A COMPARATIVE LOOK AT THE UNEMPLOYMENT INSURANCE PROGRAMS OF THE FEDERAL REPUBLIC OF GERMANY AND THE UNITED STATES*

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1. INTRODUCTION

With the enactment of the Employment Promotion Act of 1969 (Promotion Act), the Federal Republic of Germany (FRG) adopted a comprehensive program to promote full employment and combat unemployment. The program contains numerous measures to promote employment — two of which are related to unemployment insurance.

The purpose of this article is to provide a general description of the modern employment promotion system in the FRG with particular emphasis upon the unemployment insurance program. In addition, comparisons will be drawn between unemployment insurance programs of the United States and the FRG as they relate to disqualifications and administrative and judicial review.

Section 2 describes the historical development of the unemployment insurance program in the FRG. The structure of the Bundesanstalt für Arbeit (Bundesanstalt), the FRG Federal Employment Institute, is discussed in Section 3, and the benefits available for the unemployed are analyzed in Section 4. Finally, in Section 5, the FRG and U.S. unemployment insurance programs are compared.

* This article is the result of a three-week visit to the Federal Republic of Germany in which the author met with key officials who are involved with the unemployment insurance program. This article is based, in large part, on interviews with, and documents received from these officials.

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1 Arbeitsförderungsgesetz [AFG], 1969 Bundesgesetzblatt [BGBI] I 582 (W. Ger.); see also INTERNATIONAL LABOUR OFFICE, LEGISLATIVE SERIES 1969, FEDERAL REPUBLIC OF GERMANY 1 (Nov.-Dec. 1969) (English version); Bundesanstalt für Arbeit, ARBEITSFÖRDERUNGSGESETZ TEXTAUSGABE (Feb. 1986) (book prepared by the Bundesanstalt für Arbeit (Bundesanstalt), the FRG Federal Employment Institute, setting forth an updated version of the Promotion Act) (copy on file with the author).

2 The two major programs are the Unemployment Benefit, AFG §§ 100-133, and Unemployment Assistance, AFG §§ 134-141 programs.

3 The Bundesanstalt is an autonomous legal entity which administers the employment program (including unemployment insurance) in the Federal Republic of Germany (FRG). See AFG § 3(1).
2. **HISTORICAL BACKGROUND**

Before examining the present unemployment insurance program in the FRG, it would be beneficial to understand its historical development. The predecessor of the Bundesanstalt was the National Office for Placement and Unemployment Insurance (National Office), a self-governing body created by the Placement and Unemployment Insurance Act of 1927. This agency was responsible for the administration of a placement service and compulsory unemployment insurance as well as public vocational guidance and placement of apprentices. Due to the Great Depression of 1929-1932, however, the National Office was unable to accumulate reserves for its unemployment insurance fund and thus was unable to cope with the enormous financial hardship caused by increasing mass unemployment throughout the FRG.

The various functions of the National Office were reduced to merely supporting the millions of unemployed with monetary assistance. With the advent of the National Socialist regime in 1933, trade unions and employers' organizations were disbanded and the self-administrative status of the National Office was abolished. The constitutionally mandated free choice of profession and place of work was severely limited and in 1935 centralized government control of labor was declared an integral part of the national program. In 1939, the National Office was incorporated into the National Ministry of Labor. The effect of this nationalization was to increase the power of employers and to severely diminish the rights of workers.

After World War II, steps were initiated to return the placement service and unemployment insurance program to a self-governing institution. The trade unions and employers' groups wanted to be the only representatives on the governing board of the institution. The Establishment of a Federal Office for Placement and Unemployment Insurance Act of 1952, however, required equal representation of employ-

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4 Gesetz über Arbeitsvermittlung und Arbeitslosenversicherung, 1927 Reichsgesetzblatt I 187 (W. Ger.).
6 Id.
7 Id.
8 Id. at 9.
9 Id.
10 Id.
11 Id.
12 Id.
13 Id.
14 Gesetz über die Errichtung einer Bundesanstalt für Arbeitsvermittlung und Arbeitslosenversicherung, 1952 BGBl I 123 (W. Ger.).
ers, employees and public agencies. The rationale for this requirement was that the intended functions of the Federal Office were to go well beyond the administration of unemployment insurance and were to include a public placement service and vocational guidance.

In 1969, the Placement and Unemployment Insurance Act was replaced by the Promotion Act, which redefined the statutory mandate of the Bundesanstalt. In addition to offering vocational guidance, a placement service and an unemployment insurance program, the Bundesanstalt was entrusted with the promotion of vocational training. The democratically organized Bundesanstalt has developed into a versatile and effective agency, which administers unemployment insurance as only one of its many functions to assist the unemployed.

3. Organization of the Bundesanstalt

In the United States, unemployment insurance is administered by the U.S. Department of Labor which certifies individual plans submitted by each state. In the FRG, unemployment insurance and other employment programs are administered by the Bundesanstalt, a legal entity that, in principle, is governed and administered independently from the federal government. The national headquarters of the Bundesanstalt is in Nuremberg with nine regional employment offices, 146 local employment offices and approximately 500 branch offices throughout the FRG. At the national, regional and local levels,

15 Id.
16 AFG § 3.
17 The unemployment insurance program in the United States is a cooperative federal-state effort to provide assistance for unemployed workers. The Social Security Act of 1935, 42 U.S.C. §§ 501-504 (1982 & Supp. I 1983), provides for federal funding for unemployment insurance programs with various requirements covering state eligibility for such funding. The Federal Unemployment Tax Act (FUTA), 26 U.S.C. §§ 3301-3311 (1982 & Supp. II 1984), imposes a duty on states to tax employers at prescribed rates to establish a fund for the payment of benefits to eligible workers. FUTA also directs the states to enact certain statutes regarding eligibility for unemployment insurance benefits. The federal government performs a supervisory role through a statutory system that provides for grants to state programs and tax credits to employers in states certified by the Secretary of Labor as having complied with federal standards set out in FUTA. 26 U.S.C. §§ 3301-3302, 3304. For a brief description of the operation of FUTA, see California v. Grace Brethren Church, 457 U.S. 393, 396-98 (1981). The actual administration of unemployment insurance, however, is carried out by individual states pursuant to state statutes and regulations. See W. Haber & M. Murray, Unemployment Insurance in the American Economy 106-23 (1966).
18 AFG § 3.
19 Id. § 189(1).
there are separate governing bodies comprised of representatives from labor, management and government.21 The central organs of the Bundesanstalt are the Verwaltungsrat (Administrative Council) and the Vorstand (Executive Board).22 The regional and local offices are governed by Verwaltungsausschüsse (Administrative Committees).23

21 AFG § 192.
22 The Verwaltungsrat is composed of 39 members — 13 each from employers, labor organizations and governments. The Verwaltungsrat recommends legislation to the federal legislature and determines its budget. It also promulgates by-laws pursuant to which the Bundesanstalt administers the Promotion Act. The Verwaltungsrat also issues regulations in accordance with the Promotion Act; the regulations define the benefits and services rendered by the Bundesanstalt. For example, with regard to unemployment insurance, the Verwaltungsrat promulgates regulations pertaining to eligibility requirements for the submission of claims and the benefit procedure. All such regulations are subject to the approval of the Federal Ministry of Labor and Social Affairs.

The Vorstand is the executive organ of the Bundesanstalt. The Vorstand, comprised of nine members — three each from employers, labor groups and public authorities, represents the Bundesanstalt in court as well as extra-judicially in those cases where the tasks do not fall under the responsibility of the President of the Bundesanstalt. The Vorstand also issues directives concerning routine administration. The Vorstand prepares a budget which is submitted for approval by the Verwaltungsrat and the federal government. Id. § 216(2). The Vorstand also plays an important role in deciding upon the appointment of key Bundesanstalt staff positions. Finally, the Vorstand of the Bundesanstalt is responsible for the administration and investment of the Bundesanstalt funds. No individual can serve simultaneously on the Verwaltungsrat and the Vorstand.

The two leading Bundesanstalt positions — President and Vice-President — are appointed by the President of the Federal Republic upon recommendation of the federal government. Id. § 211(1). As a practical matter, the President is bound by the recommendation. The federal government, in turn, must consult the Verwaltungsrat of the Bundesanstalt before submitting a recommendation for the President and Vice-President of the Bundesanstalt. Id. § 211(1), (2). The President of the Bundesanstalt represents the Bundesanstalt in court and elsewhere and is responsible for carrying out the day-to-day administrative business of the Bundesanstalt. Any restriction of these duties must be stipulated through by-laws duly enacted by the Vorstand.

Legal supervision of the Bundesanstalt is the responsibility of the Federal Ministry of Labor and Social Affairs. The Ministry ensures the Bundesanstalt’s compliance with all laws and other legal directives and is responsible for reviewing the annual report of the Bundesanstalt.

23 The Verwaltungsausschüsse perform the functions of self-government in the state or regional employment offices (REO) and the local employment offices (LEO). The administrative committees of the nine REOs are comprised of at least five representatives each from employers, employee groups and regional government. The administrative committees of the LEOs have at least three representatives each from employers, employee groups and local government. These committees assume the duties of self-government for their respective districts. Within these limits, they deal with everything concerning the execution of functions of the Bundesanstalt. They ensure that the specialized functions, such as unemployment insurance, placement, vocational guidance, promotion of vocational training and administration are carried out in compliance with the Promotion Act and regulations. The committees are also consulted in the preparation of individual budgets for their respective offices.

Each REO has a President and Vice-President, who are appointed by the President of the FRG upon the recommendation of the federal government. Id. § 211(1).
3.1. Funding of the Bundesanstalt

The Bundesanstalt collects contributions from employers and employees in order to carry out its functions. Requiring an equal contribution rate for both,

24 Id. § 167.

Generally, persons employed as wage earners and persons employed for the purpose of receiving vocational training are subject to compulsory contribution. Id. § 168(1). However, the Promotion Act does provide for statutory exemptions under Section 169 and allows for the promulgation of regulations which create additional exemptions under Section 170(1). For example, civil servants, students, pensioners, temporary workers, casual workers and employees over age 63 do not contribute. Id. § 169(1).

25 Id. §§ 167, 174.

26 See doing Business in Europe, Common Mkt. Rep. (CCH) ¶ 40,661 (Jan. 16, 1986). However, the alteration of the unemployment insurance contribution rate to 5 percent from 4.1 percent, effective January 1, 1986. See Doing Business in Europe, Common Mkt. Rep. (CCH) ¶ 40,661 (Jan. 16, 1986). For the purpose of receiving vocational training are subject to compulsory contribution. Id. § 168(1). However, the Promotion Act does provide for statutory exemptions under Section 169 and allows for the promulgation of regulations which create additional exemptions under Section 170(1). For example, civil servants, students, pensioners, temporary workers, casual workers and employees over age 63 do not contribute. Id. § 169(1).

27 Id. § 174(1). For a definition of the basis for assessment, see id. § 175.

28 An amendment to AFG Section 174(1) decreased the overall contribution rate to 4 percent from 4.1 percent, effective January 1, 1986. See Doing Business in Europe, Common Mkt. Rep. (CCH) ¶ 40,661 (Jan. 16, 1986). [hereinafter Doing Business in Europe]. As of 1987, the unemployment insurance contribution rate increased to 4.3 percent. However, the old-age pension insurance rate decreased by 5 percent (both rates are applied to the same assessed total) thus resulting in an overall lower contribution rate. Id. ¶ 40,790 (Dec. 4, 1986).

29 AFG § 175.

30 1984 Report, supra note 5, at 56.

31 Id.

32 Id.

33 Id.
amount in the reserve fund, does not cover the deficit, the federal government is authorized by the Constitution to grant a further subsidy.\textsuperscript{34}

3.3. General Scope of Functions of Bundesanstalt

While the emphasis in this article is the administration of unemployment insurance programs, it is important to underscore that there is no isolated and independent program of financial unemployment insurance in the FRG. Payments of unemployment insurance are only one part of the comprehensive array of measures carried out by the Bundesanstalt.

The Promotion Act defines the scope and functions of the Bundesanstalt. Some of the most important functions are:

1. vocational guidance and counseling,\textsuperscript{35}
2. placement,\textsuperscript{36}

\textsuperscript{34} Grundgesetz art. 120 (W. Ger.).

\textsuperscript{35} AFG §§ 25-32. The Bundesanstalt has sole responsibility for vocational guidance and counseling. It is obligated (1) to advise juveniles and adults on the choice of a trade or profession prior to their entrance into the job market and (2) to answer questions regarding professional guidance subsequent to entering employment. This advice is augmented by information concerning an individual's choice of profession, vocational training, different occupations and labor market trends. Once a decision as to a vocation has been made, the guidance service assists in finding training facilities and in providing financial assistance to ensure vocational training. Vocational guidance services are made available in the LEOs. There are vocational guidance and counseling departments in all of the REOs and the LEOs. At the national level, there is a staff of vocational guidance experts in the Bundesanstalt that oversees the program and implements national policies.

\textsuperscript{36} Id. §§ 13-24. Under the Promotion Act, the Bundesanstalt has responsibility for ensuring that jobseekers obtain employment and that neither unemployment, inferior employment or lack of manpower occurs or continues. The placement function involves both the placement of individual jobseekers and the provision of manpower for employers. The Promotion Act also designates the Bundesanstalt as the responsible body for employment guidance. The Bundesanstalt is required to advise employees and employers about the state of the labor market, trends in trades and professions, possibilities of vocational training and training incentives.

Utilization of the placement service is voluntary. The guidance and placement services are performed with due regard for the constitutional rights of the individual to equal treatment, freedom of movement, choice of vocation and selection of place of work. With the exception of certain groups that enjoy special legal protection (e.g., the handicapped), the Bundesanstalt must be impartial to employees and employers in carrying out its services. Placement services are free to the individual, however, the Bundesanstalt may require fees from employers to cover expenses.

The placement service is subdivided by the classification of professions without regard to gender. The number of classifications vary from district to district. The LEOs accept applications from jobseekers and vacancies from employers.

The placement system in the FRG differs markedly from the U.S. system in that private employment agencies play a much lesser role in the FRG. For the most part, the Bundesanstalt has a monopoly in placement services. The existence of this monopoly has been criticized by employers and politicians who contend that the private sector would be more flexible in dealing with placement activities. While not opposed to cen-

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3. vocational training,37
4. granting of allowances for the maintenance and creation of employment,38

ternalization, these individuals believe that the private sector should have more involvement in placement. On the other hand, the trade unions and pro-labor politicians argue that decentralization of the placement program would be the first step towards creating a profit-oriented abuse that would be detrimental to the well-founded traditional system embodied in the Bundesanstalt. Only in exceptional circumstances does the Bundesanstalt authorize private organizations or individuals to perform placement functions. Id. § 23. For example, the Bundesanstalt has allowed charitable organizations to perform placement services on a no-charge basis. Additionally, profit-making placement has been allowed with regard to employment related to the arts (e.g., concert, opera, theater). Personnel leasing on a fee-basis is allowed only with authorization of the Bundesanstalt, which monitors compliance to ensure social protection of leased personnel. Arbeitnehmerüberlassungsgesetz § 17, 1972 BGBl I 1393 (W. Ger.) amended by 1985 BGBl I 1068. However, all authorized placement organizations are subject to supervision by the Bundesanstalt, which is authorized to promulgate administrative regulations to oversee the activities of the private agencies. Id. § 23(3).

37 Id. §§ 33-62. The Promotion Act provides for a number of employment promotion programs. The purpose of these incentive vocational training programs is to assist the jobseeker in acquiring updated vocational training and retraining consistent with his aptitude and individual goals as well as labor market trends. The Promotion Act provides that the Bundesanstalt shall perform these functions.

Vocational training assistance is given in the form of a subsidy which provides training and living expenses for the eligible individual. The income of the trainee is considered in determining the subsidy. Unemployed persons, however, who have been receiving Unemployment Benefits or Unemployment Assistance immediately prior to entering a vocational program will receive a payment equal to their assistance level under the Unemployment Benefit or Unemployment Assistance programs.

Vocational retraining is provided for workers who intend to enter or continue in employment for which contributions to the Bundesanstalt are paid. A further requirement is that the applicant be suitable for the program and the intended vocation. Applicants must have worked in covered employment to qualify for a retraining subsidy. The Promotion Act sets out the formula for determining the amount of the subsidy.

The Promotion Act also authorizes the Bundesanstalt to grant subsidies to existing or new training establishments (usually non-profit organizations), to employees leaving one job to begin another, and to employers for hiring workers difficult to place under normal conditions of the labor market. All of these subsidies are part of a comprehensive Incentives To Enter Employment Program. Id. §§ 53-55.

The Promotion Act also establishes special programs for the vocational rehabilitation of handicapped persons. Id. §§ 56-62. These programs offer assistance to the individual in recovering from physical or psychological disabilities. The Bundesanstalt provides subsidies to cover costs of rehabilitation and obtaining a suitable place to work. In addition to providing financial assistance to the handicapped individual, the Bundesanstalt also provides funds to training institutions for vocational rehabilitation services.

38 Id. §§ 63-99. Not to be confused with the Unemployment Benefit or Unemployment Assistance programs, this benefit scheme is created by the Promotion Act to maintain and create employment opportunities. There are three separate parts to this program: Short-Time Allowance, Incentives to Year-Round Employment in the Building Industry and Job Creation Measures.

a. Short-Time Allowance (AFG §§ 63-73)

This benefit is paid to employees during a temporary loss of working hours due to unavoidable economic causes. The purpose of this program is to allow the employer to keep experienced workers. The Promotion Act provides that for an employer to qualify,
5. payments under a program guaranteeing salaries for employees of bankrupt companies,\(^{39}\)

6. labor market and vocational research,\(^ {40}\)

7. administration of children's benefits under the Federal Child Benefit Act,\(^ {41}\) and

he must notify the LEO that there will be a loss (1) of more than 10 percent of the employees' working time, (2) for a continuous time of at least four weeks, and (3) for at least one-third of the employees in the firm. Employees who have paid contributions to the Bundesanstalt will be eligible if, as a result of the loss of working hours, they either suffer a reduction in pay or receive no remuneration. Id. § 65. The normal duration of the allowance is six months; this period may be increased to 24 months by decree of the Federal Ministry of Labor and Social Affairs. Id. § 67.


b. Promotion of Year-Round Employment in the Building Industry (AFG §§ 74-90)

The purpose of this section of the Promotion Act is (1) to increase the activity of the building industry during the winter months and thus to distribute the capacity of building firms over the whole year, (2) to counteract price increases in the building sector, and (3) to maintain employment contracts in the building industry during the winter in order to prevent disadvantages to building workers due to unemployment. The Promotion Act provides for subsidies to employers in the form of investment grants and compensation for additional winter-related costs. Id. §§ 82-87. Subsidies are provided to employees in the form of a winter allowance. Id. §§ 88-90. The Bundesanstalt is also authorized by the Promotion Act to grant bad-weather allowances to building trade workers. This subsidy is in the form of partial compensation for loss of pay days (from November 1 to March 31) due to bad weather conditions. Under the Promotion Act, the employer is required to apply for bad-weather allowances.

c. Job-Creation Measures (AFG §§ 91-99)

Section 91 of the Promotion Act authorizes the Bundesanstalt to grant incentives towards the creation of employment opportunities for unemployed persons. Job-creating measures may be promoted through subsidies and loans to public or private agencies. The subsidy is a percentage of the remuneration that the referred employee has received in the newly created job. The Promotion Act states that priority shall be given to creating stable employment opportunities for unemployed persons, especially to (1) offset effects of structural changes or technical developments, (2) prepare for, facilitate or supplement schemes designed to achieve structural improvements, or (3) create employment opportunities for older employees who have been unemployed for long periods of time. Id. § 91.

\(^{39}\) Id. § 141b protects employees of insolvent employers. The Promotion Act provides for bankruptcy compensation that secures the wages of employment prior to the bankruptcy proceedings. Upon application, bankruptcy compensation is granted by the LEO for the district in which the employer's wage accounts office for the particular employee is situated. The amount of compensation is based on unpaid net remuneration owed to the employee for the three months prior to the institution of bankruptcy proceedings. The funds for this program, which include benefits and administrative costs, come from employee contributions to the Industrial Injuries Insurance Institute.

\(^{40}\) Another statutory function of the Bundesanstalt is the administration of comprehensive labor market and vocational research programs which includes carrying out surveys of the labor market, provision of statistical data and issuance of reports. Since 1967, these activities have been performed within the Bundesanstalt by the Institute of Employment Research (IAB). 1984 REPORT, supra note 5, at 21. For a more in-depth analysis of the functions of the Institute, see id. at 22-23.

\(^{41}\) Children's benefits are provided in order to relieve the economic burden of fam-
8. benefits for the unemployed.\textsuperscript{42}

These statutory tasks are intended to contribute to the ultimate goals of reaching and maintaining a high level of employment and improving the structure of employment, hence promoting economic growth.\textsuperscript{43} Other goals include the prevention or elimination of unemployment and underemployment, the improvement of the professional mobility of workers, and the facilitation of employment of the handicapped and other persons who have difficulty finding work.

4. BENEFITS FOR THE UNEMPLOYED

Under the Promotion Act, an unemployed worker can receive funds under the Unemployment Benefit or Unemployment Assistance programs to replace lost income if he cannot be placed immediately in suitable employment.\textsuperscript{44} The Unemployment Benefit program, which is financed by compulsory contributions of employers and workers, is analogous to unemployment insurance in the United States.\textsuperscript{45} The Unemployment Assistance program is not financed by contributions and is intended for indigent unemployed workers who are not eligible for the Unemployment Benefit program.\textsuperscript{46}

4.1. Unemployment Benefit Program

4.1.1. General Scope of Coverage

Unemployment Benefit is a compulsory program for all wage earners and salaried employees regardless of earnings. Analogous to the U.S. unemployment insurance program, the Unemployment Benefit program was designed to provide compensation to a worker for the loss of earnings due to a permanent separation from employment. All claimants must be capable of work and available for employment. Generally, the program covers all workers and salaried employees.\textsuperscript{47}

\textsuperscript{42} See infra text § 4.

\textsuperscript{43} 1984 REPORT, supra note 5, at 16.

\textsuperscript{44} The statutory purpose of unemployment insurance in the U.S. is to provide income to the recently unemployed worker while he is seeking new employment. Economic Security Act: Hearings on Section 1130 Before the Senate Comm. on Finance, 74th Cong., 1st Sess. 119 (1935) (statement of Frances Perkins, Secretary of Labor) quoted in California Dept. of Human Resources v. Java, 402 U.S. 121, 131 (1971).

\textsuperscript{45} AFG §§ 100-133.

\textsuperscript{46} Id. §§ 134-141.

\textsuperscript{47} Id. § 168. In addition, the Promotion Act exempts a number of employees from
4.1.2. Eligibility

The Promotion Act provides that a person shall be entitled to Unemployment Benefits if he (1) is unemployed,48 (2) is available for placement,49 (3) has completed the qualifying period,50 (4) has registered with his local employment office (LEO),51 and (5) has applied for benefits.52

4.1.3. Amount of Unemployment Benefits

Married workers with at least one child receive Unemployment Benefits equal to sixty-eight percent of their net remuneration, i.e. re-

contributions and thus from coverage. Id. § 169; see also supra note 14 and accompanying text.

48 The Promotion Act defines an unemployed person as an employee under 65 who is temporarily out of employment. One may be engaged in part-time or self-employment and still be "unemployed." AFG § 101. Generally, if a person is working less than 19 hours per week, the person will be considered unemployed. Id. § 102.

49 The Promotion Act provides that a person is deemed available for placement if (1) he is capable of engaging in employment (longer than part-time) under the normal conditions of the general labor market, (2) he is ready to accept reasonable employment that is capable of undertaking and to participate in reasonable activities for the purpose of professional training, continuing education and reeducation in order to improve the prospects of employment and vocational rehabilitation, and (3) he is able to report daily to, and be reached by, the LEO. Id. § 103. One is not entitled to Unemployment Benefits, however, if (1) he is only able to work in a vocational capacity due to household obligations other than the care for children or others in need of care or (2) because of his conduct he is not considered employable according to the prevalent understanding of employment in the labor market. Id.

The Promotion Act further provides that persons unable to fulfill the requirements of §§ 101-103 may qualify for benefits when, due to a continuing reduction of working capacity, the worker is unable to undertake more than part-time employment under the prevailing conditions of the general labor market. Such a determination must be made by a competent insurance organization. Id. § 105a.

50 A person has completed his qualifying period if he is engaged in covered employment (i.e., compulsory contributions were made) for 360 calendar days within the reference period. Id. § 104(1). Periods of employment in which no remuneration is paid or which precede the date on which he forfeited entitlement to Unemployment Benefits or Unemployment Assistance, pursuant to a disqualification under Section 119, are not counted toward the qualifying period. Id. § 104(1), (2). The reference period is a three-year period immediately preceding the first day of unemployment on which other conditions for entitlement to Unemployment Benefits have been met (e.g., registration with the LEO). Id. § 104(2), (3). This period may not overlap any prior reference period on the basis of which the work had qualified for benefits. Id. § 104(3).

51 The unemployed person must register with the LEO and apply for Unemployment Benefits on his first day of unemployment. If, however, the LEO is closed that day, he must register on the first day thereafter. If an unemployed worker receiving benefits fails to register without a valid reason, after a warning from the LEO, he will be disqualified from receiving benefits for a two-week period. Id. § 120.

52 The duration of entitlement under the Unemployment Benefits program depends upon the period of employment during the reference period. Id. § 106. The reference period is that period of time (in years) immediately prior to reporting for benefits:

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muneration less normal and compulsory deductions provided in the Income Tax Act. All other eligible workers receive Unemployment Benefits equal to sixty-three percent of their remuneration. The benefits vary, therefore, according to the after-tax earnings of the employee. The Federal Minister for Labor and Social Affairs determines the percentage rates on an annual basis.

Generally, the basis for determining benefits is the remuneration received during the last sixty days prior to the worker’s separation from employment. This assessment period may vary in certain circumstances, such as hardship. The net remuneration on which the assessment is based as well as the limits are determined annually by the Fed-

<table>
<thead>
<tr>
<th>Period of Employment (Calendar Days)</th>
<th>In Years (Before Registering with the LEO)</th>
<th>Duration of Entitlement (Weekdays, not including Sundays)</th>
</tr>
</thead>
<tbody>
<tr>
<td>240 (seasonal workers)</td>
<td>3</td>
<td>78</td>
</tr>
<tr>
<td>360</td>
<td>3</td>
<td>104</td>
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<tr>
<td>540</td>
<td>4</td>
<td>156</td>
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<tr>
<td>720</td>
<td>4</td>
<td>208</td>
</tr>
<tr>
<td>900</td>
<td>4</td>
<td>260</td>
</tr>
<tr>
<td>1080</td>
<td>4</td>
<td>312</td>
</tr>
</tbody>
</table>

1984 REPORT, supra note 5, at 50. For example, a worker who was employed in covered employment for 360 days of a three-year reference period would be eligible for 104 days of benefits; if, however, he had worked 1080 days in the four years prior to reporting, he would be entitled to 312 days of benefits.

Effective January 1, 1986, the duration for entitlement to Unemployment Benefits was extended from 12 months to 16 months for workers over 45 years of age who were employed for at least four of the last seven years. Workers over 50 who were employed for at least five of the last seven years are now entitled to up to 20 months of benefits, and an individual over 55, employed for at least six years, is entitled to benefits for up to 24 months. AFG § 106a. This measure is intended to address several concerns: first, older employees, once unemployed, tend to remain unemployed longer than younger employees; second, the present administration wants to silence the opposition parties asserting that the administration has failed to stop unemployment; and finally, there was a desire to relieve local government of the financial burden of public assistance once former employees exhausted their Unemployment Benefits and Unemployment Assistance. Doing Business in Europe, supra note 28, ¶ 40,673, at 41,073-74 (Feb. 13, 1986). It is estimated that this amendment will save local governments from DM 300-500 million annually. Id. ¶ 40,673, at 41,074 (Feb. 13, 1986).

The Promotion Act does not require a waiting period prior to eligibility for Unemployment Benefits. Most programs in the United States require a noncompensable waiting period of one week before unemployment insurance is payable. See infra text § 5.4.

AFG § 111(1)(1); see also Einkommensteuergesetz § 32(4), (6), (7), 1985 BGBlI 977 (W. Ger.) (setting forth what constitutes a “child”).

AFG § 111(1)(2).

Id. § 111(2).

Id. § 112(3).

For example, if the general method of assessment would create undue hardship, the Promotion Act provides for an alternative method of assessment. Id. § 112(7).
eral Minister for Labor and Social Affairs.\textsuperscript{58}

4.1.4. \textit{Additional Sources of Income Received by Eligible Workers}

Fifty percent of any additional earned income received by a worker, who is also eligible to receive an Unemployment Benefit, reduces the amount of the benefit.\textsuperscript{59} For this purpose, taxes, social insurance contributions and professional expenses are treated as deductions in arriving at net income. However, when the net amount of the additional earned income plus the Unemployment Benefits equals more than eighty percent of a worker’s previous net income before unemployment, the additional net income will be fully deducted from the benefit.\textsuperscript{60}

4.1.5. \textit{Suspension of Entitlement}

Entitlement to Unemployment Benefits is suspended during any period in which the unemployed person receives or is entitled to receive remuneration as a result of previous employment.\textsuperscript{61} For example, vacation pay and dismissal compensation or severance pay received when an employment relationship has been terminated by annulment of the employment contract will cause a suspension of benefits. Suspension may not exceed twelve months.\textsuperscript{62} Entitlement is also suspended for periods when the worker is entitled to receive sick pay, accident benefits, maternity pay, retraining allowances, certain pension benefits, preliminary retirement benefits, student benefits and other specified allowances.\textsuperscript{63}

4.1.6. \textit{Disqualification}

An unemployed person may be disqualified from receiving Unemployment Benefits if he (1) terminates his employment relationship or through his conduct causes his employer to dismiss him, (2) refuses employment offered him by a LEO, or (3) refuses to participate in or abandons a program of vocational training.\textsuperscript{64}

\textsuperscript{58} Id. § 175(3).
\textsuperscript{59} Id. § 115(1). Income not exceeding 30 DM per week is not considered under the Promotion Act. Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id. § 117(1).
\textsuperscript{62} Id. § 117(3).
\textsuperscript{63} Id. §§ 118, 118a.
\textsuperscript{64} Id. § 119. For a more detailed discussion of disqualifications, see infra text § 5.6.

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4.2. Unemployment Assistance Program

4.2.1. General Scope of Coverage

Unemployment Assistance is a separate program that also is intended to compensate people who are temporarily unemployed. Although Unemployment Assistance is administered by the Bundesanstalt, it is financed by the federal government rather than through employer and employee contributions. Generally, Unemployment Assistance covers the same types of workers that are covered by the Unemployment Benefit program.

4.2.2. Eligibility

With certain exceptions, Unemployment Assistance eligibility requirements are similar to those of the Unemployment Benefit program. A person is entitled to Unemployment Assistance if he (1) is unemployed, (2) is available for placement, (3) has registered with the LEO as being unemployed, (4) has applied for Unemployment Assistance, (5) is indigent, and (6) is not presently entitled to Unemployment Benefits. In addition, in the year preceding the date of registration as unemployed he must either have been receiving Unemployment Benefits without having forfeited entitlement pursuant to Section 119(3) of the Promotion Act or he must show that (1) a minimum of 150 calendar days has elapsed since his last entitlement to Unemployment Benefits or (2) at least 240 calendar days have passed since Unemployment Assistance was terminated pursuant to Section 119(3) of the Promotion Act. The Promotion Act further provides that Unemployment Assistance is available for those persons who have received public maintenance benefits for at least 240 days within the past twelve months due to ill health, impaired capacity for employment, or for rehabilitation purposes and who no longer receive those benefits because the reason for receiving them no longer exists. Eligibility for Unemployment Assistance ceases once one becomes entitled to Unemployment Benefits.

4.2.3. Period of Entitlement

Unemployment Assistance is granted for a maximum of one
After one year, eligibility must be reestablished, for example, by reexamination of the assets and income of the claimant and his family.72

4.2.4. Amount of Unemployment Assistance

If the claimant is eligible for Unemployment Assistance immediately following receipt of Unemployment Benefits, the amount of Unemployment Assistance is fifty-six percent of the net remuneration used in determining Unemployment Benefits.73 The percentage is increased to fifty-eight percent if the claimant has any children.74 In other cases, the Unemployment Assistance benefit is based upon the wages that the claimant would receive according to his age, abilities, profession and training if he were employed.75 This wage estimate is adjusted annually according to the general income levels in the national labor market. The percentage rates for the Unemployment Benefit program are stipulated for every calendar year by decree of the Federal Minister for Labor and Social Affairs.76

Unemployment Assistance and Unemployment Benefits are components of a comprehensive program to protect workers who become unemployed. There is no analog to Unemployment Assistance in the United States. If a U.S. worker exhausts his unemployment benefits, his only recourse is public assistance.

5. COMPARISON OF THE FRG AND U.S. PROGRAMS

This part of the article will compare some of the key aspects of the FRG and U.S. unemployment insurance programs. Although the article focuses primarily on disqualification and administrative and judicial procedure, several other aspects including coverage, contributions, benefit amount, waiting period and duration of benefits will be discussed also.

5.1. Coverage

The Unemployment Benefit program in the FRG generally covers all workers employed as wage earners or salaried employees.77 The

71 Id. § 135(1)(2).
72 Id. § 139a.
73 Id. § 136(1)(1).
74 Id. § 136(1)(2).
75 Id. § 136(2).
76 Id. § 136(3).
77 See supra note 25.
program also covers apprentices, persons engaged in on-the-job training and individuals performing military or substitute civilian services.\textsuperscript{78} Persons not covered include students, disability recipients, part-time or temporary employees who are unavailable for regular work on a permanent basis, and casual workers; these individuals, however, are also not required to contribute to the Unemployment Benefits program.\textsuperscript{79}

In the United States, all employees are covered by unemployment insurance.\textsuperscript{80} Federal law allows states to exclude (1) elected officials, (2) certain policymakers, (3) members of the judiciary and legislature, (4) the National Guard, and (5) inmates in penal institutions.\textsuperscript{81} In 1978, federal law expanded coverage to certain types of employment including most non-profit employment (non-profit employers with four or more employees),\textsuperscript{82} domestic services,\textsuperscript{83} agricultural workers,\textsuperscript{84} and state and local government employees.\textsuperscript{85} Students, aliens who are not permanent residents, and employees of relatives generally are not covered.\textsuperscript{86}

As a rule, the coverage in the FRG is broader than in the United States. The trend in the United States, however, has been towards expansion of coverage to more classes of workers.

5.2. Contributions

The contribution scheme for the U.S. unemployment insurance program is quite different from that in the FRG.\textsuperscript{87} In the FRG, both the employers and employees are required to contribute.\textsuperscript{88} The rate — currently four percent (two percent for employers and two percent for workers) — is uniform throughout the country and applies to all con-

\textsuperscript{78} AFG § 168; see also supra note 47.
\textsuperscript{79} Id. § 169.
\textsuperscript{80} Introduction, 1B Unempl. Ins. Rep. (CCH) ¶ 20,000, at 3215 (Sept. 28, 1982).
\textsuperscript{81} 26 U.S.C. § 3306(c)(7); see 1B Unempl. Ins. Rep. (CCH) ¶ 20,273.03(4), (8) (Jan. 6, 1986).
\textsuperscript{82} 26 U.S.C. §§ 3304(a)(6), 3309(c); see 1B Unempl. Ins. Rep. (CCH) ¶ 20,275.03 (Mar. 15, 1977).
\textsuperscript{83} 26 U.S.C. § 3306(c)(2); see 1B Unempl. Ins. Rep. (CCH) ¶¶ 20,165-20,166.03 (Jan. 6, 1986).
\textsuperscript{84} 26 U.S.C. § 3306(k); see 1B Unempl. Ins. Rep. (CCH) ¶ 20,255 (June 20, 1973).
\textsuperscript{87} See supra notes 24-29 and accompanying text.
\textsuperscript{88} AFG § 167.
In the United States, however, under most state programs only employers contribute, and the contribution rate varies from state to state. A key factor employed by each state program in determining the contribution rate is the "experience rating" of the employer. The contribution rate imposed by a state varies on the basis of each individual employer's experience with unemployment. The rationale for this system is that the cost of unemployment insurance should be paid in such a way that those employers whose workers suffer the most involuntary unemployment should pay at a higher rate than those employers with less experience with involuntary unemployment.

The effect of the experience rating system is that the U.S. system is adversarial in nature. There is a built in incentive for the employer to contest claims filed by its workers. Thus, in all unemployment insurance claims, both the employer and the employee, as well as the state unemployment agency, are interested parties. Each has a right to participate in the proceeding, both at the administrative and judicial stages. In many instances, the employer and the employee are adversaries in the process. An advantage of the adversary system is that it weeds out spurious claims by employees. However, the adversary system may work a disadvantage to claimants with valid claims who are without resources to adequately represent themselves in the claims process.

In the FRG, an employer's role in the benefits determination process is less active. The employer is not a party to the proceedings and the contribution rate is not affected by the outcome. As a result, the U.S. employer's costs including both the actual employer contributions and the procedural costs are greater than those of his counterpart in the FRG.

5.3. Benefit Amount

In the FRG, the benefit amounts under the Unemployment Benefit and Unemployment Assistance programs are uniform throughout the country; the only variant is whether the unemployed person has chil-

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69 Id. §§ 174, 175; see also supra note 28.
70 For a listing of the states which require employer contributions for unemployment insurance, see All-State Tax Rates, 1B Unempl. Ins. Rep. (CCH) ¶ 3000, at 4803 (Jan. 23, 1987).
71 See id.
72 For a discussion of the experience rating system, see id. ¶ 1120 (Feb. 13, 1986).
73 See id. ¶ 1120, at 4219-2, -3.
74 See id. at 4224 ("[w]henever an employee receives benefits, those benefits have to be either charged to the state's fund or to the employee or employers who paid wages to the employee on the basis of which the benefits were received.").
dren. In the United States, each state has its own method of determining the benefit amount. For most states the amount is approximately fifty percent of remuneration. State laws also provide a maximum and minimum amount of benefits to be paid an employee in any one week. As of July 1986, the maximum amount varied from ninety-five dollars in Puerto Rico to $250 in the District of Columbia. With dependency allowances, the benefit may be as high as $310 per week in Massachusetts. The minimum benefit amount ranges from five dollars in Hawaii to sixty dollars in North Dakota.

5.4. Waiting Period

Another difference in the FRG and U.S. systems relates to the waiting period. A waiting period is a noncompensable period of time in which the worker must have been otherwise eligible for benefits. Most states require a one-week waiting period before benefits are paid. In the FRG, there is no waiting period and benefits are paid upon establishing eligibility.

5.5. Duration of Benefits

The duration of benefits in the FRG ranges from 78 to 312 days. In the United States, the duration varies from state to state, though the common maximum is twenty to twenty-six weeks. After these benefits are exhausted, a U.S. worker may be entitled to thirteen weeks of extended benefits under the Federal-State Extended Unemployment Compensation Act of 1970. A major distinction between the U.S. and FRG system is that the latter recently has sought to address the problem of unemployment of the older worker by increasing

95 AFG §§ 111(1), 136(1).
97 Id. ¶ 3001, at 4805-16 (July 30, 1986).
98 Id.
99 Id.
100 1B Unempl. Ins. Rep. (CCH) ¶ 1955 (June 9, 1982). In the United States, eligibility for unemployment insurance is met if: the worker files a claim for benefits; reports and registers at the local office; is able and available for work; worked in covered employment, and serves a waiting period. For a discussion of eligibility under the FRG system, see supra text § 4.1.2.
101 Id. ¶ 3001, at 4805-16.
102 AFG § 100.
103 See supra note 52 and accompanying text.
the duration of benefits for such workers.\textsuperscript{108}

5.6. Disqualification

The disqualification provisions of the Unemployment Benefit program in the FRG are similar in many respects to state unemployment insurance programs in the United States. In both countries, for example, a worker who voluntarily terminates his employment without "good cause" is subject to disqualification from benefits.\textsuperscript{107} The disqualification rules of the two countries will be compared after a separate discussion of the fundamental aspects of each.

5.6.1. Disqualification from Benefits in the Federal Republic of Germany

In the FRG, an unemployed person may be disqualified from receiving Unemployment Benefits if he either terminates his past employment relationship voluntarily or causes his own dismissal through his own misconduct.\textsuperscript{108} Such misconduct may consist of violations of provisions of his employment contract, dishonesty, willful disobedience of orders or rules, repeated negligence or gross negligence.\textsuperscript{109} Additionally, an unemployed person who refuses employment offered to him by a LEO, after being warned of the consequences of refusing the offer, may be disqualified.\textsuperscript{110} Additional reasons for disqualification include: refusal to participate in a vocational training or retraining program after a warning of the legal consequences of such refusal; voluntary termination of participation in, or causing dismissal from such a training program; or unemployment caused by a labor dispute.\textsuperscript{111}

An unemployed person will not be disqualified, however, if he refuses employment for a valid reason. Such valid reasons include a refusal because: the wages offered are below those initially agreed to or are unusually low for the area; the working conditions violate safety
standards; the work offered is considered contrary to law or principles of morality; the work arises out of a labor dispute, such as a strike or lockout; the unemployed person is unable to perform the work offered due to his mental or physical condition; or the employment would separate the person from his family so as to cause economic hardship to the family unit.112 Reasons for refusing employment that are not considered valid include refusal because: the employment offered does not correspond to the person’s previous employment, training or general experience level; the working conditions are less favorable than those at the person’s previous job; or the distance between the place of employment and the person’s home poses an inconvenience.113

Disqualification from Unemployment Benefits is generally for a period of twelve weeks from the day after the event that led to the disqualification.114 If it is demonstrated that the event causing disqualification was due to some personal hardship, the disqualification period may be halved.115 Once the disqualification period is over, the individual becomes eligible to receive Unemployment Benefits once again.116 If, however, the individual becomes disqualified again, he forfeits any benefits to which he otherwise may have become otherwise entitled.117

In order to preserve funds, temporary measures, such as increasing the disqualification period, have been implemented. Labor has opposed these measures; their position is that disqualification is punitive in nature and bad for morale. According to the labor unions, the trend towards increased periods of disqualification represents a serious conces-

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112 Interview with Dr. Erwin Brocke, President of the Bundessozialgericht, in Kassel, W. Ger. (Sept. 14, 1984) [hereinafter Brocke Interview].

113 Id.

114 Under a current amendment, effective until December 31, 1989, if an unemployed person causes his own dismissal through misconduct or terminates the employment without good cause, then he shall be disqualified from benefits for 12 weeks, or six weeks in case of hardship. AFG § 119a(1). In all other cases, the period of disqualification is eight weeks, or four weeks in case of hardship. Id. § 119a(2). However, of the approximately 300,000 disqualifications from Unemployment Benefits in the FRG in 1982, about 90 percent were a result of voluntary termination of employment or justified employee discharge. Consequently, in most instances, the period of disqualification is 12 weeks. A majority of the remaining disqualifications involve invalid refusal of employment. Deutscher Bundestag, Bericht der Bundesregierung zur Errichtung von Widerspruchsausschüssen bei der Bundesanstalt für Arbeit, Drucksache 10:442, Sachgebiet 810, 10th Wahlperiode 5 (Oct. 5, 1983) (setting forth a report by the Bundesanstalt) (copy on file with the author) [hereinafter 1983 Report].

115 AFG §§ 119(2), 119a.

116 Id. § 119(1).

117 Id. § 119(3). For example, if a person becomes eligible for benefits and refuses an offer of employment by the LEO, he will first be disqualified for 12 weeks; if after reinstatement the person refuses a second offer of employment, he will be permanently disqualified for the remainder of any benefits then due.
sion to management. The impact is even more serious when you consider the increasing number of disqualifications each year. Labor also opposed the Bundesanstalt’s decision not to continue with independent administrative review of initial determinations by the local offices. They felt that an independent review would lead to more careful decisionmaking at the administrative level.

Management disagrees with labor’s contention that disqualification is punitive. In their view, disqualification is necessary to preserve the fund for eligible claimants. It is protective rather than punitive. Management agreed with and advocated the Bundesanstalt’s decision not to implement independent review boards. They questioned its necessity and felt that it was unjustifiably expensive. In view of the elaborate mechanism for de novo judicial review outlined above, their position might be valid.

5.6.2. Disqualification from Benefits in the United States

Since unemployment insurance in the United States is governed and administered by the individual states, much variation exists as to what constitutes adequate grounds for disqualification from receipt of benefits. As noted above, a worker who voluntarily terminates his employment without “good cause” generally will be disqualified from receiving benefits. Even though most state statutes also require the rejected work to be “suitable work” before disqualifying the person, what constitutes good cause is defined differently from state to state.118

Similar to the system in the FRG, most states mandate that a person who without good cause fails to either apply for available, suitable work when directed to do so or return to his position of self-employment will be disqualified.119 These statutes are subject to an overlay of federal law, however, which limits their ability to deny benefits to workers in certain circumstances.120 The Federal Unemployment Tax Act prohibits the denial of benefits to any worker for refusing to accept work (1) where there is a strike, lockout or other labor dispute at the

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118 Several factors are considered in determining whether the employment offered is suitable. Most states consider: the degree of risk to the person’s health; safety and morality; the degree of physical fitness or prior training necessary as well as that possessed by the person; any accumulation of prior earnings; the length of any previous employment; the possibility of securing local work in the person’s customary occupation; and the distance of the available work from his residence. In general, all relevant factors may be considered in determining whether suitable work has been offered to the person and whether the reasons for refusal to accept constitute good cause. See 1B Unempl. Ins. Rep. (CCH) ¶ 1965, at 4428-31 (June 9, 1982).

119 See id. at 4428-29.

120 See id. at 4429-30.
place where the employment is offered, (2) where the wages, hours or other basic conditions of employment offered are substantially less favorable to the worker than those existing for similar work in the area, or (3) where acceptance of such employment would require the worker to join a company union or abridge or limit his right to join or retain membership in any bona fide labor organization.\textsuperscript{121}

As in the FRG, most disqualifications are caused by voluntary termination of employment or justified discharge. These reasons are followed, in frequency, by invalid refusal of suitable work or vocational training and refusal due to a labor dispute.\textsuperscript{122}

5.6.3. \textit{Comparison of Disqualification from Benefits}

There appears to be no significant distinction between disqualification provisions in the FRG and those in the United States. While the statutes of both systems mandate that offices at all levels of operation follow predetermined rules and procedures, both sets of statutes also allow for much discretion in determining eligibility.

The most notable difference lies in the duration of the disqualification period which has been much less in the FRG than in most U.S. state programs. While the maximum length in the FRG is usually twelve weeks,\textsuperscript{123} in the United States it varies from state to state and can often result in a complete forfeiture of all benefits.\textsuperscript{124} Despite opposition from organized labor, the recent trend in the FRG is toward increases in the length of the disqualification period.\textsuperscript{125} In addition, after disqualification in the United States, the person can often only become eligible again for benefits after securing further employment that lasts for a specified period of time.\textsuperscript{126} Such a penalty generally only attaches in the FRG after a worker becomes disqualified the second time.

Without performing a comprehensive study of the administrative and judicial decisions in both countries it is difficult to assess the overall impact of disqualification on the labor market in the FRG and the United States. This difficulty is further compounded by the fact that

\textsuperscript{121} 26 U.S.C. §§ 3301, 3304(a)(5) (1982).
\textsuperscript{122} See supra note 118.
\textsuperscript{123} See supra note 114.
\textsuperscript{124} See 1B Unempl. Ins. Rep. (CCH) ¶ 1965, at 4431 (July 1, 1982).
\textsuperscript{125} The disqualification period was four weeks, or two weeks in case of hardship, when the Promotion Act was passed in 1969. It was then amended to increase the period to eight weeks, or four weeks in case of hardship, before the present amendment, effective January 1, 1985, to increase the period, in most cases, to 12 weeks, or six weeks in case of hardship. See supra note 114.
\textsuperscript{126} See 1B Unempl. Ins. Rep. (CCH) ¶ 1965, at 4431 (July 1, 1982).
the statutes in each country mandate standards which are very similar, leading to the result that the majority of disqualifications in both countries occur due to valid worker discharges and voluntary terminations of employment.

5.7. Administrative and Judicial Procedure

5.7.1 Administrative and Judicial Procedure in the Federal Republic of Germany

In the FRG, all claimants for Unemployment Benefits and Unemployment Assistance must file an application with a LEO of the Bundesanstalt.\(^{127}\) The initial determination of entitlement is the sole responsibility of the director of the LEO. The decision must be written and must apprise the claimant of the procedure regarding administrative reconsideration (Widersprüche) of the initial determination.\(^{128}\) Unless a timely reconsideration is sought, the initial determination is final and binding.\(^{129}\) Claimants seeking to challenge an initial determination, however, must file a written application for review within one month from the publication of the initial LEO determination.\(^{130}\) Representation by an attorney, union official or other representative is allowed, and new evidence may be introduced. The reconsideration is carried out by the director of the LEO, the same person who rendered the initial determination. After reviewing the entire file, the director may affirm, modify or reverse the initial determination.

Claimants dissatisfied with the Widersprüche decision must have exhausted all administrative review remedies before seeking judicial review in the appropriate Social Court (Sozialgericht).\(^{131}\) This review is initiated by the claimant's filing a written demand for review within

\(^{127}\) AFG § 146. The procedure governing Unemployment Benefit claims also is applicable to Unemployment Assistance.

\(^{128}\) Sozialgesetzbuch, 10tes Buch, § 36, 1980 BGBI I 1469 (W. Ger.).

\(^{129}\) Sozialgerichtsgesetz [SGG] § 77, 1975 BGBI I 2535 (W. Ger.). For certain exceptions in which a hearing is not required, see id. § 78.

\(^{130}\) Id. § 84(1).

\(^{131}\) Id. § 85(3). The Sozialgericht has designated panels (Senat) depending on the particular aspect of social law. For example, there are separate Senat for unemployment benefits and assistance, pensions, disability, health insurance and accident insurance.

The Sozialgericht is comprised of one professional judge and two lay (honorary) judges (one from labor and one from management). Lay judges are appointed by the Minister of the State in which the court sits for a four-year term. Judges of the Sozialgericht sit on a particular Senat for a certain period of time, although it is not uncommon for judges to move to another Senat after completing their term. Brocke Interview, supra note 112.
one month of the Widersprüche determination. The parties at this stage are the claimant and the local office. Again, representation is allowed. The timely application for review operates to suspend the prior decision. The Sozialgericht hears new evidence through witnesses and documents. An oral hearing may be convened or the case may be submitted through the introduction of written papers. The claimant may ask the court to subpoena the former employer; however, absent a subpoena, the employer is neither a party to the proceeding nor present at the hearing. In certain situations, the court may issue a decision without a hearing (Vorbescheid). If the claimant requests a hearing after a Vorbescheid, the court will grant a hearing; if no hearing is sought, the court's decision if final and binding. In most cases, however, the court will hear the case and render a decision (Urteil). Of course, some cases may be negotiated out of court (Vergleich) or withdrawn by the claimant (Rücknahme). Negotiated settlements and withdrawals are final and binding.

Parties dissatisfied with the Sozialgericht verdict may ask the court for leave to appeal the decision to the State Supreme Court for Social Jurisdiction (Landessozialgericht) having jurisdiction over the case. This second level review must be initiated in writing within thirty days from the date of mailing of the Sozialgericht's decision. Representation is permitted. The appellant may be the claimant or the Regional Employment Office. In certain instances (for example, if less than thirteen weeks of benefits are involved), the appeal may not be allowed. If the Landessozialgericht accepts the appeal, a de novo

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132 Id. § 87(1).
133 Id. § 97.
134 Id. § 106.
135 Id. § 108.
136 Id. § 106(3)(4).
137 Brocke Interview, supra note 112. The employer is not a party at the administrative level either.
138 SGG § 105.
139 Id. § 125.
140 Id. § 101.
141 Id. § 102.
142 Id. § 143. There are nine Landessozialgerichte in the FRG. Each Landessozialgericht Senat is comprised of three professional judges and two lay judges (one from labor and one from management). The lay judges are appointed for a four-year term by the Minister of the State. Brocke Interview, supra note 112.
143 SGG § 151(1).
144 If the Sozialgericht finds for the claimant, the LEO notifies the appropriate REO, which decides whether to appeal the decision. Factors considered in determining whether to appeal include the potential cost and the significance of the issue. Brocke Interview, supra note 112.
145 SGG § 144(1)(2).
hearing is held.\textsuperscript{146} Again, the claimant may testify and present new evidence or the case may be submitted on written papers.\textsuperscript{147}

At the Landessozialgericht hearing, the examination of witnesses is carried out by the court and not by the parties or their representatives. This also applies to proceedings in the Sozialgericht. (Actually, a nonadversarial process exists throughout the entire FRG judicial system.) After receiving testimony, oral and written argument and documents, the Landessozialgericht renders a decision.

A party dissatisfied with the decision of the Landessozialgericht may seek leave to appeal to the Federal Social Court (Bundessozialgericht).\textsuperscript{148} As a general rule, the Landessozialgericht must approve the appeal.\textsuperscript{149} If the Landessozialgericht allows the appeal, the Bundessozialgericht must accept it. It is possible, however, that the Bundessozialgericht will grant the appeal notwithstanding a denial by the Landessozialgericht.\textsuperscript{150} In any event, appellant must submit a written request for appeal within thirty days of the Landessozialgericht verdict.\textsuperscript{151} Representation is required before the Bundessozialgericht.\textsuperscript{152} There is no new evidence received by this court, and after careful review, a decision is rendered.

On rare occasions, and upon recommendation of the Bundessozialgericht, the decision will be reviewed by the Grosse Senat. The Grosse Senat is comprised of the Presiding Judge of the Bundessozialgericht, six other professional judges from various senates (e.g., unemployment, social security, war victim relief) and four honorary judges (two from labor and two from management).\textsuperscript{153} The Grosse Senat will hear cases only when there has been a conflict between different senates in the Bundessozialgericht.\textsuperscript{154} The Presiding Judges of the two conflicting senates must sit on the Grosse Senat that hears the

\textsuperscript{146} Id. § 157.
\textsuperscript{147} Id.
\textsuperscript{148} Id. § 160. The Siebte Senat of the Bundessozialgericht is in charge of judicial review of administrative action/inaction in matters concerning the Promotion Act. This Senat consists of three professional judges and two lay judges (one from labor and one from management). The lay judges are appointed for a four-year term by the Federal Minister of Labor. Brocke Interview, supra note 112.
\textsuperscript{149} Id. § 161(1). In certain situations, an appeal may proceed directly from the Sozialgericht to the Bundessozialgericht bypassing the Landessozialgericht. This accelerated appeal, called Sprungrevision, occurs in significant cases (e.g., mass appeals, cases of first impression affecting many individuals). Id. § 161.
\textsuperscript{150} The petitioner may file a motion challenging the Landessozialgericht's denial, giving the Bundessozialgericht discretion to review the case. Id. § 160(a)(4).
\textsuperscript{151} Id. § 164(1).
\textsuperscript{152} Id. § 166(1).
\textsuperscript{153} Id. § 41(1).
\textsuperscript{154} Id. §§ 42, 43.

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dispute. In cases involving constitutional issues (e.g., religious freedom, equal protection), the Grosse Senat, like every other panel of the Bundessozialgericht, must refer the case to the Federal Constitutional Court (Bundesverfassungsgericht).\textsuperscript{165}

5.7.2. Comparison of Administrative and Judicial Procedures

There are several key differences in the FRG and U.S. systems with regard to administrative and judicial procedure. First, in the United States, the employer is an interested party in all unemployment insurance claims that involve that employer.\textsuperscript{166} Therefore, in the United States, employers, employees and the state unemployment agency alike may all seek administrative and judicial review. In the FRG, only the employees and the Bundesanstalt are parties to the proceedings, and therefore, only they may seek review.\textsuperscript{167}

A second distinction relates to administrative review. Under the FRG system, there is no independent administrative review of initial determinations by the LEO. An initial determination of a claim can be reconsidered upon timely request by the claimant,\textsuperscript{168} but this reconsideration is carried out by the same LEO director who was responsible for the initial determination. Claimants who are dissatisfied with the reconsideration determination must proceed directly to judicial review.\textsuperscript{169}

The U.S. system contains a more involved administrative review process.\textsuperscript{170} As in the FRG, the initial determination is made by a local office.\textsuperscript{171} However, in the U.S., claimants or employers dissatisfied with the determination may appeal the decision to a state administrative tribunal.\textsuperscript{172} This tribunal is called a board of review in many states. These boards are independent components of a state unemployment system and usually are comprised of three members — one appointed from labor, one from management, and a neutral member. Upon a timely application for appeal, the board will appoint a referee, usually a full-time employee of the board, to conduct a hearing.\textsuperscript{173} This hear-

\textsuperscript{165} Id. § 39(2).
\textsuperscript{166} See supra note 94 and accompanying text.
\textsuperscript{167} See supra note 137 and accompanying text.
\textsuperscript{168} See supra note 121 and accompanying text.
\textsuperscript{169} See supra note 122 and accompanying text.
\textsuperscript{170} See 1B Unempl. Ins. Rep. (CCH) ¶ 2020, at 4543-44 (Sept. 9, 1986).
\textsuperscript{171} See id. at 4541-42.
\textsuperscript{172} Social Security Act § 303(a)(1), 42 U.S.C. § 503(a)(1) (1982) (requiring that state unemployment insurance laws provide an opportunity for a fair hearing before “an impartial tribunal” for all individuals whose claims for unemployment benefits are denied).
\textsuperscript{173} See 1B Unempl. Ins. Rep. (CCH) ¶ 2020, at 4543 (Sept. 9, 1986).
ing, attended by the employer and the claimant, allows for presentation of new evidence, testimony by the parties and their witnesses, and cross examination. After the hearing, the referee will render a decision. In some states this decision is final and the only review allowed is to the courts. In about half the states, however, a dissatisfied party may seek further review with the board. After the board’s determination of this second level appeal, the decision is final and may be appealed only to the courts.

The FRG system of administrative review has not always been dependent on the same LEO director to render both the initial determination and any appeal taken therefrom. In 1979, a project was undertaken in which Section 119 determinations of the LEOs were reviewed not by the Chief of the LEO, but instead by an independent committee. Each committee consisted of three members — one from labor, one from management and one from the Bundesanstalt. Upon timely written request by the claimant, individual committees, not the chief of the LEO, would review the entire record of the LEO determination of the claim and render a decision. During the three-year experiment, over 6,600 committee sessions were conducted. At each session between four and twenty-two cases were presented. In 1983, the Bundesanstalt submitted a report recommending the project be abolished and, as a result, the committee system was abandoned.

Organized labor has favored the committee system. It contended that all areas of social law except unemployment benefits had such a system. Additionally, it maintained that (1) such a system would strengthen the autonomy of the LEOs, (2) that it would improve the quality of the LEO determination process, and (3) would allow for greater uniformity of decisions and greater acceptance of LEO decisions. Labor underscored that during the experiment, Widersprünge involving Section 119 disqualifications were reduced from nineteen percent to 14.7 percent of the total number of Widersprünge.

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164 See id. at 4544.
165 See id.
166 See id.
167 See id.
168 Interview with Dr. Hans V. Lüpke, Administrative Specialist in Unemployment Insurance with the Bundesanstalt für Arbeit, in Nuremberg, W. Ger. (Sept. 6, 1984) [hereinafter cited as Lüpke Interview].
169 Id.
170 1983 REPORT, supra note 114, at 10.
171 DEUTSCHER GEWERKSCHAFTSBUND BUNDESTAG VORSTAND, PROTEST GEGEN DIE BESETTUNG DER WIDERSPRUCHSAUSSCHÜSSE, BERICHT AN DEN BUNDESTAG, NEUE VERWALTUNGSRATSENTSCHEIDUNG NÖTIG (Feb. 1983) (report by national labor council objecting to the removal of the committee system).
172 Interview with William Adamy, Advisor for the Deutscher Gewerkschaftsbund
Management, on the other hand, vigorously opposed the committee system. It is believed that the LEO director, acting independently, would be likely to grant fewer benefits. The reasons given included: (1) internal changes in the present system could remedy the serious problems; (2) the decrease in Section 119 appeals were not due to the experiment but rather to external factors; (3) the committee system causes a greater delay in the Widersprüche process; (4) the committee system was too expensive; and (5) the committees were quasi-judicial in nature and constituted an intrusion on the judicial process. Perhaps the most significant argument of the employers was that there was only a four percent disparity between the committee decisions and the LEO decisions. Labor’s response to this was that the committee system itself was the reason for the low variance between initial determinations and the committee reconsideration determinations (i.e., the LEOs knew they were being watched and thus were more careful in their decisionmaking).

In any event, the committee system was abandoned and today Widersprüche is once again carried out by the chief of the LEO that issued the initial determination. Today Bundesanstalt statistics reveal that Widersprüche is utilized by claimants more than ever. From 1970 to 1985, the number of Widersprüche cases increased from 51,800 to 334,569 (approximately a 600% increase). In 1983, 32.5% of the Widersprüche cases resulted in total victory for the claimant and 3.4% of the cases represented a partial victory. No similar statistics were available for 1984 and 1985. In 1970, there were 3,617 appeals to the Sozialgericht (7.0% of the Widersprüche), while in 1985 there were 33,847 appeals (10.1% of the Widersprüche). In 1985, there was a 584.6% increase in Widersprüche over the 1970 level; over the same period there was an 945.9% increase in appeals to the Sozialgericht (34,214 cases), 630.9% increase in appeals to the Landessozialgericht (3104 cases) and 367.9% increase in appeals to the Bundessozialgericht (401 cases). These statistics reveal an ever-increasing dissatisfaction on the part of claimants with the decisions of the LEOs and the courts.

Bundesvorstand, in Düsseldorf, W. Ger. (Sept. 12, 1984) [hereinafter Adamy Interview].

172 Interview with Reinhard Ebert, Senior Administrator with the Bundesvereinigung der Deutschen Arbeitgeberverbände, in Cologne, W. Ger. (Sept. 12, 1984).
174 Id.
176 Adamy Interview, supra note 172.
178 BUNDESANSTALT FÜR ARBEIT; GESCHÄFTSBERICHT (1985 and earlier editions).
177 Id.
178 Id.
179 Id.
The third major distinction between the FRG and U.S. systems lies in the procedure for judicial review of agency determinations. The judicial review process in the FRG seems to favor labor. The claimant is entitled to two separate de novo hearings in both the Sozialgericht and the Landessozialgericht. Further judicial review by the Bundessozialgericht is permitted although the hearings are not de novo. Moreover, the judges are specialists in unemployment insurance law and it appears that there is thorough review of the administrative decisions.

In the U.S., state procedures do not allow for de novo judicial review of final board decisions. Of course, such review is generally not permitted until all administrative remedies have been exhausted. Depending upon particular state laws, a dissatisfied party may appeal to the courts — in most states the court of general jurisdiction. Under the U.S. system, the court’s review is limited to a review of the administrative record, and it will not consider any evidence, either in the form of testimony or documents. The court may remand the case to the board. The scope of judicial review is limited in nature; usually the only question before the court is whether the agency determination is against the manifest weight of the evidence or is contrary to law. Thus, the system of judicial review in the United States is far less rigorous than its counterpart in the FRG. Interestingly, based on the discussion above, administrative review is far less rigorous in the FRG.

6. Conclusion

The Bundesanstalt administers a comprehensive and innovative program to promote employment in the FRG. With increasing unemployment, a greater emphasis has been placed on the Unemployment Benefits component of the program which, in theory, is supposed to be one of many measures designed to combat unemployment and carry out the intent of the Promotion Act. With increased rates of unemployment, more pressure is put on the benefit structure. Today more than two-thirds of the Bundesanstalt’s budget is earmarked for benefits. Claims are increasing and more workers are contesting their disqualifi-
cations each year. There is little doubt that what was originally intended to be a social benefit program is evolving into an insurance system, much like that in the United States, with an increased emphasis on eligibility and disqualification. If the level of unemployment and the pressures on the Unemployment Benefit system continue, it seems likely that the temporary measures, such as the increase in the disqualification period, will become permanent and the FRG program will become more and more similar to its U.S. counterpart.

187 Id.