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New dismissal protection for severely disabled employees as per Sec. 95 (2) s. 3 SGB IX (Social Code Book 9) (new version)

*On 1 December 2016, the German Federal Parliament passed the Federal Participation Act ("**Bundesteilhabegesetz**" - "**BTHG**"), which partly entered into force on 1 January 2017. The purpose of the BTHG is to strengthen the participation and self-determination of persons with disabilities. The law will come into force in four stages of reform. What has hardly been noticed in company practice is that effective 1 January 2017, i.e. already with the first stage, dismissal protection for the severely disabled employees was significantly enhanced by expanding the rights of the representative body for severely disabled employees ("**Schwerbehindertenvertretung**"). This means in practice that even more complex termination procedures have to be anticipated.*

I. Introduction

Towards the very end of the legislative process a modification was incorporated into the BTHG that is of high relevance to employers. As of 1 January 2017, a severely disabled employee can only be given notice of termination after the employer has consulted the representative body for severely disabled employees. Otherwise, the termination is invalid under Sec. 95 (2) s. 3 Social Code Book 9 ("**SGB IX**") (new version). Severe disability is defined as a recognised degree of disability of at least 50. People with a degree of disability of at least 30 but less than 50 may, upon request, be declared equivalent to a severely disabled person ("**gleichgestellt**") and will then essentially be afforded the same protection in law.

II. Previous legal situation

It is true that even under the previous legal regime the representative body for severely disabled employees had to be consulted before giving notice of termination to a severely disabled employee. However, if the employer ignored that body's right to be heard, this did not affect the validity of the termination as such. All the representative body could do was make an attempt to enforce its rights in a labour court proceeding and motioning for a fine of up to EUR 10,000.00. The legislator realised that in practice such sanctions were of rather limited relevance.

III. Legislative change

As of 1 January 2017, any such termination is invalid unless the representative body for severely disabled employees is consulted before giving notice to a severely disabled employee or an employee with equivalent status. The following sentence 3 was inserted in Sec. 95 (2) SGB IX: *"A notice of termination to a severely disabled person which the employer issues without previous consultation as per sentence 1 is ineffective."* This amendment governs the legal consequences of a failure to involve the representative body for severely disabled employees.

IV. Effects on termination

As a result, the formal requirements on an effective termination of a severely disabled employee have considerably increased since 1 January 2017.

If the operation has a works council and a representative body for severely disabled employees, employers must now conduct three procedures before being able to give notice of termination to a severely disabled employee:

- Obtaining the consent of the integration office ("**Integrationsamt**")
- Consulting the works council
- Consulting the representative body for severely disabled employees

V. Open questions

The reform leaves two questions open. For one thing, it is unclear how much time for commenting the representative body for severely disabled employees must be given before the employer may give notice of termination. Unlike when hearing the works council, the BTHG does not provide for a concrete deadline in this respect. Until pertinent case law regarding this issue is available, one can only recommend to employers to grant to the representative body for severely disabled employees at least as much time for commenting as to the works council, i.e. one week in the case of termination for convenience and at least three days in the case of termination for cause. A severely disabled person should not be given a notice of termination before both aforementioned bodies have submitted a conclusive comment. On the other hand, whether such comment is positive or negative has no effect on the legal validity of the termination.

Secondly, it is unclear whether the representative body must be consulted before filing the application with the integration office. The revised law does not include any concrete provision in this respect either. As long as no pertinent case law exists in this regard, immediate consultation, i.e. prior to filing the application with the integration office, is recommended so as to avoid invalidity of termination.

VI. Summary

The BTHG strengthens the rights of severely disabled employees, and of employees having equivalent status, in the case of a notice of termination by a new compulsory requirement providing for the involvement of the relevant representative body. At the same time, this further increases the already considerable effort to be expended for termination of a severely disabled employee. In the future, before giving such notice of termination, employers must additionally ensure that the representative body for severely disabled employees is informed and heard and should rely on relevant experience with works council consultations until all outstanding issues have been resolved.

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