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Employment Tracker

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With our Employment Tracker, we regularly look into the "future of labour law" for you!

At the beginning of each month, we present the most important decisions expected for the month from the Federal Labour Court (BAG) and the European Court of Justice (ECJ) as well as other courts. We report on the results in the issue of the following month. In addition, we point out upcoming milestones in legislative initiatives by politicians, so that you know today what you can expect tomorrow.

Recent decisions

With the following overview of current decisions of the past month, you are informed which legal issues have been decided recently and what impact this may have on legal practice!

Subject	Date/ AZ	Remark/ note for practice
Federal Labour Court		
Competent authority for mass dismissal notification after closure of a plant **Termination for operational reasons after opening of insolvency proceedings**	08.11.2022 - 6 AZR 15/22 -	**The subsequent terminations of the cabin staff of the insolvent airline Air Berlin are in principle effective. In particular, the locally responsible employment agency remains locally responsible for the mass dismissal notice even after a shutdown.** *This was decided by the 6th Senate of the Federal Labor Court.* Facts The Federal Labor Court had to decide on the termination of the plaintiff's employment for operational reasons in connection with the Air-Berlin insolvency. In particular, it was in dispute which employment agency must be notified of the mass dismissal if the original business no longer exists due to a shutdown. The defendant insolvency administrator dismissed the plaintiff employee, who was employed by the debtor as a flight attendant in Düsseldorf, for operational reasons after the opening of the insolvency proceedings. The plaintiff successfully defended herself against this dismissal before the Federal Labor Court. The Federal Labor Court ruled that the plaintiff's employment relationship - and that of the other employees whose employment relationships were terminated in this context - had not been effectively terminated. The insolvency administrator then initiated a new consultation procedure with the works council for ground staff and the staff representatives for flying personnel. The defendant

		insolvency administrator stated that he saw no possibility of reopening the business and that he therefore planned to repeat the terminations. The defendant consulted the works council and staff representatives about the planned layoffs and filed a mass layoff notice with the Employment Agency in Düsseldorf for the employees assigned to the Düsseldorf station. The defendant then terminated the plaintiff's employment relationship again. The plaintiff filed an action against these terminations. She was of the opinion that the terminations were invalid. The mass dismissal notice had to be filed in Berlin at the debtor's headquarters and not in Düsseldorf, since there was no longer any operation there at the time of the notice due to the shutdown. The mass dismissal notice also had errors in its content. The consultation procedure was also defective. <u>The decision of the Federal Labour Court</u> According to the Federal Labor Court, the termination in dispute ended the employment relationship. The Federal Labor Court stated that the termination was socially justified due to the shutdown of flight operations. The staff representatives had been sufficiently involved. In particular, the notice of mass dismissal pursuant to Sec. 17 (3) of the German Unfair Dismissals Act (KSchG) had been submitted in full to the employment agency in Düsseldorf, which continued to be responsible for the matter.
Consideration of vacation periods for overtime bonuses **Collective agreement for temporary employment**	16.11.2022 - 10 AZR 210/19 -	**In order to reach the threshold value above which an employee is entitled to overtime pay in accordance with the provisions of the collective agreement for temporary employment, not only the hours actually worked but also the vacation time must be taken into account.** *This was decided by the 10th Senate of the Federal Labor Court.* <u>Facts</u> The parties were in dispute as to whether hours billed for vacation must also be included in the calculation of overtime bonuses. The collective agreement applicable to the employment relationship stipulates that overtime bonuses in the amount of 25% are paid for periods exceeding a certain number of hours

		worked in the respective calendar month. Since the employer did not consider the hours accounted for vacation in the calculation in the month of August 2017 and therefore did not pay the plaintiff any overtime surcharges, the plaintiff claims overtime surcharges for this month. He believes that vacation time should be included in the calculation of overtime pay. The courts previously dealing with the matter were of the opinion that vacation periods are not to be included in the calculation of overtime bonuses. In this respect, the wording of the collective bargaining agreement clearly refers exclusively to the hours actually worked. The Federal Labor Court, on the other hand, assumed that not considering vacation periods when calculating overtime bonuses could constitute an incentive to forego vacation that is inadmissible under European Union law. For this reason, the Federal Labor Court referred this question to the European Court of Justice for a preliminary ruling. In its judgment of January 13, 2022 (C-514/20), the European Court of Justice ruled that Article 7 (1) of the Working Time Directive precludes the non-consideration of vacation time for the calculation of overtime bonuses. Considering the ruling of the European Court of Justice, the Federal Labor Court will now decide on the plaintiff's appeal. <u>The decision of the Federal Labour Court</u> Taking into account the ruling of the European Court of Justice, the Federal Labor Court awarded the plaintiff the claimed overtime bonuses. The collective agreement provision of Sec. 4.1.2 of the Collective Agreement for Temporary Employment (MTV) must be interpreted in accordance with the law in such a way that not only hours actually worked but also vacation time must be taken into account when calculating overtime bonuses. The Federal Labor Court justifies this result by stating that the provision could otherwise prevent employees from taking their statutory minimum vacation. This is not compatible with Sec. 1 of the German Federal Vacation Act (BUrlG) as understood in accordance with Union law.
Effectiveness of a transfer to another place of work abroad	30.11.2022 - 5 AZR 336/21 -	**The employer may instruct the employee to work at one of the company's workplaces abroad on the basis of his right of direction under the employment contract, unless otherwise expressly agreed in the employment contract or impliedly agreed under the circumstances. Sec. 106 of the Trade, Commerce and Industry Regulation**

Act (GewO) does not limit the employer's right to issue instructions to the territory of the Federal Republic of Germany. However, the exercise of the right to issue instructions in individual cases is subject to an equitable review under this provision.

This was decided by the 5th Senate of the Federal Labor Court.

Facts

The Federal Labor Court had to decide whether the transfer of the plaintiff pilot to a foreign country and a precautionary change of employment notice was effective.

The plaintiff is employed by the defendant – an airline based in Malta – as a flight captain and is stationed at an airport in Germany. The defendant intended to close the station where the plaintiff was stationed and, as a result, transferred the plaintiff to an airport in Italy. As a precaution, it terminated the employment relationship and offered the plaintiff to continue the employment relationship at the same time with the new place of work in Italy. The plaintiff conditionally accepted the offer.

In the parties' employment contract, it was agreed that the plaintiff could also be deployed at any other location of the company and that his remuneration would then be based on the system applicable there. The parties also agreed that Irish law would apply to the employment relationship.

According to the collective pay agreement applicable to the employment relationship, German law applies to the employment relationships of pilots employed at German bases. The plaintiff therefore received significantly higher compensation than was agreed in his employment contract.

A social collective agreement in force at the defendant provided that, in the event of a permanent closure of a base, the pilots employed there could be assigned to another base within Germany or in other EU countries by means of a transfer or change notice. The pilots who were transferred to a foreign stationing location were to be employed in accordance with the social collective agreement under the working conditions and salaries applicable there.

In his action, the plaintiff claims that the transfer and the precautionary notice of termination are invalid. He is of the opinion that the defendant's right of direction does not cover his transfer abroad and the associated change in the compensation system with significantly lower compensation. The precautionary change notice was also invalid. He did not have to accept the associated withdrawal of the collectively agreed application of German law. In addition, the defendant did not carry out a proper social selection.

The defendant is of the opinion that, due to the specifics of the industry and profession, a transfer clause under which a pilot can also be transferred abroad is permissible and the transfer is therefore not objectionable against the background of the closure of the station.

The decision of the Federal Labour Court

The Federal Labor Court has ruled that the transfer of the plaintiff pilot to an airport in Italy was effective.

In justification, the Fifth Senate stated that the employer's right to issue instructions pursuant to Sec. 106 of the German Trade Regulations Act (GewO) also includes the transfer to a foreign place of work if – as in the case in dispute – a specific domestic place of work is not firmly agreed in the employment contract, but instead a company-wide transfer option is expressly provided for. A limitation of the right to issue instructions to workplaces in the Federal Republic of Germany cannot be inferred from the law.

The transfer was also not unreasonable in the individual case. Since the home base at Nuremberg Airport has been closed down, the possibility of stationing the plaintiff there no longer exists. There were also no vacancies at another domestic stationing location.

The inequity of the instruction also did not result from the fact that the plaintiff would lose his entitlement to the higher pay under the collective agreement. This is because the scope of the collective pay agreement is limited to pilots stationed in Germany. The remuneration agreed in the employment contract, on the other hand, is not affected by the transfer. In addition, the collective social plan provides that pilots who are transferred to a foreign station will continue to be employed under the working conditions applicable there, in particular the collectively agreed salaries there.

Since the plaintiff's transfer was already effective on the basis of the defendant's right to issue instructions, the precautionary notice of termination was no longer relevant.

Upcoming decisions

With the following overview of upcoming decisions in the following month, you will be informed in advance about which legal issues will be decided shortly and what consequences this may have for legal practice!

Subject	Date/ AZ	Remark/ note for practice
Federal Labour Court		
Social selection in insolvency **Gross selection error within the meaning of Section 125 (1) sentence 1 Insolvency Code (InsO)** **Consideration of pension proximity in social selection?** **Social selection in the case of phased shutdown**	08.12.2022 - 6 AZR 31/22 -	The Federal Labour Court decides on the validity of a dismissal for operational reasons and, in this context, on two details of social selection: In particular, the Federal Labour Court has to clarify whether the pension proximity of an employee can be taken into account in the social selection and whether a further social selection has to be made in the case of a gradual shutdown. The plaintiff, who was 63 years old at the time of the termination, had been employed by the debtor in the area of distribution logistics since 1972. Insolvency proceedings were opened against the debtor's assets in 2020 and the defendant was appointed as insolvency administrator. The reconciliation of interests concluded with the works council provided that initially 61 employees would be dismissed for operational reasons, one of them in the area in which the plaintiff worked. The other employees working in this area were younger than the plaintiff and had less years of service with the company. The defendant terminated the plaintiff's employment as of June 30, 2020. The plaintiff was named in the reconciliation of interests. As no purchaser was found for the business, the business was to be shut down after a phase of out-production. The defendant concluded a further reconciliation of interests with the works council. This provided that the employees required for the phase-out would not

		receive notice of termination until May 31, 2021. These employees were named in the reconciliation of interests. Only one employee from the sales logistics area was retained. The remaining employees, who were not required for production, were each terminated on the next permissible date. The reconciliation of interests did not provide for any social selection. The plaintiff's employment relationship was also terminated again as of September 30, 2020 as a precautionary measure. The plaintiff is of the opinion that both terminations are invalid due to grossly incorrect social selection. With regard to the first termination, she is clearly more worthy of protection due to her age and length of service. In addition, social selection should also have been carried out before the second termination. In contrast, the defendant is of the opinion that the plaintiff is not clearly more worthy of protection with regard to her age because she is only dependent on receiving unemployment benefits for a short period of time and will be able to draw an early retirement pension for those insured for a particularly long period of time on December 2020. Before the second notice of termination was issued, there was no need for social selection, as all employees had been dismissed - albeit on different dates. The lower courts found in favour of the plaintiff and consequently held the dismissals to be invalid. The defendant's appeal is directed against this.
Effectiveness of an ordinary termination due to illness **Presumption of futility of company integration management with the consent of the integration office**	15.12.2022 - 2 AZR 162/22 -	In the context of an ordinary termination due to illness, the Federal Labour Court has to clarify in particular the question of whether the uselessness of a company integration management (so-called "bEM") can be assumed based on the approval of the integration office for a termination. The plaintiff, who was treated as a severely disabled person, was continuously on sick leave from December 2014 until May 2020. In May 2019, the defendant invited the plaintiff to a bEM. The plaintiff agreed to participate, but refused to sign the data protection consent sent in this regard. The defendant informed the plaintiff in the first conversation in July 2019 that the bEM procedure could not be carried out without signing the data protection declaration. The bEM procedure was then not continued, and no further bEM was offered. After approval

		by the integration office, the defendant terminated the employment relationship with due notice. In her action, the plaintiff claims that the termination is invalid. The termination was not socially justified. The defendant had failed to carry out the bEM procedure in breach of its duties. The plaintiff's refusal to sign the data protection declaration was not an obstacle to the performance of a bEM. In addition, due to the plaintiff's continuing illness, a further bEM had to be offered before a notice of termination was issued. The defendant was therefore required to demonstrate and prove the objective uselessness of a job action plan in the specific case. The defendant did not meet these high requirements. In contrast, the defendant is of the opinion that the termination was socially justified for reasons of illness. The plaintiff's refusal to give the consent required by the defendant under data protection law is not to be assessed differently than if the plaintiff had not agreed to the bEM as a whole. A further attempt to carry out a bEM did not have to be undertaken, since each new attempt would probably have failed again because of the same problem. The Labour Court dismissed the action, while the Baden-Württemberg Regional Labour Court upheld it. In the opinion of the Regional Labour Court, the termination was not justified on personal grounds. The Regional Labour Court based its decision mainly on the fact that the defendant would have had to attempt a further bEM before issuing the notice of termination. The defendant had not sufficiently demonstrated the possible uselessness of a further BEM. In particular, the approval of the termination by the Integration Office did not have a presumptive effect to the effect that a bEM would not have been able to avoid the termination. The assumption of a presumption effect leads to a worse position of severely disabled persons compared to non-severely disabled persons and therefore cannot be considered. The Federal Labour Court will now decide whether the decision of the Regional Labour Court is correct.
Limitation of vacation entitlements	20.12.2022	It is disputed before the Federal Labour Court whether vacation claims are subject to the regular limitation period of three years.

	- 9 AZR 266/20 -	The plaintiff has asserted a claim for vacation compensation for a total of 101 vacation days from the years 2013 to 2017. Due to a high workload, the plaintiff was unable to take all of her annual leave for years. The defendant did not ask the plaintiff to take additional leave, nor did it advise her that leave not requested could expire at the end of the calendar year or carryover period. The defendant is of the opinion that the plaintiff is not entitled to compensation for vacation because the plaintiff's vacation has expired. The defendant could not have been aware of and complied with its obligations to notify and request the plaintiff to take leave, since the case law of the Federal Labour Court in this regard did not change until after the termination of the employment relationship. In any case, the vacation entitlement is time-barred. The plaintiff, on the other hand, is of the opinion that the vacation entitlement is not subject to the statute of limitations because the defendant neither requested her to take her vacation nor pointed out a possible expiration. The Labour Court granted the asserted vacation claim in part, the Regional Labour Court in full. In its ruling of September 29, 2020, the Federal Labour Court referred the question to the European Court of Justice as to whether the statute of limitations for vacation entitlement is compatible with European law if the employer has not complied with its obligations to notify and request. In its judgment of September 22, 2022, the European Court of Justice ruled that the Working Time Directive and the European Charter of Fundamental Rights preclude the limitation of vacation entitlements if the employer has not actually enabled the employee to exercise this entitlement. Taking into account the decision of the European Court of Justice, the Federal Labour Court must now decide on the appeal of the defendant.
Expiry of vacation entitlements in the event of long-term incapacity for work	20.12.2022 - 9 AZR 401/19 -	The proceedings before the Federal Labour Court to be heard on the same day will also deal with details of vacation entitlement, taking into account a ruling by the European Court of Justice of September 22, 2022. The expected decision will focus on the question of whether vacation entitlement expires 15 months after the end of the vacation year in the event of continued incapacity for work, even if the employee was not notified of the expiry.

Obligations of the employer to co-operate		The plaintiff seeks a declaration that she is still entitled to 14 vacation days for 2017. She has been incapacitated for work since an illness in 2017 and was unable to take 14 vacation days in that year. The employer had not pointed out the forfeiture of the vacation entitlement. The defendant is of the opinion that the vacation entitlement expired at the latest at the end of March 31, 2019. According to the plaintiff, a forfeiture of the vacation entitlement cannot be considered because the defendant did not point out the forfeiture in time. The lower courts dismissed the action. The Federal Labour Court then referred the question to the European Court of Justice as to whether such a forfeiture of vacation entitlements is compatible with European law. In its judgment of September 22, 2022 (C-727/20), the European Court of Justice ruled that such a forfeiture of vacation entitlements is contrary to the Working Time Directive and the European Charter of Fundamental Rights if the employer has not fulfilled its obligations to cooperate. Taking this decision into account, the Federal Labour Court must now decide on the plaintiff's appeal.
European Court of Justice		
Conformity with European Law of National Provisions on the Derogation from the Principle of Equality between Temporary and Permanent Employees by Collective Agreement **Preliminary ruling of the Federal Labour Court**	15.12.2022 - C-311/21 -	The European Court of Justice will rule on questions relating to the derogation from the principle of equal treatment of temporary and permanent employees by collective agreement. The expected ruling will focus on the question of whether Section 8 (2) sentence 1 of the German Temporary Employment Act (AÜG), which permits a deviation from the principle of equal treatment by collective bargaining agreement, sufficiently complies with the "overall protection" stipulated by the Directive. The background to the pending decision is a request for a preliminary ruling by the Federal Labour Court: The plaintiff in the main proceedings was employed by the defendant as a temporary worker based on a fixed-term employment contract and transferred to a retail company. She

claimed differential compensation under the principle of equal pay because comparable permanent employees received higher compensation at the hirer.

The collective bargaining agreements concluded between ver.di and the Association of German Temporary Employment Agencies (iGZ e.V.), which apply to the employment relationship of the parties by virtue of membership, provide for deviations from the principle of equal pay enshrined in Sec. 8 (1) AÜG. Among other things, the collective agreements provide for lower remuneration of temporary workers compared to permanent employees.

The plaintiff is of the opinion that these collective agreements are not compatible with Union law (Art. 5 par. 1 and par. 3 of Directive 2008/104/EC). The defendant, on the other hand, is of the opinion that due to the fact that both parties are bound by collective agreements, it only owes the remuneration provided for in the collective agreement for temporary workers, and that Union law has not been violated.

The European Court of Justice will now have to clarify detailed questions regarding the respect for the overall protection of temporary workers required by Article 5 (3) of Directive 2008/104/EC.

Legislative initiatives, important notifications & applications

This section provides a concise summary of major initiatives, press releases and publications for the month, so that you are always informed about new developments and planned projects.

Subject	Timeline	Remark/ note for the practice
Regulations on telephone sick leave for minor respiratory illnesses extended	21.11.2022	The Federal Joint Committee has extended its Corona special regulation on sick leave by telephone until March 31, 2023. Insured persons can therefore continue to be written off sick for up to 7 days for minor respiratory illnesses after taking a medical history by telephone. The sick leave can be extended once for an additional 7 days by telephone.
New version of the church labour law adopted	22.11.2022	The Association of Dioceses in Germany has adopted a new "Basic Order of Church Service" as a recommendation for the German (arch)dioceses. This was announced by the German Bishops' Conference in a press release dated November 22, 2022. The new basic order of ecclesiastical service replaces the basic order of April 27, 2015. The decision of the General Assembly of the Association of Dioceses has a recommendatory character; in order to have legal effect, it must be implemented in diocesan law in the individual (arch)dioceses. The new Basic Order contains the following contents and innovations: ▪ The Basic Order is conceived as a "constitution of ecclesiastical service." The normative text contains not only specific regulations on employment or service law, but in particular also central statements on the structural features and basic principles of church service and essential characteristics of Catholic identity. ▪ In its new version, the Basic Regulations apply to all fields of action of church service and all employee groups, regardless of their legal status. ▪ Institution-oriented approach: The previous predominantly person-oriented approach focused on the individual employee and his or her personal lifestyle. Under the institution-

		oriented approach, the employer and its managers have first responsibility for protecting and strengthening the ecclesial character of the institution. The Catholic identity of an institution is to be shaped through mission statements, a Christian organizational and leadership culture, and by communicating Christian values and attitudes. ▪ This goes hand in hand with another important message of the new basic order: **the core area of private life is not subject to any legal assessment and is beyond the reach of the employer.** This legally inviolable zone covers in particular the relationship life and the intimate sphere. Apart from exceptional cases, leaving the Catholic Church remains an obstacle to employment or a reason for dismissal, as in the previous version of the basic regulations. Anti-clerical activity is also an obstacle to employment or continued employment. ▪ Under the new law, religious affiliation is only a criterion for hiring if it is required for the position in question. This applies, on the one hand, to pastoral and catechetical services and, on the other hand, to those activities that shape the Catholic profile of the institution in terms of content, share responsibility for it and represent it to the outside world. All employees are expected to identify with the goals and values of the Catholic institution in the context of their work. ▪ Diversity is explicitly recognized as an enrichment in church institutions as never before. All employees can be representatives of God's unconditional love and thus of a church that serves people, regardless of their concrete tasks, their origin, their religion, their age, their disability, their gender, their sexual identity and their way of life, as long as they bring a positive basic attitude and openness to the message of the Gospel, respect the Christian character of the institution and contribute to bringing it to bear in their own field of activity.
Citizen's Income to start on January 1, 2023	25.11.2022	The German Parliament and the German Federal Council gave their final approval to the Citizen's Income Act on November 25, 2022. The Citizen's Income is intended to help people on benefits focus more on gaining qualifications, continuing their education and finding a job. <u>The Citizen's Income Act contains the following regulations at a glance:</u> **New cooperation, new opportunities for work** ▪ Cooperation and trust are to be the basis of the collaboration. Jobseekers and the job centre jointly agree on a cooperation plan for the individual path to work. This plan is

easy to understand and does not contain any legal instructions. The first invitation to develop the cooperation plan is non-binding.

- Reductions in benefits for breaches of duty and failure to report are possible from January 1, 2023, from the start of benefit receipt.
- Further training and the acquisition of a vocational qualification are at the forefront of the citizen's income. The so-called placement priority (i.e. preferential placement in gainful employment) will therefore be abolished.
- Additional financial compensation and new offers will be created for further training. For example, those who want to obtain a vocational qualification can now receive support for up to three years instead of the previous two.
- The social labour market will be continued: Job centres can continue to support jobs that are subject to social insurance contributions in order to activate people who have been unemployed for a particularly long time.
- Professional coaching can support people who find it particularly difficult to find or take up work.

More security, more respect for life achievements

- Assets and adequacy of housing will only be reviewed after 12 months of receiving Citizen's Income. Heating costs, however, are only granted to a reasonable extent in order to encourage the economical use of energy.
- After the 12-month period (waiting period), a higher level of assets (as assets that remain untouched despite the receipt of benefits) is envisaged than before. Reserves for old-age provision are also better protected.
- For trainees, pupils and students who receive the citizen's allowance, higher tax-free allowances will apply to their training allowance or part-time job.
- Those who earn between 520 and 1,000 euros will be able to keep more of their income in the future: The allowances in this range will be raised to 30 percent.

Higher standard rates and new regulations on benefit reductions

- The standard rates are to increase appropriately and significantly as of January 1, 2023 - up to 502 euros, depending on the level of need.
- The specifications for benefit reductions (so-called sanctions) will be revised based on the ruling of the Federal Constitutional Court of November 5, 2019.

		More citizen-friendly, less bureaucracy ▪ Overall, the citizen's income is less bureaucratic and digitally accessible - with a simple, user-oriented and barrier-free application process. ▪ A trivial limit of 50 euros for reclaims will also reduce the number of notices and cut red tape.
Introduction of the electronic certificate of incapacity for work	01.01.2023	After the introduction of the electronic certificate of incapacity for work was postponed several times, the starting signal for the electronic certificate of incapacity for work is now actually to be given on January 01, 2023. <u>The new version of Sec. 5 of the German Continued Remuneration Act (EFZG) contains the following changes:</u> ▪ The obligation of employees to notify the employer, which is regulated in Sec. 5 (1) sentence 2 EFZG, remains in place. Employees must continue to notify the employer immediately of any incapacity to work and its expected duration. ▪ Abolishment of the obligation to submit documents for employees with statutory health insurance Employees with statutory health insurance are no longer required to submit an incapacity for work to their employer, but only have their incapacity for work and its duration determined by a physician. In addition, they have to obtain a medical certificate. ▪ Employer's call-off obligation In order to receive an electronic certificate of incapacity for work, the employer must retrieve the electronic certificate of incapacity for work transmitted by the physician to the health insurance company. Pursuant to Sec. 109 (1) of the 4th Social Security Code (SGB IV), the health insurance company must prepare a notification for the employer to retrieve after receiving the work incapacity data. ▪ For employees with private health insurance and in the case of treatment by a private doctor or abroad, it remains the same that employees must submit a certificate of incapacity for work in paper form. <u>Need for action by employers</u> ▪ Employers should inform all employees about the changes that will apply from January 2023.

	▪ Model employment contracts must be adapted to the new regulation. ▪ If they have not already done so, employers must implement a system-tested program for retrieving the electronic certificate of incapacity. ▪ Employers must also adapt their existing work processes to the changed circumstances in order to record absences cleanly. In particular, due to the different regulations for those with statutory and private insurance, two different processes must be introduced with regard to proof of incapacity for work.

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