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German Tax and Legal News

Aggravated Dismissal Protection with regard to Severe Disability – Participation of the Representative Body is now essential

Missing participation of Representative Body for Severely Disabled Employees before notice of dismissal is given makes dismissal invalid.

The conditions for dismissal of severely disabled (or comparable) employees were tightened. A notice of dismissal now requires the prior participation of the Representative Body for Severely Disabled Employees. Without such prior participation, the dismissal is invalid.

Changed legal position
This sanction of invalidity is entirely new. The participation of the Representative Body for Severely Disabled Employees was already required according to the former legal situation, but was not a formal precondition for the dismissal.

The requirements for a valid dismissal thus have increased. If a Representative Body for Severely Disabled Employees and a works council do exist, at least three (possibly four) processes must be performed:

1. Proper participation of the Representative Body for Severely Disabled Employees (sec. 95 para. 2 s. 3 SGB IX (as of January 1, 2018: sec. 178 para. 2 s. 3 SGB IX)
2. Approval by the Integration Office (sec. 85 SGB IX; in future: sec. 168 SGB IX)
3. Proper hearing of the works council (sec. 102 BetrVG)
4. In case of dismissals in course of a collective redundancy (sec. 17 KSchG):

- consultation process with the Works Council
- notification of the employment agency

A participation shall not be required if the employer was not aware of the severe disability at the date of the dismissal, the severe disability was not obvious and the employee did not inform him about the severely disability within three weeks after receiving the termination.

Unsolved legal issues
Unfortunately, the wording of sec. 95 SGB IX new version (respectively sec. 178 SGB IX new version) leaves open various legal questions, two significant of which will be outlined hereinafter:

• The German legislator has not yet defined any definite deadline for comments/a statement. It is currently unclear, which time period shall be given to the Representative Body for Severely Disabled Employees to provide its statement.

In the meantime, there are opinions in legal literature that recommend the granting of (at least) the same term to the Representative Body for Severely Disabled Employees as to the works council in case of a dismissal which means one week for ordinary dismissal and three days for extraordinary dismissal. We currently agree with this opinion, but decisions of labour courts will certainly provide clarification with regard thereto in the near future.

• According to the wording of the aforementioned regulations, an employer has to involve the Representative Body for Severely Disabled Employees before making final decisions. The temporal context of the participation of the Representative Body for Severely Disabled Employees and the application to the Integration Office thus remains unclear.

A few opinions in legal literature consider it sufficient that the Representative Body for Severely Disabled Employees and the Integration Office will be involved at the same time. In our opinion it is highly recommendable to involve the Representative Body for Severely Disabled Employees before making an application to the Integration Office for approval of dismissal. Here again, jurisdiction will ultimately need to provide clarification.

Conclusion
The revision of the SGB IX bears legal uncertainties in connection with the termination of severely disabled employees. By referring to the principles of the consultation procedure of

the works councils according to sec. 102 BetrVG and applying these principles, such uncertainties should however in practice be surmountable.

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