TWO PAGER

Key facts about a specific employment law topic

Pusch Wahlig Workplace Law

Written Warning

1. When can a written warning be issued?

A written warning can be issued when an employee violates his main or ancillary contractual duties, for example in case the employee is late to work despite a pre-defined working time, is on sick leave and fails to submit a medical certificate in time/at all, does not fulfil a task within a given deadline or behaves inappropriately towards colleagues or superiors. Whether a concrete violation of duties qualifies only for an informal warning (Ermahnung), a written warning (Abmahnung) or even a termination of employment, is subject to the circumstances of each case and should be thoroughly evaluated before any measures are taken against the employee.

2. Who can issue a written warning?

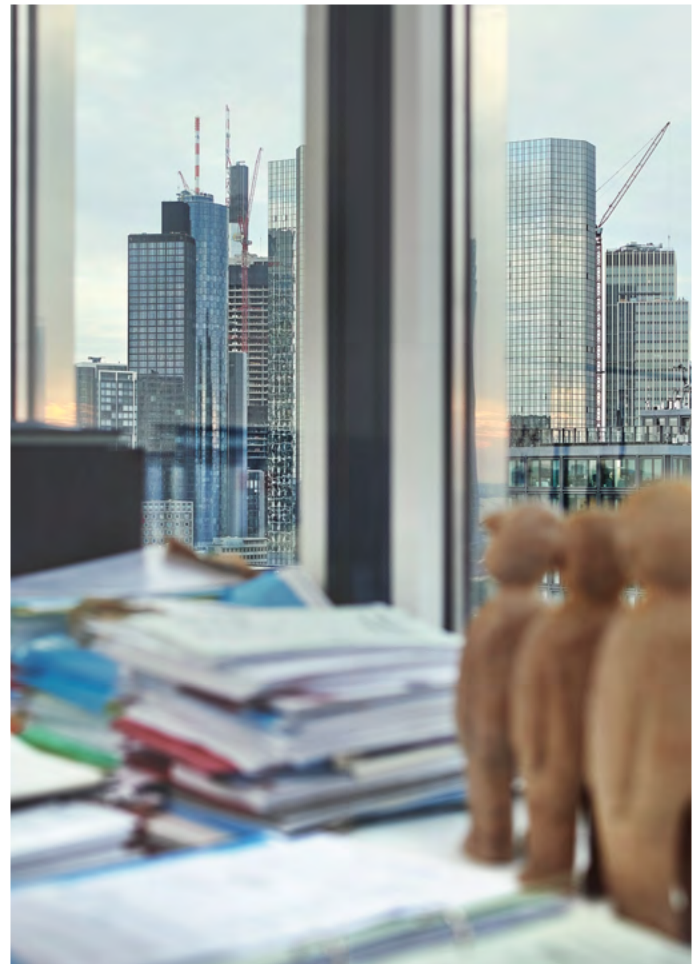
A written warning can be issued by any person within the company who has a disciplinary right of instruction towards the employee in question. In case of doubt, a legal representative of the company should sign the written warning.

3. What relevance does a written warning have under German labour law?

A written warning has two purposes: to sanction the employee for a concrete violation of duties committed in the past and to warn the employee that a repeated violation of duties may lead to further sanctions, up to and including the termination of the employment relationship. By issuing a written warning, the employer forfeits his right to issue a termination based on the concrete violation of duties, which was subject to the written warning.

Before issuing a termination for behavioural reasons (verhaltensbedingte Kündigung), it is in most cases necessary to give a written warning to the employee. In case the employee repeats the same conduct despite the warning, there may be sufficient grounds for a termination. A termination for behavioural reasons issued without a (valid) prior written warning is generally invalid. However, there is no fixed rule as to how many written warnings are required before a termination can be issued. The often-heard rule of thumb whereas a termination for behavioural reasons is possible after three written warnings have been issued to the employee has no legal grounds.

As an exception, a written warning can be obsolete before issuing a termination for behavioural reasons if the violation of duties committed by the employee was so severe that it is unreasonable for the employer to continue the employment relationship and the employee had to be aware of this. This exception for example applies in cases of (severe) theft/fraud to the detriment of the employer, sexual harassment at the workplace or the employee's persistent refusal to perform work. However, a weighing of all aspects of the case is required in order to determine whether a written warning is obsolete and a termination for behavioural reasons can be issued straight away. If a court later comes to the conclusion that a prior written warning would have been necessary but such warning was not issued before issuing the termination, then the termination is invalid. Due to the case-by-case assessment, the necessity of a prior written warning should be thoroughly reviewed based on the facts of the case before issuing a termination for behavioural reasons, taking into account German case law on similar cases, if any.



4. What are the formal and content-related requirements of a legally effective written warning?

There is no legal requirement to give a written warning in writing. However, we highly recommend to provide a written letter, which is expressly named “written warning” for evidential purposes. There is also no specific timeframe within which the written warning must be issued after the employer became aware of the employee’s violation of duties. However, the purpose of the written warning to warn the employee that a repeated violation of duties may lead to further sanctions, up to and including the termination of the employment relationship, relativizes itself over time. Also, the employer’s right to issue a written warning can forfeit if the employee could trust that the employer would not make use of this right based on time passing and the employer’s conduct towards the employee. In light of this, we recommend issuing a written warning in due course after becoming aware of the employee’s violation of duties.

Furthermore, there are strict requirements for the content of a written warning, in order to have the employee’s breach of duties properly documented. A written warning has three elements: (1) the description of the employee’s conduct, which shall be sanctioned through the written warning; (2) the request to adjust this conduct; and (3) the warning about further consequences for the employment relationship in case the conduct is repeated. The warning letter should be structured accordingly.

It is of high importance that the breach of duties the employee is accused of is explained and documented very clearly in the written warning and as concrete as possible. In case several breaches shall be sanctioned, a separate warning letter should be issued for each breach. Courts review each breach of duties stated in a written warning separately. In case the written warning does not hold up to the legal requirements only with regard to one of several breaches stated in the warning, the warning letter as a whole needs to be removed from the employee’s personnel file and has no further legal relevance with regard to a potential future termination.

5. Does the works council, if existing, have to be heard before a written warning is issued?

No, issuing a written warning is not subject to works council co-determination.

6. What legal action can an employee take against a written warning that is unjustified from his point of view?

The employee can file a law suit in front of the labour court requesting the removal of the written warning from his personnel file. There is no deadline for such law suit. The court reviews whether the written warning observes the formal and content-related requirements explained above. The burden of proof in this regard is on the employer.

7. How long may a written warning be kept in the employee‘s personnel file?

When an employee did not successfully challenge a written warning in court, there is no legal obligation to remove it from the employee’s personnel file after a specific timeframe. Generally, written warnings can therefore be kept in the personnel file as long as it is not excluded that they may be relevant in the future, for example in case of a termination of the employment for behavioural reasons.

This Two Pager is for general guidance only. It does not contain definitive advice.
If you have any questions, please contact Dr. Jochen Keilich, keilich@pwwl.de.

PROUD MEMBER OF
L&E GLOBAL
Alliance of Employers' Counsel Worldwide