



Vacation entitlements: Germany & Spain

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1. How much vacation are employees entitled to?



The statutory minimum vacation in Germany is always as many days as employees can take 4 weeks off per year:

- 6-day working week: 24 days of vacation
- 5-day working week: 20 days of vacation
- 4-day working week: 16 days of vacation
- 3-day working week: 12 days of vacation, etc.

In Germany, employees' vacation entitlements are governed by the Bundesurlaubsgesetz (BUrlG). § 3 (1) BUrlG regulates the statutory minimum vacation, i. e. the minimum to which every employee is entitled. In this respect, § 3 (1) BUrlG provides that every employee is entitled to at least 24 working days of vacation per year. However, it is important to note that this regulation assumes a 6-day working week. If employees work fewer than 6 days per week, the minimum vacation entitlement is also reduced: the statutory minimum vacation in Germany is always as many days as employees can take 4 weeks off per year.

In addition, there may be statutory additional leave, for example for severely disabled persons.



In Spain, employees' vacation entitlements are governed by the Workers' Statute. It regulates the statutory minimum vacation, i. e. the minimum to which every employee is entitled. In this respect, Article 38 provides that every employee is entitled to at least 30 calendar days of vacation per year, that means, 22 working days, in other words, 2.5 calendar days/1,8 working days per month worked. In addition, the CBA, the individual contract or a collective agreement can extend this period.

Something that should be highlighted: Part-time employees will be entitled to the same vacation days as full-time employees, but they will receive their salary based on the hours worked (proportional rule applies).

2. Are there differences between statutory minimum leave and contractual additional leave?



Employers may also grant additional contractual leave. Unlike the statutory minimum leave, this is subject to the freedom of disposition and can be designed in a more employer-friendly manner. In practice, it is common for employers to grant contractual leave in addition to statutory leave. In most cases (depending on the respective industry), employees have a total of 25 – 30 days of vacation per year in a 5-day week.



Employers may also grant additional contractual leave. Unlike the statutory minimum leave, this is subject to the will of the parties and it can be designed in a more flexible way. It is common practice, in certain sectors, to grant contractual leave in addition to statutory leave to retain or attract talent.

3. How are employees paid during vacation?



The amount of the vacation pay is calculated according to the average earned income of the last 13 weeks before the start of the vacation (§11 BUrlG). However, not only the basic salary is included in the calculation, but also additional payments, provided that the employees receive these regularly.

To **be taken into account** when calculating vacation pay (for example):

- **Basic salary (also piecework wages, which can fluctuate)**
- **Allowances and supplements (e.g. for holiday, night or Sunday work, but also hazard pay)**
- **Bonuses (on a monthly basis etc.)**
- **Commissions**

Not to be taken into account when calculating vacation pay (for example):

- **Overtime payments**
- **One-time payments (such as one-time bonuses, anniversary bonuses, etc.)**
- **Tips**
- **Travel costs and expenses**



- Annual vacation days must be paid according to the employees' regular salary. This is also applicable to part-time employees, as they will receive their regular salary, but it will be proportional to the hours worked.
- During the annual leave, employees are entitled to receive i) their fixed salary and ii) an average of the variable remuneration received during that year (if this variable remuneration has been received during at least 6 out of the 11 preceding months).
- Employees with variable working times would be also entitled to an average of the working time done during the year in question.

4. Who decides when vacation is taken?



- In principle, § 7 BUrlG stipulates that the employer must grant leave. Granting vacation is therefore a duty of the employer. However, employers must take the wishes of their employees into account when determining vacation.
- The order does not matter here. This allows the employer to plan the timing of the leave and communicate it to the employee. The employee can then object if he/she has other wishes regarding the location and distribution of the vacation. The employer would then have to take these wishes into account and weigh them against the interests of the company.
- In practice, however, a different order is common: Employees usually apply for their vacation and the employer approves the vacation. The employer can refuse the employee's request for the location of the vacation if there are conflicting urgent operational concerns.
- Operational interests that may be considered when planning leave include:
 - considerable personnel bottlenecks
 - special times, e.g. school vacations for a cleaning staff in a school, during the lecture period of a university, in a seasonal business during the season, special high times such as in the closing sale, in the Christmas season
 - significant absences of other employees due to illness



- By mutual agreement between the employer and the employee. However, CBAs can also fix the corresponding vacation period or it can be established by agreement between the company and the legal representation of the employees. In all cases, the employee will be entitled to know their corresponding vacation days at least 2 months prior to the beginning of the vacation period, unless the CBA established a longer period.
- Vacation days cannot be replaced with a payment in lieu; employees are entitled to the actual time off. An agreement for the mentioned payment will be null and void.
- In case the employer and the employee cannot reach an agreement about the vacation period, the employee could file a complaint before the employment court (statute of limitations of 20 days from the day after on which the company denies the employee's petition) and the labor/employment court shall set the date for the corresponding entitlement and its decision shall not be subject to appeal.

5. What happens if the employer does not respond to a leave request?



- Employees may not simply take their vacation on their own authority. They must request the leave from the employer and the employer must first approve it. Only then may employees take their leave. If employees stay away from work without this approval of the vacation by the employer, this constitutes a breach of duty under the employment contract and may lead to dismissal.
- If an employer refuses a justified request for leave without good reason or does not respond to the employee's request at all, employees can sue for their claim in the labor court. If the request is urgent, for example because a booked trip is imminent, the leave entitlement can even be enforced by means of an interim injunction.



In the event that the employee takes a leave without the employer's authorisation, this would be an unjustified absence from work and as there is no document to prove it, the employee may be sanctioned or even dismissed. If the employer fails to answer the employee's request, the employee could file a complaint following the procedure described in section 4.

6. When does vacation time expire? Can vacation entitlements be carried over to the next year?



Granting vacation is a duty of the employer. For this reason, employers in Germany have far-reaching obligations to collaborate when it comes to the expiration of vacation.

§7 (3) BUrlG: vacation must be granted and taken in the current calendar year. A transfer of vacation to the next calendar year is only permitted if urgent operational or personal reasons justify this. In the case of such a transfer, the vacation must be granted and taken until March 31st = transfer period.

However, the Bundesarbeitsgericht (= Federal Labor Court) recently further developed German vacation law in accordance with EU law. The court made it clear that companies are obliged to enable their employees to exercise their vacation entitlement by fulfilling their obligations to request and inform them about those. Companies must provide information about existing vacation entitlements + their expiration.

If companies do not comply with this obligation,

- vacation entitlements do not expire at the end of a calendar year or in the permissible transfer period (Something different can only apply under certain circumstances to employees who were prevented from taking their vacation for health reasons from the beginning of the vacation year until March 31st of the second calendar year (following the vacation year)).
- vacation entitlements do not expire after the usual limitation period: In Germany the normal limitation period for most claims is 3 years, beginning at the end of the year in which the claims arose. This means that claims become time-barred after that if they have not been asserted. Normally, this limitation period would also apply to vacation entitlements. However, with the latest case law, it is clear that this statute of limitations only begins at the end of the calendar year in which the employer informed the employees about their specific vacation entitlement and its expiry dates.

Note: Employers should urgently fulfil their obligation to cooperate, otherwise vacation entitlements will never expire in cases of doubt.

Employers should therefore

- inform every employee on time about how many vacation days they are still entitled to (i.e. individually for each employee).
- ask them to apply for their vacation on time so that it can be taken in the current calendar year.
- inform them about the consequences of not taking their vacation on time, which is their expiry on the end of the year (or, if that is the case, after the permissible transfer period).
- There are only a few exceptions to this; for example, vacation entitlements already existing before parental leave cannot become time-barred during parental leave, even if the employer complies with its obligations to cooperate.



- Vacation days should be used within the calendar year in which they are earned, taking into consideration that the right to use them generally expires on 31st December of each year.
- Unless otherwise stipulated, the employee loses their right to use the unused vacation days on that date and it is not mandatory for the employer to economically compensate the employee for the unused days – unless it was the employer’s fault due to which the employee was not able to use the vacation days. **See Section 6 of the Vacations Entitlement in Germany.**
- And the same will be applicable to false/bogus self-employees, according to the EU case (C-214/16), they will be able to claim, at the time of termination of their relationship, compensation for annual leave accrued throughout the duration of the contract with the hiring company/employer, or the use of the vacation days during the following year if there is still an ongoing relationship.
- In addition, it is common practice that companies allow vacation carry-over of some days (usually until January-March following year). The CBA, the employment agreement, or any other collective agreement can regulate the mentioned carry-over time frame.

7. What happens if vacation cannot be taken (e.g. because the employment relationship is terminated beforehand)? And are the employees paid for the unused vacation days?



- Vacation must usually be granted and taken in the current calendar year or – if a carryover into the next year is possible (see above) – in the respective transfer period. Vacation must therefore be taken in kind, regardless of the date. A payout in money is generally not possible.
- The only exception is the case in which vacation can no longer be taken because the employment relationship ends beforehand. (*Example: The employer terminates the employment relationship with a short notice, but the employee still has a few vacation days left.*) In this case, the vacation entitlement will be paid in cash



- If vacation days (period of leave fixed in the company's vacation calendar) coincide with leave due to pregnancy, childbirth or breastfeeding or the suspension of the employment contract for various causes: birth, adoption or risk during pregnancy or breast-feeding, the vacation days can be used in a different period of time, even though the calendar year has ended.
- Furthermore, employees on sick leave for reasons other than the ones previously mentioned, will be able to use their vacation days (if the planned vacation period coincides with a sick leave) once they are medically discharged, provided that no more than 18 months have elapsed since the end of the year in which they were accrued.
- And last but not least, we are facing the same scenario as our German colleagues: unused vacation days will not be paid, unless the employment relationship has ended, in which case, the unused vacation days will be compensated economically and fairly.