

GERMANY

Act on Employee Inventions

as last amended by Article 7 of the Act of July 31, 2009 I 2521

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Part I Scope of Application and Definitions of Terms

Section 1 Scope of Application

This Act applies to inventions and technical improvement proposals by private employees, public service employees, civil servants and members of the armed forces.

Section 2 Inventions

Inventions as defined in this Act shall be only those inventions that are patentable or protectable as utility models.

Section 3 Technical Improvement Proposals

Technical improvement proposals as defined in this Act shall be those proposals for other technical innovations that are not patentable or protectable as utility models.

Section 4 Service Inventions and Free Inventions

(1) Inventions by employees as defined in this Act may be either tied or free inventions.

(2) Tied inventions (service inventions) are those inventions developed during the term of an employment relationship that either

1. arise from work performed by the employee at a private enterprise or a public authority or
- ii. are essentially based on the experience or activities of the enterprise or public authority.

(3) Other inventions by employees shall be free inventions. They shall however be subject to the restrictions in Sections 18 and 19.

(4) Subsections (1) to (3) shall apply mutatis mutandis to inventions by civil servants and members of the armed forces.

Part II Inventions and Technical Improvement Proposals by Private Employees

1. Service Inventions

Section 5 Duty to Report

(1) Any employee developing a service invention shall be obligated to notify it to his or her employer without delay by means of an individual report in text form, which the employee shall identify as the report of an invention. Where two or more employees have contributed to developing the invention, they may submit the report jointly. The employer shall, without delay, confirm in text form the date of receipt of the report to the employee.

(2) In the report, the employee shall describe the technical problem, the solution to the problem, and how the service invention was developed. Any available notes necessary for an understanding of the invention shall be attached. The report shall include the work-related instructions and directions received by the employee, the experience and activities in the enterprise of which use was made, any other employees who contributed to the invention, and the nature and extent of the contribution by these employees, and it shall highlight what the employee making the report considers to be his or her own share in the invention.

(3) A report not meeting the requirements of subsection (2) shall be deemed to be in order unless the employer declares within two months that the report is insufficient and specifies what supplementary information is required. To the extent necessary, the employer shall assist the employee in supplementing the report.

Section 6 Claims to Service Inventions

(1) The employer may claim a service invention by making a declaration to the employee.

(2) A service invention shall be deemed to have been claimed if the employer has not released the invention to the employee by means of a declaration in text form within four months from receiving a proper report (Section 5(2), first and third sentences).

Section 7 Effect of Claims

(1) When a service invention is claimed, all ownership rights in the invention shall pass to the employer.

(2) Any disposition made of a service invention by an employee before the employer has claimed the invention shall be ineffective insofar as it is prejudicial to the employer's rights.

Section 8 Freed Service Inventions

A service invention shall become free if the employer waives his or her claim to it by means of a declaration in text form. Regardless of the restrictions in Sections 18 and 19, the employee may dispose of a service invention that has been freed.

Section 9 Compensation for Claims

(1) The employee shall have a right to receive reasonable compensation from his or employer as soon as the employer makes a claim to a service invention.

(2) The commercial exploitability of the service invention, the duties and position of the employee in the enterprise, and the enterprise's share in the development of the invention shall be decisive for the assessment of this compensation.

Section 10 (Repealed)

Section 11 Directives for Compensation Payments

After hearing leading organizations representing employers and employees (Section 12 of the Act on Collective Agreements), the Federal Minister of Labor shall issue directives for assessing compensation.

Section 12 Determination or Settlement of Compensation

(1) The type and amount of compensation shall be determined by agreement between the employer and the employee within a reasonable time after the claim to a service invention has been made.

(2) Where two or more employees have contributed to a service invention, compensation shall be determined separately for each employee. The employer shall notify the employees concerned of the total amount of compensation awarded and the share of the service invention assigned to each inventor.

(3) Where no compensation agreement is reached within a reasonable time after a claim is made to a service invention, the employer shall set the compensation. He or shall make a reasoned declaration of the compensation settlement in text form to the employee and pay compensation according to this settlement. Compensation shall be set no later than three months from the grant of the intellectual property rights.

(4) An employee who objects to the compensation settlement may contest it by means of a declaration in text form within two months. In the absence of any contestation by the employee, the compensation settlement shall be binding on both sides.

(5) Where two or more employees have contributed to the service invention, the compensation settlement shall not be binding on any of them if one of them contests the settlement on the ground that his or her share in the service invention has been incorrectly determined. In this case, the employer shall be entitled to set compensation anew for all parties concerned.

(6) The employer and the employee may each request the other to consent to a different compensation arrangement if the circumstances that were decisive for the determination or settlement of the compensation have substantially changed. The employer may not request a refund of compensation payments already made. Subsections (1) to (5) shall not apply.

Section 13 Applications for Domestic Intellectual Property Rights

(1) An employer shall be obligated and solely entitled to apply for domestic intellectual property rights for a service invention reported to him or her. Where the service invention is patentable, the employer shall apply for a patent for it unless, on judicious evaluation of the industrial exploitability of the invention, protection as a utility model appears more appropriate. The application shall be filed without delay.

(2) An employer shall have no obligation to file such an application where

1. the service invention has been freed (Section 8);
2. the employee has agreed that no application shall be filed;

3. the conditions specified in Section 17 apply.

(3) Where, after making a claim to a service invention, an employer does not comply with his or her duty to apply for intellectual property rights and then fails to apply for these rights within a reasonable additional period set by the employee, the employee may file an intellectual property application for the service invention in the employer's name and at the employer's expense.

(4) Where a service invention has been freed, only the employee shall be entitled to apply for intellectual property rights in the invention. Should his or her employer have already made an application for intellectual property rights in the invention, the rights resulting from the application shall pass to the employee.

Section 14 Applications for Foreign Intellectual Property rights

(1) After making a claim to a service invention, an employer shall also be entitled to apply for industrial property protection abroad.

(2) In respect of foreign countries in which an employer does not wish to acquire intellectual property rights, the employer shall release the service invention to the employee and shall, upon request, enable the employee to acquire foreign intellectual property rights. The service invention shall be released in sufficient time for the employee to benefit from the priority dates under international treaties pertaining to industrial property.

(3) When releasing a service invention under subsection (2), an employer may at the same time reserve a non-exclusive right to use the service invention in the foreign countries concerned, in return for reasonable compensation. The employer may also require the employee, while he or she is exploiting the released invention in these countries, to respect the employer's obligations arising from contracts existing at the time that the service invention was released, in return for reasonable compensation.

Section 15 Reciprocal Rights and Duties when Acquiring Intellectual Property Rights

(1) When applying for intellectual property rights in a service invention, an employer must at the same time give his or her employee copies of the application documents. The employer shall keep the

employee informed of the progress of the application procedure and, on request, shall allow the employee to inspect the relevant correspondence.

(2) The employee shall, on request, assist his employer in acquiring intellectual property rights, and shall make the necessary declarations.

Section 16 Abandoning Intellectual Property Applications or Intellectual Property Rights

(1) Where an employer, before having satisfied his or her employee's claim for reasonable compensation, intends to discontinue an application for intellectual property rights in a service invention, or to cease to maintain granted intellectual property rights in the invention, the employer must notify the employee accordingly and, on the employee's request and at the employee's own expense, shall assign these rights to the employee and turn over to him or her any documents necessary to maintain these rights.

(2) The employer shall be entitled to abandon the above rights if the employee does not request the assignment of these rights within three months from receiving the notification from the employer.

(3) At the time of making the notification in accordance with subsection (1), the employer may reserve, in return for reasonable compensation, a non-exclusive right to use the service invention.

Section 17 Trade Secrets

(1) Where the legitimate interests of the enterprise require that a service invention reported to an employer should not be disclosed, the employer may refrain from applying for industrial property protection, so long as the employer acknowledges to his or her employee that the service invention is protectable.

(2) If an employer does not acknowledge that a service invention is protectable, he need not apply for intellectual property rights so long as he requests the Arbitration Board (Section 29) to seek an agreement on the protectability of the service invention.

(3) In assessing the compensation for an invention under subsection (1), the economic disadvantages accruing to the employee because

intellectual property rights in the service invention have not been granted shall also be considered.

2. Free Inventions

Section 18 Duty to Report

(1) An employee who has developed a free invention in the course of an employment relationship shall report this to his or her employer in text form without delay. He shall provide the employer with sufficient information concerning the invention and, if necessary, concerning its development to allow the employer to judge whether it is in fact a free invention.

(2) Where the employer, within three months from receiving the report of the invention, fails to dispute that the reported invention is free by means of a declaration in text form to the employee, the employer may no longer claim the invention as a service invention (Section 6).

(3) There shall be no obligation to notify the employer of a free invention if the invention is obviously not usable in the employer's line of business.

Section 19 Duty to Offer

(1) Before an employee exploits a free invention during his or her employment relationship for a purpose not related to his or her employment, the employee must first offer his or her employer, at the least, a non-exclusive right to use the invention on reasonable terms, if the invention falls within the scope of the employer's actual or planned line of business at the time that the offer is made. The offer may be submitted together with the report under Section 18.

(2) Where the employer does not accept the offer within three months, his or her prerogative shall lapse.

(3) Where the employer declares within the time specified in subsection (2) an intention to acquire the rights offered to him or her, but asserts that the terms of the offer are not reasonable, a court shall, on petition by the employer or the employee, set these terms.

(4) The employer or the employee may submit a request for new terms to be set if the circumstances that were decisive for the terms

previously agreed or set have changed substantially.

3. Technical Improvement Proposals

Section 20

(1) An employee shall be entitled to reasonable compensation from his or her employer for technical improvement proposals that afford the employer an advantageous position similar to that obtained through an intellectual property right, as soon as the employer exploits such proposals. The provisions of Sections 9 and 12 shall apply by analogy.

(2) In all other cases, technical improvement proposals shall be dealt with in accordance with a collective agreement or works agreement.

4. Common Provisions

Section 21 (Repealed)

Section 22 Mandatory Applicability

The provisions of this Act may not be derogated from to the detriment of the employee. However, agreements concerning service inventions after they have been reported and agreements concerning free inventions and technical improvement proposals (Section 20(1)) after they have been communicated shall be permissible.

Section 23 Inequitable Agreements

(1) Agreements concerning service inventions, free inventions or technical improvement proposals (Section 20(1)), which are permitted by this Act, shall be ineffective if they are inequitable to a significant extent. The same shall apply to compensation settlements (Section 12(4)).

(2) Employers and employees may assert the inequity of an agreement or compensation settlement only if they do so by making a declaration in text form to the other party no later than six months from termination of the employment relationship.

Section 24 Duty to Maintain Secrecy

(1) An employer shall keep an employee's invention that has been reported or notified to him or her secret for as long as the employee's legitimate interests require the employer to do so.

(2) An employee shall keep a service invention secret until it has become free (Section 8).

(3) Other persons who have, in consequence of this Act, had knowledge of an invention may neither exploit this knowledge nor make it public.

Section 25 Obligations Arising from the Employment Relationship

Other obligations on the part of the employer and the employee arising from the employment relationship shall not be affected by the provisions of this Act except where the freeing of an invention (Section 8) would require otherwise.

Section 26 Termination of Employment Relationship

The rights and duties arising from this Act shall not be affected by the termination of the employment relationship.

Section 27 Insolvency Proceedings

Where insolvency proceedings concerning the assets of an employer who has claimed a service invention are opened, the following shall apply:

1. Should the insolvency administrator sell off the service invention together with the enterprise, then the purchaser shall assume the employer's duty to provide compensation for the period from the opening of insolvency proceedings onward.

2. Should the insolvency administrator exploit the service invention within the debtor's enterprise, the administrator shall pay reasonable compensation for the use of the invention to the employee from the insolvency estate.

3. In all other cases, the insolvency administrator shall make an offer of the service invention together with the intellectual property rights therein to the employee no later than one year from the opening of insolvency proceedings, and Section 16 shall apply mutatis mutandis. Should the employee not accept the offer within two months from receiving it, the insolvency administrator may dispose of the invention without the enterprise or abandon the rights in the invention. In the event that the invention is sold, the insolvency administrator may reach an agreement with the purchaser requiring him or her to pay compensation under Section 9. Where such an agreement is not reached, the insolvency administrator shall pay the compensation to the employee from the proceeds of sale.

4. Otherwise, the employee may claim compensation under Sections 9 to

12 only as an insolvency creditor.

5. Arbitration Proceedings

Section 28 Amicable Settlement

In all disputes between employer and employee arising under this Act, petition may be made at any time to the Arbitration Board. The Arbitration Board shall endeavor to facilitate an amicable settlement.

Section 29 Establishment of the Arbitration Board

(1) The Arbitration Board shall be established within the Patent Office.

(2) The Arbitration Board may meet off the Board's premises.

Section 30 Membership of the Arbitration Board

(1) The Arbitration Board shall consist of one chairperson or the chairperson's alternate, and two assessors.

(2) The chairperson and his or her alternate shall possess the qualification for judicial office specified in the German Judiciary Act. They shall be appointed by the Federal Minister of Justice for a period of four years. They may be reappointed.

(3) The assessors shall possess special experience in the technical field to which the invention or technical improvement proposal relates. They shall be appointed separately for each case by the president of the Patent Office from among the staff members or assistant members of the Patent Office.

(4) At the request of a party, the Arbitration Board shall include two further assessors, one chosen from employers and the other from employees. They shall be appointed, separately for each case, by the president of the Patent Office from lists of proposed names. These lists may be put forward by the leading organizations referred to in Section 11 and by trade unions and independent employees' associations formed for social and professional purposes which are not affiliated to any of the above leading organizations, where the members of such unions or associations include a substantial number of employees from whom inventive contributions may be expected in consequence of the kind of work that they perform in the enterprise.

(5) The president of the Patent Office shall appoint an assessor under subsection (4) from the list of names put forward by the organization to which the party concerned belongs, if the party has declared his or her organization membership before the members of the Arbitration Board are appointed.

(6) The Arbitration Board shall be supervised by its chairperson; the chairperson shall be supervised by the president of the Patent Office. The members of the Arbitration Board shall not be bound by instructions of any kind.

Section 31 Appeals to the Arbitration Board

(1) Appeals to the Arbitration Board shall be made by means of a written petition. The petition shall be filed in duplicate. It shall contain a brief statement of the facts together with the name and address of the other party.

(2) The chairman of the Arbitration Board shall serve the petition on the other party and invite the party to comment in writing on the petition within a fixed period.

Section 32 Requests for Enlargement of the Arbitration Board

A request for the enlargement of the Arbitration Board shall be submitted together with the petition (Section 31(1)) by the party appealing to the Arbitration Board or by the other party within two weeks from the service of the petition (Section 31(2)).

Section 33 Proceedings before the Arbitration Board

(1) Sections 41 to 48, 1042(1) and 1050 of the Code of Civil Procedure shall apply by analogy to proceedings before the Arbitration Board. Section 1042(2) of the Code of Civil Procedure shall apply by analogy, with the proviso that the Arbitration Board may not exclude patent attorneys, holders of a certificate of representation (Section 3 of the Second Act Amending the Industrial Property Regulations and Adding Provisional Rules thereto of July 2, 1949 - Law Gazette of the Administration of the United Economic Area , p. 179), and representatives of associations falling under Section 11 of the Labor Courts Act.

(2) In all other cases, the Arbitration Board shall decide its own procedure.

Section 34 Settlement Proposals from the Arbitration Board

(1) The Arbitration Board shall take its decisions by a majority vote. Section 196(2) of the Courts Constitution Act shall be applicable.

(2) The Arbitration Board shall provide the parties with a settlement proposal. The settlement proposal shall be reasoned, and it shall be signed by all the Board members. It shall refer to the possibility of objection and the consequences of failure to object within the period prescribed. It shall be served on the parties.

(3) The settlement proposal shall be deemed to be accepted and its content to have been agreed to unless the Arbitration Board receives an objection in writing from one of the parties within one month from the service of the proposal.

(4) Where unavoidable circumstances have prevented one of the parties from lodging an objection within the period prescribed, the party shall, upon petition, be restored to the status quo ante. The petition must be filed in writing at the Arbitration Board within one month from the time that the impediment ceased to exist. The objection must also be lodged within this period. The petition for reinstatement must state the facts on which it relies together with the means of proving these facts. After one year from the service of the settlement proposal, restoration of the status quo ante may no longer be applied for, and an objection may no longer be lodged.

(5) The Arbitration Board shall decide on the petition for reinstatement. An immediate appeal against the Board's decision may be filed at the regional court having jurisdiction at the place of the petitioner's residence, in accordance with the provisions of the Code of Civil Procedure.

Section 35 Termination of Arbitration Proceedings without Result

(1) Proceedings before the Arbitration Board shall terminate without result where

1. the other party has not submitted his or her comments within the period specified in Section 31(2);
2. he or she has refused to participate in the proceedings before the Arbitration Board;
3. the Arbitration Board has received a written objection within the

period specified in Section 34(3).

(2) The chairman of the Arbitration Board shall inform the parties that the arbitration proceedings have terminated without result.

Section 36 Costs of Arbitration Proceedings

No fees or costs shall be charged in proceedings before the Arbitration Board.

6. Court Proceedings

Section 37 Requirements for Bringing an Action

(1) Any rights or legal relationships governed by this Law may be asserted in an action in court only after proceedings have been held before the Arbitration Board.

(2) The above shall not apply where

1. the rights asserted in the action arise from an agreement (Section 12, 19, 22 or 34) or rely on the assertion that the agreement is invalid;
2. six months have passed since the appeal was lodged at the Arbitration Board;
3. the employee has left the employer's enterprise;
4. the parties have made an agreement to refrain from appealing to the Arbitration Board. This agreement may only be made after a dispute (Section 28) has occurred. It must be in writing.

(3) Where both parties have dealt with the substance of the case orally, without relying on the absence of any appeal to the Arbitration Board, an agreement under subsection (2), no. 4 shall be deemed to have been made.

(4) A prior appeal to the Arbitration Board shall not be necessary in the case of an application for an order of seizure or for a preliminary injunction.

(5) Notwithstanding the restriction in subsection (1), an action following an order of seizure or a preliminary injunction shall be admissible where a party has been instructed period under Section 926 or 936 of the Code of Civil Procedure to bring an action within a specified period.

Section 38 Action for Reasonable Compensation

In the case of a dispute as to the amount of compensation, an action may be brought for the payment of a reasonable amount to be decided by the court.

Section 39 Jurisdiction

(1) For all disputes concerning employee inventions, exclusive jurisdiction shall, irrespective of the value in dispute, rest with the courts having jurisdiction in patent litigation (Section 143 of the Patent Act). The provisions governing procedure in patent litigation shall apply.

(2) Subsection (1) shall not apply to legal disputes relating solely to claims for the payment of compensation that has been determined or set for an invention.

Part III Inventions and Technical Improvement Proposals by Employees in Public Service, Civil Servants and Members of the Armed Forces

Section 40 Employees in Public Service

The provisions relating to employees in private enterprises shall apply to inventions and technical improvement proposals by employees in enterprises and offices of the Federal Government, federal state governments, municipalities and other bodies, institutions and foundations under public law, with the following provisos:

1. Instead of making a claim to the service invention, the employer may claim a reasonable share of the proceeds arising from the invention if this has been agreed beforehand. The amount of the employer's share may be the subject of prior binding agreements. Where no agreement on the amount of the share is reached, the amount shall be set by the employer. Section 12(3) to (6) shall apply mutatis mutandis.
2. The treatment of technical improvement proposals under Section 20(2) may also be governed by a service agreement; clauses allowing a provision forming part of a service agreement to be replaced by a decision of a higher authority (Dienststelle) or other office shall not be enforceable.
3. Restrictions on the manner of exploiting a service invention may, in the public interest, be imposed on the employee by a general order issued by the highest competent service authority.
4. The Federal Government and the federal state governments also shall be entitled to put forward lists of names for the employer assessors (Section 30(4)).
5. Where public authorities have set up their own arbitration boards to resolve disputes arising under this Act, the provisions of Sections 29 to 32 shall not apply.

Section 41 Civil Servants and Members of the Armed Forces

The provisions relating to employees in public service shall apply mutatis mutandis to inventions and technical improvement proposals by civil servants and members of the armed forces.

Section 42 Special Provisions for Inventions at Universities

The following special provisions shall apply to inventions by university employees:

1. The inventor shall be entitled to reveal the service invention in the course of his or her teaching and research activities, so long as the inventor has notified his or her employer in good time, generally

two months in advance, of his or her intention to do so. In this case Section 24(2) shall not apply.

2. If the inventor, on the basis of freedom of teaching and research, chooses not to reveal his or her service invention, then the inventor shall not be obliged to report the invention to his or her employer. Should the inventor wish to reveal the invention at a later time, the inventor shall report the invention to his or her employer without delay.

3. Where a claim is made to the service invention, the inventor shall retain a non-exclusive right to use the invention in the course of his or her teaching and research activities.

4. If the employer exploits the invention, he or she shall pay compensation amounting to 30 percent of the income resulting from the use of the invention.

5. Section 40, no. 1 shall not apply.

Part IV Transitional and Final Provisions

Section 43 Transitional Provision

(1) Section 42 in the version in force on February 7, 2002 (Federal Law Gazette I, p. 414) shall apply only to inventions developed after February 6, 2002. Notwithstanding the first sentence, in cases where professors, lecturers or academic assistants at a scientific university have, before July 18, 2001, entered into a contractual obligation to transfer the rights in an invention to a third party, Section 42 of the Act on Employee Inventions in the version in force until February 6, 2002 shall continue to apply until February 7, 2003.

(2) The provisions of the Law on Employee Inventions in the version in force until February 6, 2002 shall apply to inventions developed by university employees before February 7, 2002. The right of professors, lecturers and academic assistants at a university to offer their inventions developed before February 6, 2002 to their employers shall remain unaffected.

(3) The provisions of this Law in the version in force until September 30, 2009 shall continue to apply to inventions reported before October 1, 2009. The first sentence shall apply mutatis mutandis to technical improvement proposals.

Section 44 (Repealed)

Section 45 Implementing Provisions

In consultation with the Federal Minister of Labor, the Federal Minister of Justice shall have the power to issue the necessary regulations for the enlargement of the Arbitration Boards (Section 30(4) and (5)). In particular, the Minister may specify the following:

1. what personal attributes are required of persons put forward as employer or employee assessors;
2. how the assessors appointed from the lists of proposed names shall be remunerated.

Section 46 Annulled Provisions

Insofar as they have not already been repealed, the following provisions shall be rescinded on the entry into force of this Act:

1. the Ordinance on the Treatment of Inventions by Workers of July 12, 1942 (Reich Law Gazette I, p. 466);

2. the Implementing Regulations for the Ordinance on the Treatment of Inventions by Workers of March 20, 1943 (Reich Law Gazette I, p. 257).

Section 47 (repealed)

Section 48 (repealed)

Section 49 Entry into Force

This Law shall enter into force on October 1, 1957.