

Termination of employment contract of severely disabled persons

1. Application for approval by the Office of Integration

When terminating the employment contract of severely disabled persons, a large number of formal hurdles must be taken into account. In addition to the hearing of the works council and the representation body of severely disabled persons, the termination by the employer requires the prior consent of the Office of Integration (in Bavaria: Office of Inclusion) according to Sections 168 cont. of the German Social Security Code nine (*Neuntes Buch Sozialgesetzbuch – SGB IX*). A notice of termination that is given without the prior consent of the Office of Integration is irrevocably invalid. No consent is required in the event of termination by the employee, the challenge of the employment relationship, the end of a fixed-term employment or the conclusion of a termination agreement.

2. When is an employee considered severely disabled?

Employees are considered to be severely disabled if they have a degree of disability (GdB) of at least 50, or if they are equal to these people. The consent of the Office of Integration is only to be obtained if the employer is aware of the severe disability or if the severely disabled employee informs the employer within 3 weeks after giving notice that he is severely disabled or has filed an application for recognition of the severe disability or equal status. The application for recognition of a severe disability shall only be considered if it was made at least 3 weeks before receipt of the notice of termination. If the severe disability is obvious, the employer must also obtain consent from the Office of Integration without prior notification of the employee.

3. Exceptions to the consent requirement

The consent of the Office of Integration is not to be obtained in accordance with the deadline according to Section 1 para. 1 of the German Termination Protection Act (*Kündigungsschutzgesetz – KSchG*) if the employment relationship has not existed for more than six months without interruption at the time of receipt of the notice of termination.

Furthermore, the consent of the Office of Integration is not required if the severely disabled employee has reached the age of 58 and is entitled to severance pay, compensation or similar on the basis of a social plan.

Note: This exception only applies if the employer has informed the severely disabled employee of his intention to terminate the contract in due time and the employee does not object to the termination until the employer has given notice. Furthermore, this exception also does not apply if the claim for severance pay is only based on a contractual agreement. Section 173 para. 1 No. 2 and para. 2 SGB IX take up further exceptions, to which practically only extremely subordinate importance is attached.

4. How long does the procedure before the Office of Integration take?

According to Section 171 para. 1 SGB IX, the Office of Integration should make the decision within one month. Due to the necessary granting of a legal hearing, the clarification of the facts of the case and the obligatory participation of the employee representatives according to Section 170 para. 2 SGB IX, however, in our experience a duration of 2 or more months can regularly be expected.



5. Participation of employee representatives

The consent of the Office of Integration and its participation of employee representatives according to Section 170 para. 2 SGB IX does not release the employer from its own duty to separately involve the employee representatives. Employee representatives can be involved by the employer before, during or after to the approval procedure at the Office of Integration. The employer is still obliged to hear the works council according to Section 102 of the Works Constitution Act (*Betriebsverfassungsgesetz – BetrVG*).

In addition, the representative body for severely disabled persons must be heard as additional employee representatives. If there is no local representation body of severely disabled employees, the (group) representation body of severely disabled persons should be involved. Despite the compelling wording of Section 177 para. 1 SGB IX „are elected“ there is no obligation for the employer to initiate an election of the representation body of severely disabled persons. If there is no representation body of severely disabled persons, there is no requirement (and possibility) to involve it.

6. When can the termination be pronounced?

The employer may only terminate the employment contract after receiving a written consent from the Office of Integration. Information on the phone provided by the Office of Integration in advance is not sufficient! The employer can only give notice of termination within one month after receiving a written consent from the Office of Integration, Section 171 para. 3 SGB IX. He must observe a notice period of at least four weeks.

7. Special characteristics in the case of termination without notice

Consent to termination without notice can only be applied for within two weeks of knowledge of the facts relevant for the termination, Section 174 para. 2 SGB IX. According to the BAG case law this provision is *lex specialis* to Section 626 para. 2 of the German Civil Code (*Bürgerliches Gesetzbuch – BGB*). In future, the Office of Integration or the administrative courts will solely examine whether the application period under Section 174 para. 2 SGB IX has been observed. The labour courts do not additionally examine whether the notice period for giving notice of termination under Section 626 para. 2 BGB has been observed (BAG dated 11.6.2020 - 2 AZR 442/19).

Consent to the termination without notice must be given by the Office of Integration within 2 weeks, otherwise consent is deemed to have been given, Section 174 para. 3 SGB IX. The procedure is thus considerably accelerated compared to the consent to ordinary termination.

Note: If two terminations, one with and one without notice are given, two approval procedures must be carried out. The Office of Integration should be requested explicitly to decide on both applications in parallel. In some cases, we find that the Office of Integration initially only follows one application and, for example, only gives its consent to termination without notice.