JONES DAY

FIRST QUARTER 2013

GERMAN LABOR AND EMPLOYMENT NEWS

DISMISSAL FOR HEALTH REASONS—PITFALLS SURROUNDING THE WORKS COUNCIL HEARING

by ***Franka Thomas***

Düsseldorf
Rechtsanwältin / German Attorney at Law
fthomas@jonesday.com
+49.211.5406.5509

The dismissal of an employee for health reasons requires careful preparation and the observance of specific formalities if, in the case of an action against unlawful dismissal, the employer wants to prevail in court. If the company has a works council, the council must hold a hearing as prescribed in Section 102 Para. 1 S. 1 of the German Works Constitution Act (*Betriebsverfassungsgesetz*; BetrVG) before notice of dismissal may be given. And if, as is often the case, this hearing is carried out incompletely or inaccurately, the notice is deemed to be ineffective, and the terminated employee is entitled to reinstatement.

This article gives an overview of the necessary elements of the works council hearing.

TIMING OF THE HEARING

On the one hand, the hearing must take place before notice of dismissal is given to the employee. Unlike other declarations of intent, notice of dismissal is considered to have been given not upon its receipt by the employee being dismissed, but as soon as the written notice of dismissal has left the employer's sphere of

CONTENTS

Dismissal for Health Reasons—Pitfalls Surrounding the Works Council Hearing 1

Increased Protection Against Dismissal in Small Businesses 3

Dismissal for Operational Reasons, Social Selection, and Age Groups 6

Possible Tax Arrangements in the Taxation of "Stock Options" 7

Dismissal on Grounds of Suspicion 9

influence. However, if the works council's hearing takes place after notice of termination has been sent to the employee, the dismissal will be considered ineffective, according to Section 102 Para. 1 S. 3 BetrVG.

On the other hand, at the time of the hearing, the employer must have already made the decision to dismiss the employee; merely considering the possibility is not sufficient. Therefore, a hearing for dismissal that is held when an employee's incapacity to work is foreseen but not yet a reality would be insufficient, since the actual situation permitting the dismissal has not yet occurred.

FORM OF THE HEARING

The law does not prescribe a particular form for the hearing. However, for the purpose of proof, a written hearing is recommended. Moreover, receipt of the hearing letter should be confirmed in writing by the chairman of the works council, since only the employer obligated to furnish proof of a proper hearing in dismissal proceedings is able to document the hearing and the expiration of the term of the hearing.

CONTENT OF THE HEARING

Section 102 BetrVG stipulates that the employer must inform the works council about the employee to be dismissed and the reasons for his or her dismissal.

The courts have substantiated these requirements. Accordingly, the works council must be informed of the following data regarding the employee: name; date of birth; period of employment; marital status; number of dependents (to the extent known); nationality; and any severe handicaps or equivalent status (again, to the extent known). In larger enterprises, the employee's personnel number and function must also be included.

The hearing is convened primarily to assess the reason for the dismissal. A general statement to the effect that notice of dismissal is to be given because of absences due to illness is not sufficient. Rather, the employer must also inform the works council of all the facts on which it intends to base the dismissal.

In the case of permanently ill employees where it is certain that they will not become capable of working again, submitting a medical certificate or the declaratory decree by the social insurance agency is sufficient.

Moreover, in the case of employees who are not permanently ill, the employer must not only document the absences accrued so far, but also state why it is acting on the assumption that illnesses are to be expected in the future as well (i.e., provide the reason for the negative forecast).

In the case of dismissal due to frequent short-term illnesses, the employer must list chronologically each day of absence since the commencement of the employment period, as well as each separate illness (to the extent known). Furthermore, the employer must explain the extent to which the employee's illnesses led to operational disruptions. If the dismissal is to be based on sick-pay costs, it is necessary to document when additional costs were accrued because the employee's absences necessitated overtime work by colleagues or the hiring of substitutes.

Furthermore, the hearing must specify whether the dismissal is to be given with or without notice and when it shall become effective.

According to the principle of subjective determination, it is sufficient for the employer to disclose to the works council the reasons that, from the employer's point of view, form

the basis for the dismissal, even if these reasons do not ultimately support the dismissal. Deliberately incomplete and/or incorrect depictions will deem the hearing (and thus the dismissal) to be ineffective, as will deliberate concealment of circumstances that would have exonerated the employee, e.g., a medical certificate that predicts a quick recovery.

If the employee in question is subject to special protection against dismissal pursuant to Section 15 of the German Protection Against Dismissal Act (*Kündigungsschutzgesetz*; KSchG) (as would be the case in the termination of a works council member for cause), the works council must not only be heard but also expressly approve of the dismissal (pursuant to Section 103 BetrVG). If approval is not granted by the works council, there is a possibility that it may be granted judicially.

PERIOD FOR COMMENT

The period for the works council's comment in the case of dismissal with notice pursuant to Section 102 Para. 2 S. 1 BetrVG is one week from receipt of the hearing information. A request for comment, however, is not necessary. If the employer substantially amends its assertion within this period, the period commences anew. If the works council conclusively comments on the intended dismissal within this period, the period ends at that time. For a comment to be considered conclusive, it must clearly indicate that the works council does not want any further discussion of the case. When in doubt, the employer should wait for the one-week period to lapse.

RESPONSE OF THE WORKS COUNCIL

The works council may respond in a number of ways:

- The works council may expressly declare its approval of the intended dismissal. If this is the case, the hearing is considered to have been completed prior to the expiration of the time limit, pursuant to Section 102 Para. 2 S. 1 BetrVG.
- The works council may remain silent with regard to the hearing. In such a case, the hearing does not end until the legal term of preclusion has ended. Approval of the dismissal is considered to have been granted after the time limit has lapsed, at which point the employer must provide notice, pursuant to Section 102 Para. 2 S. 2 BetrVG.
- The works council may give formal notice that it has chosen to refrain from commenting on the intended dismissal. In the case of a dismissal with notice, the fiction of approval would apply with this notification. The process is then complete, and the employer may give notice of dismissal after receipt of this information, i.e., before the one-week period has lapsed.
- Pursuant to Section 102 Para. 2 S. 1 BetrVG, the works council may express concerns regarding the dismissal. While expressing concerns—in contrast to lodging a formal objection—does not increase the likelihood that the dismissal will be overturned, it does encourage the employer to take the works council's concerns into consideration. However, if the expression of concerns takes the form of a conclusive comment, the process is complete and the employer may give notice of dismissal.
- The works council may formally object to the dismissal, Section 102 Para. 3 BetrVG. The objection need not be designated as such; it is sufficient if it is unmistakably clear from the works council's response that it has rejected the dismissal. The objection must be based on one of the reasons stated in Section 102 Para. 3 BetrVG. In the case of an objection, the employee, if he or she takes action against unlawful dismissal, has a right of reinstatement until a binding court decision regarding the action has been made, Section 102 Para. 5 BetrVG. The employer may counter the right of the employee to continue working by following the procedure described in Section 105 Para. 1 S. 2 BetrVG (filing a motion for an injunction before the court), according to the strict conditions stipulated therein.

INCREASED PROTECTION AGAINST DISMISSAL IN SMALL BUSINESSES

by ***Dr. Markus Kappenhagen***
Düsseldorf
Rechtsanwalt/German Attorney at Law
Fachanwalt/Certified Labor and Employment Lawyer
mkappenhagen@jonesday.com
+49.211.5406.5500

The protection of employees against dismissal, once restricted to those employed by large organizations, will soon be extended to those employed by small businesses, as a result of a judgment recently passed by the German Federal Labor Court.

The German Federal Labor Court (*Bundesarbeitsgericht*; BAG) (judgment dated January 24, 2013, 2 AZR 140/12) has redefined the term “small business.” Currently, unlike large corporations, businesses with 10 or fewer employees can almost always terminate their employees without stating a reason, pursuant to Section 23 Para. 1 S. 2 of the German Protection Against Dismissal Act (*Kündigungsschutzgesetz*; KSchG). This is because in small businesses, the supervisor/employee relationship is typically less adversarial, and the financial and administrative procedures tend to be less onerous. In the future, however, as a result of new methods of classifying temporary workers, small businesses too may be forced to provide reasons for terminations—and not only for the terminations of their “own” employees, but also for those of temporary workers brought in for longer periods.

The case in question involved a fruit seller who had a staff of 10 regular workers and was therefore exempt from the requirement to state the reasons for any terminations. However, the fruit seller had also hired a temporary worker. Surprisingly, the BAG included this temporary worker in the total number of “workers employed” at the business.

According to the BAG, what is relevant is not the actual number of workers who have an employment relationship with the employer, but the "regular personnel strength characterizing the business." It was further stated that no distinction ought to be made between a company's own employees and any temporary workers.

ARE FREELANCERS NOW COUNTED TOWARD THE WORKFORCE TOTAL?

This judgment could have far-reaching consequences. According to studies of the union-oriented Hans Böckler Foundation, employee turnover is higher in small businesses, where notices of termination are given more frequently than in large businesses. This will be impeded by the new judgment, since the BAG has replaced the unequivocal legal term "employee" with the diffuse term regular "personnel strength." From now on, prior to giving notice, owners of small businesses must report both the number of employees deployed by the company and the number of temporary workers brought in for long-term assignments. The latter must now be considered part of the minimum number of "employees."

In view of the broad interpretation of the term "personnel strength," however, it must be asked whether commercial agents, software developers who have worked in the business for longer terms, and other freelancers will also be regarded as "personnel" in the future. The long-established entrepreneurial practice of keeping the number of personnel below the limit prescribed for protection against dismissal is being destroyed by this ruling.

TEMPORARY WORKERS ARE INCREASINGLY BEING TREATED LIKE PERMANENT STAFF

Thus, the judgment is definitely objectionable. Only a few years ago, the BAG stated in detail why temporary workers are not employees of the hiring company (judgment dated October 22, 2003, 7 ABR 3/03). The BAG explained that they were not to be included when determining the number of works council members to be elected, according to the German Works Constitution Act (*Betriebsverfassungsgesetz*; BetrVG), or the number of works council members to be released from work (Sections 9 and 38 Para. 1 BetrVG). The regional labor courts did not include temporary workers within the scope of Section 23 of the KSchG, either.

Apparently, the BAG sees things differently now. Nevertheless, the judgment is in line with a tendency observable in legislation and case law: the legal position of temporary workers is being approximated to that of permanent staff when longer-term assignments are involved. In 2001, the BetrVG was modified to the effect that temporary workers are entitled to vote for the works council in the hiring company if they have been employed within the company for more than three months (Section 7 S. 2 BetrVG). In a judgment of the BAG of October 18, 2011 (1 AZR 335/10), temporary workers deployed for longer terms were counted among the permanent staff to a further extent; since then, employers with fewer than 20 of their "own" employees, in addition to temporary workers on long-term assignments (i.e., lasting more than three months), have had to implement an often time-consuming conciliation of interests and social compensation plan in the event of operational changes at the facility. Amended in 2011, Section 1 Para. I of the German Temporary Employment Act (*Arbeitnehmerüberlassungsgesetz*; AÜG), according to which workers are hired out on a "temporary basis," should have a similar impact.

FURTHER CONSEQUENCES?

One consequence of the current judgment is that termination of a small business's "own" employees now requires a reason for the termination if the temporary workers cause the headcount of 10 to be exceeded. It remains to be seen whether "former" small businesses, fearing actions against unlawful dismissal, will refrain from providing notice of termination.

However, the impact of the judgment can go even further: the inclusion of temporary workers may apply to other thresholds, such as the one established for lodging claims to reduce working hours. Pursuant to Section 8 Para. 7 of the German Act on Part-Time and Fixed-Term Employment (*Teilzeit- und Befristungsgesetz*; TzBfG), a claim for a reduction in working hours may be filed if the employer employs more than 15 "workers." If, however, "regularly employed" temporary workers are to be counted toward that total, a larger number of small businesses may be affected. The ruling may also affect the statutes holding that companies with more than 20 employees must reserve 5 percent of their jobs for the severely disabled and that those with more than 21 employees must inform the employment

agency in advance if they intend to dismiss more than five of them.

The judgment is leading the way to many labor disputes.

DISMISSAL FOR OPERATIONAL REASONS, SOCIAL SELECTION, AND AGE GROUPS

by *Julia Zange*

Frankfurt
Rechtsanwältin / German Attorney at Law / *Maître en Droit*
Fachanwältin / Certified Labor and Employment Lawyer
jzange@jonesday.com
+49.69.9726.3939

According to the German Protection Against Dismissal Act (*Kündigungsschutzgesetz*; KSchG), a dismissal is considered "socially justified"—and therefore legally binding—if it is contingent on "pressing operational requirements that are opposed to a continued employment of the employee in the firm" (i.e., if it is a dismissal for operational reasons).

A prerequisite is that the job of the dismissed employee has been eliminated without substitution, and no vacancy is available in the company which that employee could fill. When deciding to dismiss the employee, the employer must use the social-selection process—i.e., give due consideration to the employee's personal circumstances. In practice, however, the social-selection process, which is used only in the case of dismissals for operational reasons, is frequently administered incorrectly.

SOCIAL SELECTION

When an employer must dismiss personnel for operational reasons, the decision of whom to dismiss must be made according to defined social criteria: the employees' seniority, age, legal obligations to furnish support, and/or severe disability. As a rule, other criteria—such as job performance, readiness to perform, achievements, popularity, ability to work on a team, and other "soft skills"—cannot be taken into consideration.

The purpose of the social-selection process is to make sure that the dismissal "hits" the employee who, according to his or her data, least depends on the continuation of the employment. This also means that the dismissal does not necessarily affect the person who filled the eliminated position. (I.e., it is the job that is dispensed with, not the employee.)

IMPLEMENTATION OF THE SOCIAL-SELECTION PROCESS

The social-selection process is applied to all comparable employees of a facility.

The employees to be included in the process must be comparable in terms of their employment contracts; i.e., they must be exchangeable, or exhibit "horizontal comparability." The employer must be entitled to assign the job of the respective other by virtue of its right to issue directions (job-related exchangeability). (Comparability, as a rule, refers to the same level of hierarchy within the facility. Vertical comparability, either upward or downward, does not exist.)

Once the group of comparable employees has been determined, the employer must weigh the social data of each person against the data of the others; a point system is often used. Despite the legal prohibition against age discrimination, age may be taken into consideration if doing so is justified by legitimate causes.

In the weighing of the social data, the employer has a scope for evaluation and assessment that is reviewed in

court when it is necessary to determine whether all social factors were sufficiently considered.

EXCEPTIONS FROM THE SOCIAL-SELECTION PROCESS

The law grants narrow exceptions to the binding social-selection process. Employees whose continued employment is in the legitimate interest of the company, particularly to safeguard a balanced personnel structure within the organization (such as with respect to age), may be excluded from the social-selection process, but only if the company's operational interests outweigh the interests of the employee in need of social protection—an extremely difficult call to make.

BALANCED PERSONNEL STRUCTURE

A personnel structure that must be balanced with respect to age, for instance, necessitates the protection not just of older employees, but that of younger ones as well. Accordingly, the employer may classify the employees by age, dividing them into groups in their twenties, thirties, and so on, and then dismissing members of each age group on a pro rata basis.

The German Federal Labor Court (*Bundesarbeitsgericht*; BAG) has so far not considered the formation of age groups to be a violation of the prohibition against age discrimination (see BAG, judgment dated December 15, 2011, 2 AZR 42/10). The formation of age groups actually has an anti-discriminatory effect, since younger employees, who tend to have less seniority, better health, and fewer dependents, would otherwise be more vulnerable in the social-selection process. However, the formation of age groups is permitted only if it actually leads to maintenance of the existing structure.

If multiple groups of comparable employees are affected by the dismissals, each such group will then be further divided into age groups, from which members are subsequently dismissed on a pro rata basis (BAG, judgment dated July 19, 2012, AZR 352/11).

However, if the number of employees in each of the age groups is unequal (e.g., if three of the company's age groups include only two employees in line for dismissal), social selection on the basis of age is not possible, because dismissal on a pro rata basis will not maintain the age structure of the staff. For this reason, the formation of age groups is an option primarily for larger businesses.

Moreover, the employer must seek to safeguard the age structure *within* the individual comparison groups through the formation of suitable age groups; the aim of safeguarding the age structure for the whole facility is not sufficient to assume the legitimacy of the age groups formed.

POSSIBLE TAX ARRANGEMENTS IN THE TAXATION OF "STOCK OPTIONS"

by ***Dr. Martin Bünning***
Frankfurt
Rechtsanwalt / German Attorney at Law;
Tax Consultant
mbuenning@jonesday.com
+49.69.9726.3939

Nikolaj Kubik
Frankfurt
Rechtsanwalt / German Attorney at Law
nkubik@jonesday.com
+49.69.9726.3939

TAXATION OF EMPLOYEE STOCK OPTIONS

Today, stock options are part of the "standard repertoire" in the compensation practice of large companies, particularly in the employment contracts of managing directors, board members, and other top executives. They give the employee the right to purchase a certain number of the company's shares at a previously set price (the purchase price) after the expiration of a retention period.

As a rule, stock options granted on the basis of respective agreements are considered income on which the employee must pay taxes. In this respect, the income "flows in" not when the stock option is granted, but only when the option is exercised and the stocks are booked on the employee's securities deposit (the "inflow" time). The amount of the taxable income is determined on the basis of the difference between market value at the time of inflow and the purchase price agreed upon in the option agreement.

Depending on the development of the stock price, there might be a significant increase in value up until the time of exercise, resulting in a corresponding tax burden. The question for the employee is whether the tax burden can be minimized by means of an appropriate arrangement, such as bringing forward the inflow relevant in terms of taxes to a point in time when the value of the stock option is low and the actual increase in value of the stocks prior to the time of exercise is no longer covered by the employee's income tax and/or wage tax.

ADVANCED INFLOW TIME

The German Federal Finance Court (*Bundesfinanzhof*; BFH) decided in its judgment dated September 18, 2012 (VI R 90/10) that the noncash benefit of a stock option flows to the employee also in the case of a transfer to a corporation belonging to him or her, even if no adequate consideration has been agreed upon (an amount known as the "concealed equity contribution"). Decisive to the time of inflow is the employee's "utilization" of the benefit allocated by the employer, i.e., its economic incorporation into the employee's property.

If, as is usually the case, the employee exercises the option him- or herself, the noncash benefit flows in at the time the stocks are booked on the securities deposit. This does not apply, however, if the employee has previously disposed of the option.

In the opinion of the BFH, this is the case if the employee transfers the options by means of a concealed equity contribution to his or her limited-liability company (*GmbH*). Thus, the inflow of the noncash benefit in this case is advanced to the time of transfer of the options. The employee therefore receives only the value of the option and/or the stock at this point in time. If, after this concealed equity contribution, there is another increase in the value of the stock and the corporation exercises the option at the time of exercise, then the further increase in value remains untaxed for the time being. The hidden reserves are subject to taxation only if the stocks are sold by the corporation. Such capital gains (and dividends) are, as a matter of principle, 95 percent exempted from the corporation tax and the trade tax. When the tax exemption is taken into account, taxes accrue in the amount of approximately 1.6 percent of the capital gain. If the corporation distributes the capital gain to the shareholder/employee, for private assets a flat-rate tax amounting to 25 percent plus the solidarity surcharge and, if applicable, church tax accrue. Even in the case of a full distribution, the total tax burden thus amounts to less than 30 percent on the gains from the stock option; if the employee had exercised the option directly, income tax (or, if applicable, "wealth tax" (*Reichensteuer*)) of up to 45 percent plus the solidarity surcharge and church tax would have accrued.

According to the BFH, such tax arrangements generally do not constitute an abuse of the law, even if the arrangements lead to lower tax burdens.

TAX PLANNING IN CONNECTION WITH EMPLOYEE STOCK OPTIONS

The BFH's judgment leaves room for individual tax planning in connection with employee stock options, particularly in the case of managing directors, board members, and other top executives with relatively high income and a high percentage in variable remuneration in the form of stock options.

Imagine the following scenario:

Managing Director X establishes a limited-liability company (GmbH) *for his private asset management. X is the beneficiary of a stock-option plan provided by his employer, and in May 2013 he receives the (transferable) option to purchase 1,000 shares from the U.S. parent company at an exercise price of €10 per share. At the time the option is granted, the price is €18 per share. The earliest date for exercising the option is May 31, 2015.*

On August 15, 2013, X transfers the options to his limited-liability company by means of a concealed equity contribution. On this day, the stock of the parent company is listed at €16 per share. On May 31, 2015, the quotation of the shares has risen to €32 per share. The limited-liability company purchases 1,000 shares at the exercise price of €10 per share.

What is the solution?

At the time of transfer of the stock option, X was supposed to receive a noncash benefit in the amount of €6,000 (€16,000 [the quotation of the shares] minus €10,000 [the exercise price]), which is taxable.

At the time of exercise of the option by the limited-liability company, X does not receive any (further) noncash benefit. For the limited-liability company, the acquisition is a transaction that does not affect the net income. Subsequent gains from dividends or capital gains of up to 95 percent should be tax-free.

In such an arrangement, it is necessary to consider not just the circumstances of the individual case, but also the fact that capital gains and dividends would not be exempt from taxes at a rate of 95 percent for the limited-liability company if the stocks were purchased by the corporation with the object of reselling the same on short notice. According to the German Tax Act 2013, this arrangement should be restricted to credit institutions and financial-services institutions, but due to the current political landscape, the German parliament has not yet adopted the act, despite the fact that this particular amendment was not viewed as controversial by any of the political parties.

DISMISSAL ON GROUNDS OF SUSPICION

by ***Georg Mikes***

Frankfurt
Rechtsanwalt / German Attorney at Law
Fachanwalt / Certified Labor and Employment Lawyer
gmikes@jonesday.com
+49.69.9726.3939

In past years, case law has increasingly dealt with a special form of termination that is largely unknown to the wider public and seldom considered by human resources departments: dismissal on grounds of suspicion.

THE NATURE OF DISMISSAL ON GROUNDS OF SUSPICION

In this form of termination, an employee (or a board member such as a managing director or management board member) may be dismissed on grounds that he or she is under suspicion of having committed a serious breach of duty. In many respects, dismissal on the grounds of mere suspicion seems odd, because the dismissed employee may turn out to have been innocent of the allegation. Nevertheless, as grounds for dismissal, suspicion ranks equally with a proven offense. This leads to the core problem pertaining to dismissal on grounds of suspicion: weighing the employee's need to be protected from unjustified accusation and dismissal against the employer's need to facilitate termination of employment when the type and seriousness of the suspected offense make it impossible for the employee to be trusted, even if it is theoretically possible that he or she is innocent. How justice can be achieved in such a case amounts almost to a philosophical question.

Nevertheless, one thing is for sure: this form of termination constitutes a special form of *dismissal on grounds of conduct*. It usually takes the form of dismissal without notice, and in most cases, an accusation relevant under criminal law has already been made. However, the Federal Labor

Court (*Bundesarbeitsgericht*; BAG) has emphasized that the deciding factor is not whether a criminal offense has been committed, but whether there has been a violation of a "contractual primary or collateral duty" (BAG, judgment dated June 21, 2012, 2 AZR 694/11—a case, ironically, that dealt with bribery, i.e., a criminal offense).

THE PARTICULARITIES OF DISMISSAL ON GROUNDS OF SUSPICION

To protect employees against reckless suspicion, the court has held that any suspicion must be *strong*. This elusive criterion, for which the employer bears the full burden of proof, often causes interpretation problems in practice, since an employer that is certain of its employee's guilt can simply dismiss the employee without notice on grounds of offense. (If the incident under suspicion can realistically be explained just as well by factors that would not justify termination, the dismissal will be invalid (BAG, judgment dated June 21, 2012, 2 AZR 694/11).) In particular, a potential indictment by the public prosecutor's office, the institution of main proceedings, and/or a possible conviction would support the employer's position. At least in the latter case, the employee might as well be terminated on grounds of offense, even if the conviction was made in a trial based on circumstantial evidence.

In contrast to dismissal on grounds of offense, dismissal on grounds of suspicion requires a prior hearing for the employee concerned. In the hearing, it is important for the employee to be confronted with the substantiated criminal charge, because he or she must have the opportunity to respond with a substantiated statement; assessments or overly general accusations are not sufficient. However, the employer is not required to produce evidence or introduce witnesses for the prosecution, and indeed, no formal criteria therefor have been established under case law. Thus, in a recent case in which the employee opted not to make a verbal statement, the BAG did not fault the employer for failing to submit a list of questions in advance or to set a one-week time limit for the submission of a statement (BAG, judgment dated May 24, 2012, 2 AZR 206/11). The BAG did not even require the employer to state explicitly that it planned to terminate the employee; however, the court did hold that any threat to ongoing employment must be recognizable.

The employee, in turn, is not required to submit a statement, but the employer's suspicions are likely to increase if the employee fails to do so or if he or she makes only a general statement (i.e., if the employee categorically rejects the accusation without providing details), despite being confronted with substantiated facts that he or she could address in a more substantiated manner.

BEGINNING OF THE PERIOD DURING WHICH THE EMPLOYEE MAY BE TERMINATED

If the employer considers dismissal without notice on grounds of suspicion, the provisions are basically identical to those for dismissal on grounds of offense: the employer may dismiss the employee without giving notice within two weeks of having learned of the relevant facts (Section 626 Para. 2 of the German Civil Code). In this respect, case law concedes a considerable scope of discretion to the employer. As long as the employer observes the two-week period, it may, for instance, terminate the employee after the hearing, which usually concludes the employer's own investigations (with the employer determining for itself when it has obtained sufficient evidence of wrongdoing). Alternatively, the employer may await the result of an investigation by the public prosecutor's office, indictment before the criminal court, or even the institution of main proceedings. According to case law, there may be several points in time when a corresponding period starts to run (e.g., after the hearing of the employee, upon the employee's indictment by the prosecution, or upon the criminal court's acceptance of the indictment), and against

this background the employer is allowed to serve another termination letter, as the bringing of a criminal charge is recognized as a way of "strengthening the suspicion" (BAG, judgment dated January 27, 2011, 2 AZR 825/09).

CONSIDERATIONS OF PROCEDURAL TACTICS

According to the foregoing, in many cases it may be reasonable for the employer to exercise the option of serving another termination letter. Furthermore, there may be cases in which the employer actually considers the commission of the offense to have been proved but, as a precaution, intends additionally to dismiss the employee on grounds of suspicion. This is possible in principle, but it may involve additional challenges, since commission of an offense and suspicion thereof are formally deemed to be different reasons for termination.

In such cases, if a works council exists, it must be heard with respect to dismissal on both grounds. In addition, with regard to dismissal on grounds of suspicion, the works council must be informed about the statement submitted by the employee during his or her hearing—which can necessitate a separate timeline. Depending on the circumstances, the employer may wish to hear the employee with respect to the potential termination on grounds of offense so that synchronization of dismissal on either ground may be procured. After all, employers do not have to worry that dismissal on grounds of suspicion might have been the wrong choice if it is almost certain that the employee has committed the offense, as case law assumes that the two dismissal options do not coexist without connection.

If the court is convinced of the commission of the offense, it will consider dismissal on grounds of suspicion to be effective. However, the other prerequisites in this regard must be satisfied. For instance, it would be fatal for the employer if the employee committed the offense and the court was convinced thereof, but the employer dismissed the employee only on grounds of suspicion—without the required hearing.

LAWYER CONTACTS

FRANKFURT
NEXTOWER
Thurn-und-Taxis-Platz 6
60313 Frankfurt am Main
Germany
Tel.: +49.69.9726.3939
Fax: +49.69.9726.3993

DÜSSELDORF
Königsallee 61
40215 Düsseldorf
Germany
Tel: +49.211.5406.5500
Fax: +49.211.5406.5501

MUNICH
Prinzregentenstr. 11
80538 Munich
Germany
Tel.: +49.89.20.60.42.200
Fax: +49.89.20.60.42.293

Georg Mikes
German Attorney at Law;
Certified Labor and
Employment Lawyer
gmikes@jonesday.com

Dr. Markus Kappenhagen
German Attorney at Law;
Certified Labor and
Employment Lawyer
mkappenhagen@jonesday.com

Friederike Göbbels
German Attorney at Law;
Certified Labor and
Employment Lawyer
fgoebbels@jonesday.com

JONES DAY GLOBAL LOCATIONS

ALKHOBAR
AMSTERDAM
ATLANTA
BEIJING
BOSTON
BRUSSELS
CHICAGO
CLEVELAND
COLUMBUS
DALLAS
DUBAI
DÜSSELDORF
FRANKFURT
HONG KONG
HOUSTON
INDIA
IRVINE
JEDDAH
LONDON
LOS ANGELES
MADRID
MEXICO CITY
MIAMI
MILAN
MOSCOW
MUNICH
NEW YORK
PARIS
PITTSBURGH
RIYADH
SAN DIEGO
SAN FRANCISCO
SÃO PAULO
SHANGHAI
SILICON VALLEY
SINGAPORE
SYDNEY
TAIPEI
TOKYO
WASHINGTON

The content of this newsletter is intended to convey general information about changes in German labor law. It should not be relied upon as legal advice. It is not an offer to represent you, nor is it intended to create an attorney-client relationship.

© 2013 Jones Day. All rights reserved. Printed in the U.S.A.