

## LEGAL UPDATE ARBEITSRECHT

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# Considering social criteria when assigning winding up work

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### Operational shut-down and termination of all employment contracts

In principle, social criteria must not be considered in the event of an operational shut-down and the simultaneous termination of all employment contracts. This also applies if individual employees are tasked with winding up work during their individual (longer) notice periods (Federal Labour Court (Bundesarbeitsgericht, BAG), decision dated 7/7/2005 – 2 AZR 447/04).

### Winding up work as fixed term continued employment opportunity

The situation must be evaluated differently if employment continues beyond the notice period, even if it is only intended to be for a fixed term for the duration of necessary winding up work. In this event social criteria must be considered. This corresponds with the purpose and objective of the statutory provisions on social criteria in accordance with section 1 (3) of the German Protection Against Unfair Dismissal Act (Kündigungsschutzgesetz, KSchG), where the employees in the workplace who are the most vulnerable socially will be retained for a longer period of time, even if this is still only for a fixed term. Winding up work which extends beyond an employee's individual

notice period is deemed to be a fixed term continued employment opportunity.

### Decision of the Düsseldorf Regional Labour Court

In light of this the Düsseldorf Regional Labour Court (Landesarbeitsgericht, LAG) in its ruling dated 9/1/2024 (3 Sa 529/23, [Press release](#)) again made it clear that the employer cannot freely choose which employees it continues to employ beyond their individual notice period to carry out winding up work in the event of a staggered operational shut-down. In such cases the employer must take social criteria into consideration and offer fixed term continued employment to employees who are the most vulnerable socially.

In the opinion of the Düsseldorf LAG the comparison groups must be formed taking the applicable winding up work into consideration and not the tasks originally performed by the employees. Ultimately the employer must assess which employees are most suitable for the applicable winding up work because of their qualifications.

### Practical guidance

If winding up work is required in the event of an operational shut-down, it must be assessed

whether these tasks could be carried out by employees during the course of their notice period before notice of termination is given. If this is not the case and employees must be (continued to be) employed beyond their notice period to carry out winding up work, social criteria must be taken into account when considering the applicable employees. When

forming comparison groups employers must assess what tasks still need to be carried out, the timeframe and what skills and qualifications are required. Employers are, of course, free to have the winding up work carried out by (external) third parties without continuing to employ their own employees.

#### Hinweis

Dieser Überblick dient ausschließlich der allgemeinen Information und kann konkreten Rechtsrat im einzelnen Fall nicht ersetzen. Sprechen Sie bei Fragen bitte Ihren gewohnten Ansprechpartner bei GÖRG bzw. der Autorin Dr.Hanna Jansen unter +49 211 33660-543 oder [hjansen@goerg.de](mailto:hjansen@goerg.de) an. Informationen zum Autor finden Sie auf unserer Homepage [www.goerg.de](http://www.goerg.de).

Wir verwenden das generische Maskulinum und sehen von einer Nennung aller Geschlechtsidentitäten ab, damit dieser Text besser lesbar ist, und meinen damit ausdrücklich jeden in jeder Geschlechtsidentität.

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