WIRLITSCH
KANZLEI FÜR ARBEITSRECHT

NEWSLETTER LABOR LAW

April 2024 | 4th edition

TOPICS

Dear readers,

Welcome to the new NEWSLETTER LABOR LAW!

Here we inform you about:

Successful launch of the new branch office in Singen: Our new branch office in Singen was launched in 2024 and we can already look back on two successful training sessions.

Our main topics are:

- Pushing into the reduced earning capacity pension: How an innocuous letter from the health insurance company can lead to job loss.

- Shortage of skilled workers and the three Ds: Demographics, Digitalization and Decarbonization. The challenges of the changing labor market.

- The latest labor court decisions:

Ban on cell phone use in the workplace

... and much more!

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JOUR FIXE LABOR LAW

Are you interested in discussing labor law topics in a small group? Then our jour fixe is just right for you!

We deal with all kinds of employment law topics or topics you wish to discuss at our jour fixe. The jour fixe takes place every three months at the end of the month.

In addition, we always discuss the latest case law on a wide range of topics.

- Working time law
- Works constitution law
- Staff representation law
- Disability law
- Civil service law...

The next jour fixe dates:

- 24.04.2024 at 18.00 in Freiburg,
- 25.04.2024 at 19.00 in Singen,
- 26.04.2024 at 19.00 via Zoom

https://us02web.zoom.us/j/81168682712?pwd=TXZPNUsvdnlaMlMrQU1sKzFOVk5nZz09

You will receive all further information about the event location with our special invitation to the jour fixe or at

wirlitsch-arbeitsrecht.de

TRAININGS LABOR LAW

The next training courses at a glance:

07. Mai 2024

Schwerbehindertenrecht für Schwerbehindertenvertretungen, Betriebs- und Personalräte

08. Mai 2024

Arbeitszeit und Arbeitszeiterfassung

13. bis 15. Mai 2024

Arbeitnehmervertreter im Aufsichtsrat

23. Mai 2024

Betriebliches Eingliederungs-management (BEM)

All further information on the training courses can be found at

afb-bodensee.de

Singen Branch

Our new branch office in Singen has been open since January 1, 2024. You can book on appointment at our new premises in Singen. We look forward to assisting you with your legal matters.

Now also in Singen!

Further information on our services can be found on our website:

www.wirlitsch-arbeitsrecht.de

WIRLITSCH - Law firm for labor law

Julius-Bührer-Straße 4

78224 Singen (Hohentwiel)

Appointments by telephone only

Tel.: 0152 37605935

Illness and being forced into a reduced earning capacity pension

In the case of employees who have been ill for a longer period of time and for whom it is unclear whether they will be able to return to their old job, there is a risk that a seemingly harmless letter from the health insurance company could lead to the loss of their job if the right measures are not taken in good time if there are corresponding provisions in the collective agreement or employment contract.

Letter of demand from the health insurance fund

In the situation described above, the health insurance funds can request the insured person to submit an application for medical rehabilitation to the pension provider in accordance with Section 51 SGB V. This sounds good at first - the employee in poor health is looking forward to rehab, possibly in beautiful surroundings - but there is a risk of being unexpectedly forced out of the employment relationship and into a disability pension.

What can happen?

According to § 116 SGB VI, an application for medical rehabilitation can be reinterpreted as a pension application if either the medical rehabilitation does not appear to be promising or if it has been carried out without success. The pension application is then deemed to have been submitted at the time of the application for rehabilitation! The employee concerned can therefore be retired without intending to do so.

What can you do about this?

An objection can be lodged against the health insurance fund's notice of demand - a deadline of one month from receipt of the notice must be observed. However, as appeals and legal action have no suspensive effect in this case, only summary proceedings before the social court can help. Corresponding letters of demand from health insurance companies are often incorrect; for example, there is often no sufficiently substantiated medical report. The health insurance companies also usually disregard their discretion - and do not address this in the letter. This makes the decision unlawful. To be on the safe side, an application for recognition of the severely disabled status and at the same time for equal status should be submitted at this stage.

How does the application according to § 51 SGB V affect the employment relationship?

If the insured person is awarded a disability pension after unsuccessful rehabilitation, this can have serious consequences for the employment relationship. Various collective agreements and, in connection with this, employment contracts stipulate that the employment relationship ends automatically at the end of the month in which the pension notice is delivered. This is particularly problematic if only a partial disability pension is awarded and the employee still has a residual capacity to work 3-6 hours a day. He could therefore continue to work part-time for his old employer and also draw a partial disability pension.

However, various collective agreements, such as § 33 TVöD/TV-L, state that

((2) The employment relationship shall also end at the end of the month in which the notice from a pension insurance provider (pension notice) is delivered stating that the employee is fully or partially incapacitated for work. (...)

The employment relationship therefore ends automatically due to the award of disability pension, which the employee has not actively applied for. However, Section 33 (3) TVÖD/TV-L provides for the possibility of preventing the termination of the employment relationship. However, an application must be submitted within 2 weeks of receipt of the pension notice. The employee must expressly request continued employment in their previous position or another vacant position. Very few employees are aware of this deadline, so in such situations it is essential to take a close look at the employment contract and the collective agreements and request continued employment. Otherwise there is a risk that the employment relationship will end, even though part-time employment would still be possible.

What can be done to prevent unwanted termination due to retirement?

A review of conditions can be brought before the labor court. This is possible up to 3 weeks after the end of the employment relationship at the latest. Since the consent of the integration office is also required for the termination of employment due to a resolutory condition (in this case the commencement of retirement) in the case of severely disabled persons and employees with equivalent status in accordance with Section 175 SGB IX, the termination of the employment relationship can be prevented in this way.

Conclusion:

1. Requests from the health insurance fund to submit an application for rehabilitation should not be accepted without objection. It should always be checked whether an objection, possibly in summary proceedings, makes sense.

2. Parallel to the objection against the request of the health insurance company, an application for recognition of the severely disabled status and at the same time the application for equalization should be submitted.

3. If an application has been submitted and reinterpreted as a pension application and a partial disability pension is awarded by the pension insurance institution, the conditions of the employment contract should be examined carefully so as not to miss the two-week deadline for submission.

4. It is still possible to take legal action against an unexpected retirement before the labor court - depending on the circumstances of the individual case, it may still be possible to continue the employment relationship. This can improve the chances of not being forced out of the employment relationship prematurely and having to rely on the significantly lower disability pension.

Shortages of skilled workers and the three Ds

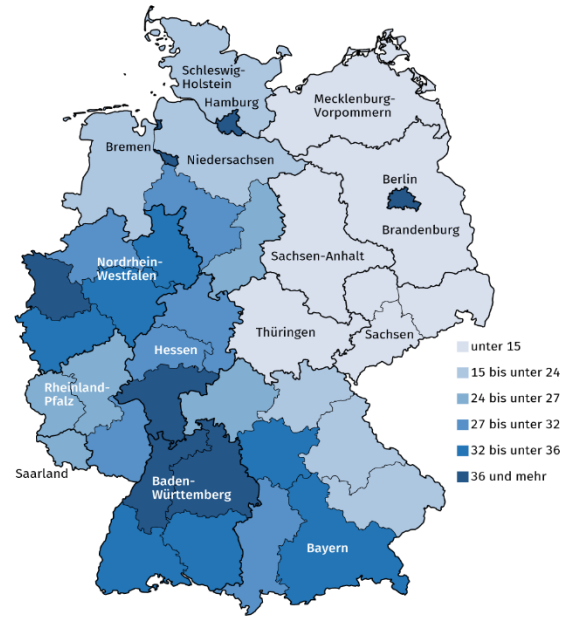
Demography, Digitalization and Decarbonization. The challenges of the changing labor market. The baby boomers of the post-war era are gradually retiring, while significantly fewer young people are joining them.

At the same time, the accelerated structural change caused by digitalization and the ecological transformation is leading to major shifts in the skills in demand among skilled workers. The transformation of the German economy towards a digital, ecologically decarbonized economy can only succeed with enough suitably qualified skilled workers.

New horizons thanks to the Skilled Immigration Act

With the Skilled Immigration Act, Germany is opening up further to international skilled workers. This law makes it easier to recruit and hire qualified workers from non-EU countries. A key innovation is the recognition of foreign professional qualifications and the flexibilization of the criteria for taking up employment. This is a response to the shortage of skilled workers and enables companies to build diversified and competent teams.

Anteil der Personen mit Migrationshintergrund 2022
Erstergebnisse des Mikrozensus in (ehemaligen) Regierungsbezirken in %



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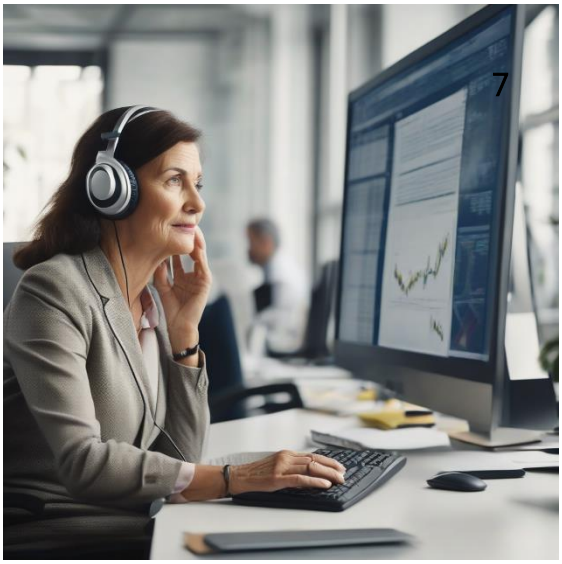
Important: Works and staff councils should prepare for a more diverse workforce and develop integrative strategies to optimally integrate new employees. This also means, for example, that in future it may be necessary to communicate the content of health and safety instructions in several languages.

Age knowledge is used more abroad



In some countries, working people make up a growing proportion of the working population. This is one of the findings of a study by the Roman Herzog Institute (RHI). The researchers looked at working life in an international comparison as well as the importance of so-called silver workers for securing skilled workers. While around 50% and 45% of 65 to 69-year-olds are employed in Japan and Iceland respectively - third place for the USA with 31% - in Germany it is not even one in five seniors, in 11th place out of 20. For the employment researchers, this is a reason to suggest that voluntary working from retirement age should be made easier in view of the increasing shortage of workers. After all, a long working life - before or after retirement - and a high level of life satisfaction are not mutually exclusive, the study continues

At the top of the country rankings are countries in which people also have a long working life, according to the RHI paper. The study identifies a further opportunity to leverage employee potential in weekly working hours. In Germany, 41% of employees work less than 40 hours per week. Almost one in four employees even work less than 35 hours. With a part-time rate of 22%, Germany ranks fourth among OECD countries, well above the average of 16%. The researchers then compared the actual and desired working hours in Germany. While full-time employees would like to work four to five hours less per week, part-time employees would like to work one to 3.5 hours more per week on average. The experts therefore suggest increasing the full-time ratio by improving full-time offers and childcare facilities.

Is the cell phone ban subject to co-determination?

Whether the private use of cell phones is subject to co-determination depends on whether it concerns regulations on the "order of the company or office" or purely "work behavior". In the latter case, there is no co-determination. If the order of the company/office is affected, the works or staff council has a say. Section 87 Para. 1 No. 1 BetrVG or Section 80 Para. 1 No. 18 BPersVG is decisive. Case law has so far been inconsistent and has sometimes assumed co-determination in the case of a cell phone ban (e.g. in an important decision by the Munich Labor Court 18.11.2015 - 9 BVGa52/15), and sometimes not.

In its recent decision on this topic (BAG 17.10.2023 - 1 ABR 24/22), the BAG has now finally ruled that a ban on private cell phone use during working hours can be introduced without the consent of the works council (BAG 17.10.2023 - 1 ABR 24/22). The court is convinced that such a ban during working hours only affects working behavior and is therefore not subject to co-determination. The use of smartphones demands the employees' attention - at least for a short time. This could lead to work interruptions, lack of concentration or failure to complete tasks. A corresponding ban on use therefore typically and primarily concerns work behavior.

BAG 17.10.2023 - 1 ABR 24/22 on the cell phone ban

This is what happened: The employer is an automotive company with around 200 employees. In November 2021, the employer posted a notice informing its employees in writing that the use of cell phones during working hours was not permitted and threatened to impose consequences under employment law in the event of a violation. This also applied to waiting times for employees during technically-related idle times in production. The works council then invoked its right of co-determination under Section 87 (1) No. 1 BetrVG and, after refusal, the works council initiated resolution proceedings.

The BAG dismissed the works council's appeal on points of law and thus confirmed the decisions of the lower courts of the Braunschweig ArbG (17.3.2022 - 6 BV 15/21) and the Lower Saxony Higher Labor Court (13.10.2022 - 3 TaBV 24/22). Guiding principle of the BAG decision: The works council has no right of co-determination if the employer prohibits employees from using smartphones privately during working hours in order to ensure proper work performance.

Works constitution law training entitlement - webinar instead of classroom training? (07.02.2024) 5/24

According to the Works Constitution Act (BetrVG), works councils are entitled to training courses required for works council work, the costs of which must be borne by the employer. This may include accommodation and catering costs for an external face-to-face seminar even if the same training provider offers a webinar with the same content. At the employer - an airline - a staff representative body (PV) has been established by collective agreement, whose training entitlement is based on the BetrVG. The PV sent two of its members to a basic training course on works constitution law lasting several days in Potsdam at the end of August 2021. The employer paid the seminar fee for this, but refused to cover the costs of accommodation and meals. The main reason given for this was that the members of the HR department could have taken part in a webinar offered by the same training provider lasting several days at the same time and with the same content. In the proceedings initiated by the PV, it claimed that the employer also had to bear the accommodation and catering costs. The lower courts ordered the employer to do so. The employer's appeal against this decision was unsuccessful at the Seventh Senate of the Federal Labor Court. Just like a works council, the PV has a certain amount of leeway when assessing which training courses it sends its members to.

In principle, this also includes the training format. This is not precluded from the outset by the fact that a face-to-face seminar regularly incurs higher costs than a webinar with regard to accommodation and meals for the training participants.

Federal Labour Court, decision of 7 February 2024 - 7 ABR 8/23 - previous instance: Regional Labour Court, Düsseldorf, decision of 24.11.2022 - 8 TaBV 59/21

Deadline expired: Establishment of whistleblowing hotlines

By introducing reporting systems for whistleblowers, employers are responding to the Whistleblower Protection Act (HinSchG). This law protects employees who draw attention to grievances in the company or department. This also includes reporting violations of occupational health and safety regulations.

Important: For larger companies and public authorities, the obligation to set up internal reporting offices has been in place since July 2023. For smaller companies with between 50 and 249 employees, there was a transitional period that expired in December 2023.

This means that all companies and departments must have set up an internal reporting office by 2024 at the latest, otherwise they could face fines of up to €20,000. Works and staff councils must support the establishment of these systems.

Retroactive terminations under employment law: what employees should do

In practice, it happens again and again that employers terminate employment contracts retroactively. However, this is generally not permitted.

Legal basis

The notice periods in employment law according to the German Civil Code (BGB) are generally four weeks. In the probationary period, these periods are often shorter, sometimes only two weeks. Shorter notice periods during the probationary period do not change the fact that retroactive terminations are not permitted.

It does not matter whether it is a retroactive termination without notice, a retroactive termination during the probationary period or a retroactive termination due to illness. In all these cases, the dismissal is inadmissible.

Decision criteria

The decisive factor for the question of retroactive termination is when the employee received the notice of termination. The notice of termination is a declaration of intent that must be received, which means that receipt of the notice of termination is an essential requirement for it to be effective.

Example

If the employer terminates with retroactive effect, e.g. the notice of termination is issued for 30.12.2023 to 31.12.2023 as part of the probationary period, but the notice of termination is not received until 03.01.2024, then this termination is inadmissible.

Action for protection against dismissal

If a retroactive dismissal is issued, the employee should immediately file an action for protection against dismissal. This is possible within three weeks of receiving the notice of termination.

Consequences

If the employee wins the action for protection against dismissal, the dismissal is invalid and the employment relationship continues. The employee is then entitled to their full remuneration until the legally binding conclusion of the action for protection against dismissal.

Conclusion

Employees should not accept a retroactive termination of their employment relationship. In this case, it is generally advisable to file an action for protection against dismissal within three weeks.

THIS & THAT

My name is Alexandra Worch and I have been employed as a research assistant at the law firm since 2019. I mainly support the lawyers by carrying out research and helping to write articles for journals and chapters for various specialist books.

In addition to my work at the law firm, I studied law at the University of Konstanz, specializing in “European and International Private and Civil Procedure Law in Legal Practice”. I am now a trainee lawyer at the Regional Court of Constance.

REVIEW DURING LAST YEAR EVENTS

From top left to bottom right:

Open day at the Wessenberg School, training fair, January 2024 I Law firm Company excursion, Heidelberg, May 2023 I Guest speaker RA Wirlitsch in the meeting room of the Landratsamt (Administrative District Office) Konstanz at the graduation ceremony of the commercial vocational school summer exam 2023 I Law firm team at the Christmas market in Constance, December 2023

NEWSLETTER LABOR LAW

We introduce ourselves

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Our specialization is in:

LABOR LAW (individual and collective labor law)

We have been enforcing your rights in employment law for decades with a sense of proportion and perseverance, even in the face of considerable resistance in and out of court.

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We represent works and staff councils, e.g. in the negotiation and enforcement of works and service agreements, restructuring and conciliation boards, etc.

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