law firms providing legal services to clients worldwide through its member firms and affiliates, including Fidal, Luther and Pirola (“Member Firms”).

Anna-Schneider-Steig 22, 50678 Cologne, Germany

Telephone +49 221 9937 0

Fax +49 221 9937 110,

contact@luther-lawfirm.com

Responsible for the content (V.i.S.d.P.): Achim Braner

Luther Rechtsanwaltsgesellschaft mbH

An der Welle 10, 60322 Frankfurt am Main, Germany

Telephone +49 69 27229 23839

achim.braner@luther-lawfirm.com

Picture credits: xartproduction / Adobe Stock: page 1; iStock / Adobe Stock: page 4; iStock / Adobe Stock: page 5; iStock / Adobe Stock: page 6; drubig-photo / Adobe Stock: Seite 1; mrmohock / Adobe Stock: page 8; foxyburrow / Adobe Stock: page 9; denisismagilov / Adobe Stock: page 10; Bits and Splits / Adobe Stock: page 11;

Disclaimer

Although this newsletter has been carefully prepared, no liability is accepted for errors or omissions. The information in this newsletter does not constitute legal or tax advice and does not replace legal or tax advice relating to individual cases. Our contact persons at the individual locations are available for this purpose.

unyer GLOBAL ADVISORS

unyer (a Swiss Verein) based in Zurich, Switzerland, is a global association of law firms providing legal services to clients worldwide through its member firms and affiliates, including Fidal, Luther and Pirola ("Member Firms").

These Member Firms are legally independent of each other. unyer itself does not provide any legal or other advisory services to clients.

www.unyer.com

FIDAL

Luther.

Pirola Pennuto Zei