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Special Newsletter
Works council elections 2022

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Dear Readers,

We wish you a Happy New Year and all the best for 2022!

The year has just begun and already the first tasks are on the agenda in HR and legal departments. This year, works councils will once again be elected in Germany's companies between March 1 and May 31. In some companies, preparations are already in full swing and the election campaign has been underway for weeks. It is now entering the final phase. Reason enough for us to devote ourselves to this topic once again in a special edition of our newsletter.

In recent months, we have regularly published articles on the topic of "Works Council Elections 2022" in our Luther Labor Law Blog. In this issue, we summarise them again for you in a compact form in preparation for the upcoming elections.

One of the topics is the Works Council Modernization Act. With this, the legislator created new rules for the election procedure last year. Dietmar Heise's articles on the election procedure also provide an overview of the basic points of the new legal regulations that need to be taken into account.

However, we do not only deal with the specific election procedure, but also with fundamental topics relating to works council work. For example, Klaus Thönißen and Christian Kuß deal with current issues relating to the employer's liability in the event of violations of data protection by the works council. Dr Eva Rütz and Katharina Gorontzi shed light on the implications of mobile work and artificial intelligence in terms of works council constitutional law. These are just two of the many topics that await you in our special newsletter.

Even if there are no works council elections coming up, it is worth taking a regular look at our Luther Labor Law Blog, in which we provide information on current topics and developments in the area of labor law.

We look forward to your feedback and hope you enjoy reading!

Best regards

Paul Schreiner Achim Braner

The election campaign has started: Five recommendations for how to act during the election campaign from an employer's perspective

The 2022 works council elections are just around the corner. Between 1 March and 31 May 2022, employee representatives will once again be elected in German undertakings. Even though this means that there is still some time to go until the submission of the election proposals, the election campaign has already commenced in most businesses. Candidates are starting to campaign for themselves and employers should also use this phase.

Approaching candidates: also a tool for employers

The employers' interest in works council elections is obvious: undertakings have an interest in working with the works council in a trusting and constructive manner. It can, therefore, make sense to specifically encourage people from among the workforce to become active on the works council, given that there are numerous matters requiring the works council's approval, such as the introduction of technical devices (long-running issue: software/Sweet HR), where it certainly helps having employees with the necessary technical knowledge and interest on the works council. Consequently, approaching potential candidates could be a start.

Soliciting support for individual candidates is permissible, but should be kept within acceptable limits and should not take on the character of a separate election campaign (this means, for example, no use of company resources for a particular candidate).

Criticism is permitted

Employers are not obliged to remain neutral during the election campaign. In 2017, the German Federal Labour Court (Bundesarbeitsgericht – "BAG", decision of 25 October 2017 – 7 ABR 10/16) clearly rejected such a neutrality requirement, which had previously been assumed to exist by some courts and in part of legal literature. Employers, too, can invoke the freedom to express their opinion under Article 5 (1) German Basic Law (*Grundgesetz – "GG"*) and take a stand in the election campaign. After all, employees can be expected to classify their employer's statements and make their own, free election decisions. Like everywhere, objective and factually correct criticism is always appropriate. Employers are thus allowed to openly address problems encountered in their work with current bodies.

This includes the right to publicly comment on individual candidates, also in a pointed manner, and even the right to make critical statements in relation to individual candidates.

Observing clear rules

The right to influence works council elections is not entirely unrestricted. The limits are clearly defined in Section 20 German Works Constitution Act (*Betriebsverfassungsgesetz – "BetrVG"*), according to which it is unlawful to promise or grant any advantages (Section 20 (2)), threaten with or cause any disadvantages (Section 20 (2)) or generally obstruct the election (Section 20 (1)). In this context, Section 20 (2) German Works Constitution Act protects above all the internal decision-making process of the employees entitled to vote whereas the prohibition against obstructions under Section 20 (1) German Works Constitution Act is to guarantee the external election process.

No preferential treatment

A prohibited preferential treatment of individual candidates does not only exist when these candidates are promised or granted salary increases, promotions or other direct benefits. Supporting an election campaign by providing funding or company infrastructure is also prohibited, unless such support is granted to all candidates in the same manner.

No unfavourable or discriminatory treatment

Conversely, an unfavourable or discriminatory treatment exists, in particular, if individual candidates or lists are not granted the same access to company funds as the remaining candidates. Threatening with or carrying out salary cuts, transfers or dismissals as a means of influencing the works council elections are, of course, also prohibited.

Conclusion: No false restraint – works council elections affect the entire undertaking

The election campaign for the 2022 works council elections has begun. As an employer, you should not hesitate to state your opinion. You should openly address current problems experienced in your work with employee representatives or individual works council members and encourage employees to become active on the works council and to stand for election. The limits of what constitutes undue influencing of the elections are clear and should not, therefore, prevent any undertaking from becoming actively involved in the election campaign.

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The election procedure – Part I: Preparations by the electoral board

The 2022 works council elections are just around the corner. The preparations are starting now. The German Works Council Modernisation Act 2021 (*Betriebsrätemodernisierungsgesetz 2021*) and the new election rules (Wahlordnung) have changed the election procedure. Employers should be roughly familiar with the procedure.

The electoral board as master of the procedure

The electoral board is responsible for the precise organisation of the election. It normally consists of three employees (who are entitled to vote). This means that the members are not election experts. They need help, from the employer, a lawyer – or a trade union.

If a works council already exists, it will appoint the electoral board. If it fails to do so, the labour court (upon application) or the general works council (*Gesamtbetriebsrat*) may appoint the electoral board. In groups of companies, the electoral board may also be appointed by the group works council if a general works council does not exist. An electoral board may only be appointed by the employees themselves in businesses that do not have a works council; in this case, the appointment must take place at an electoral meeting.

The body making the appointment may, exceptionally, appoint more than three members to the electoral board if this is necessary to properly carry out the election. Only odd numbers of members are permitted. Substitute members may also be appointed. The trade unions represented in the business may each appoint one person who belongs to the business to the electoral board, but only as a non-voting member. To the extent necessary, the electoral board itself may designate assistants to provide support during the election.

The electoral board will carry out its work at meetings and decide by resolution. In acknowledgement of digitalisation, meetings by video or telephone or hybrid meetings are now also permitted. However, certain tasks (examining the election proposals, drawing lots for the purposes of numbering several election proposals) may only be dealt with at meetings held in person.

Initial examinations by the electoral board before initiating the election

The election will be officially initiated by posting an election notice. Before the electoral board can do this, it must carry out some initial examinations:

In what unit should the election take place, i.e. how should the business be delimited? This is often easy to assess. The assessment becomes more difficult when there are several smaller units that are connected organisationally, for example, smaller branches. The assessment of joint businesses (*Gemeinschaftsbetriebe*) of several undertakings can also be difficult.

Who is to be considered an employee of the business? Temporary workers, for example, are also employees. Disputes often arise with regard to freelancers or third parties working for the business on a long-term basis, for example, in IT. Genuine executive employees (*leitende Angestellte*) are not to be taken into account.

Who is entitled to vote, who is eligible? Unlike in the past, all employees aged 16 or older are now entitled to vote. Temporary workers may only vote, however, if they are deployed in the business for longer than three months; this period must, of course, include the election day. Younger employees are only entitled to vote. Only persons who are of age and, in addition, have belonged to the business, or at least to the undertaking or the group of companies, for a minimum of six months can be elected to the works council.

How many employees are entitled to vote in the business? This number is particularly important for the size of the works council to be elected and the election procedure: in businesses with up to 100 employees entitled to vote, a “simplified” election procedure is applied; in business with 101 to 200 employees entitled to vote, the electoral board and the employer can voluntarily agree to apply the “simplified” election procedure instead of the regular one. For employers, however, such an agreement is rarely advisable: the “simplified” election is first and foremost a much faster one, not a simpler one. As such, it is much more prone to mistakes.

How many employees of the different sexes are there? This is particularly important for the composition of the works council, given that there are minimum quotas for the number of works council members from among the sex that is in the minority. To date, “women” and “men” are the only sexes known in case law and in legal literature. People of other sexes will probably seldom play a role in practice. This is because there will usually be too small a number of them in the businesses to allow them to secure even a single seat on the works council.

Further preparations: election day, documents

The electoral board will determine the election day or, in larger businesses, the election days. In doing so, it should take into account the large number of tasks that need to be attended to prior to the election day. The preparations for the election will take at least ten to twelve weeks, according to a rough estimate.

The electoral board will create the electoral roll from a list made available by the employer. This electoral roll is extremely important because only employees included in the electoral roll will be entitled to vote on the election day. The employer should compile all employee data needed for this purpose. The electoral roll must state each employee’s surname, given name and date of birth. Temporary workers, minors entitled to vote and any other employees entitled to vote who are not eligible must be marked as such. The electoral roll must be divided by sex into separate lists.

By compiling the electoral roll, the electoral board finally determines whom it considers an employee (who is entitled to vote). Therefore, the employer should verify at an early stage that it agrees with the electoral board’s assessment. If the employer does not agree, it should timely ask for a correction.

The preparation of the so-called election notice will involve a lot of work for the electoral board. This document contains the key data of the upcoming works council election, as determined by the electoral board in accordance with the requirements stipulated in the German Works Constitution Act and the Election Rules. For “regular” elections in larger businesses, the election notice must include 13 mandatory items (Section 3 (2) Election Rules German Works Constitution Act (*Wahlordnung BetrVG – “WOBetrVG”*)); the electoral board may add further details on a voluntary basis. In the case of “simplified” elections, the number of the mandatory items of information rises (!) to 15 (Section 31 (2) Election Rules German Works Constitution Act).

Upon completion of the documents, the electoral board must put up the electoral roll and the election notice in the business. In addition, it may also publish the documents electronically. Furthermore, the electoral board must send the election notice (not the electoral roll) electronically to any employees entitled to vote who will not be in the business on the election day, as far as can be foreseen. The hurdles for an announcement made only electronically are high, and it is unlikely that many businesses will be able to clear them.

The publication of the election notice will mark the official start of the works council election. More on this in the following article.

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The election procedure – Part II: The initiated “regular” election

In the previous article, we have described the steps involved in a works council election up until the election notice is issued (= displayed). In this article we explain what else employers should bear in mind. The issuance of the election notice marks the official initiation of the works council election, according to the provisions of the election rules. Many steps follow. Just like the description in the previous article, the following comments apply to larger businesses that generally employ more than 100 employees entitled to vote.

Election proposals

The issuance of the election notice is followed by a two-week period during which employees and any trade unions represented in the business may file proposals of candidates for election to the works council. Such lists of proposals should, but are not required to, contain twice the number of candidates as there are members to be elected to the works council. It is important to note that each list of proposals must be supported by the signatures of at least 1/20 of the employees entitled to vote in the business. Fifty signatures are enough in any case – that is, in businesses with at least 1,000 employees entitled to vote.

The electoral board must review all lists of proposals filed. If they do not give rise to objections, the electoral board must make them known in the business. In doing so, it must remain neutral, which means that it may not prefer any list.

Review and correction of the electoral roll

Together with the election notice, the electoral board had to publish the electoral roll. This electoral roll is extremely important for the election, as only employees whose names are included in the roll can stand as candidates for election to the works council in a list of proposals. The same applies to the

right to vote: only employees whose names are included in the electoral roll on the election day can and may cast their votes on that day.

This is why all employees and also the employer should verify that the electoral roll is correct. For employees, the time allowed to do so is again limited: employees can only file objections to the accuracy of the electoral roll with the electoral board within two weeks of the issuance of the election notice. Thereafter, until voting is concluded, the electoral board may only make corrections to the election notice in the case of objections filed in due time, upon employees joining or leaving the company, or if there are obvious mistakes. The employer or trade unions cannot raise an objection.

The right to contest the election due to mistakes in the electoral roll has also been restricted: employees can now only contest the election on the grounds of mistakes in the electoral roll if an employee (any employee) previously filed an objection in due time or if the contesting employees were prevented from doing so. The employer cannot contest the election if the inaccuracy is due to information that was provided by the employer.

The important thing for the employer to do is, therefore, to check the electoral roll and also the preparatory work carried out by the employer within the two-week period. If the employer discovers mistakes in its own lists that have been provided to the electoral board and wishes to keep the option open to contest the election, the employer should ask the electoral board for corrections timely enough for the electoral board to be able to correct the mistake within the two-week period.

Ballot papers and method of voting

In preparation for the actual election, the electoral board must prepare ballot papers. If more than one valid list of proposals has been received during the two-week period, the names of the lists are to be set out on the ballot paper in the order of their previously assigned ordinal number. Voters shall have only one vote, which they may give to a list of their choice (so-called proportional representation).

If only one valid list of proposals has been filed within the set period, so-called relative majority voting takes place: all candidates included in this list are put forward for election individually and by name on the ballot paper. Each voter may cast as many votes at his or her discretion as there are works council members to be elected. In some businesses, there is a deliberate practice of putting all candidates on one list with a view to achieving relative majority voting. This is allegedly supposed to give the election a more democratic touch. Please be cautioned against this practice: if only one candidate who is put off by this practice finds enough supporters and files his or her own election proposal at the last possible moment, the entire well-intentioned plan fails. Such cases are not uncommon.

If, on the other hand, not a single valid list of proposals has been filed within the set period, the electoral board must fix an additional period of exactly one week, which it may neither shorten nor extend. If again no list is filed, the electoral board must discontinue the election.

Election and postal vote

The act of voting itself is similar to public elections: at the polling station, the voters must be checked off of an (updated) electoral roll. It must be ensured that they can cast their votes secretly. The folded ballot papers must be placed into a ballot box that cannot be tampered with and must be kept in that box until voting is concluded. By the way, the requirement of envelopes for the ballot papers has just been abolished. Voters must now fold their ballot papers in such a way that their vote cannot be seen. May the employees be more adept than Armin Laschet, one of the candidates for the post of Chancellor in the 2021 German federal election, who folded his ballot paper incorrectly, thus revealing the marks he had made.

In the context of works council elections, the postal vote is simply referred to as “written vote”. Unlike in the recent federal election, for example, a postal vote in works council elections is only permitted in exceptional cases. Only employees entitled to vote who are absent from the business at the time of the election and, therefore, cannot cast their vote personally may demand to vote by postal vote. If the electoral board is aware of the absence of an employee entitled to vote, it must send that employee the necessary documents, even without an express request from the latter.

Counting of votes, announcement of the election result

After voting is concluded, the votes are counted. In the event of relative majority voting, that is, if only one list of proposals has been filed, the candidates elected can easily be determined, at least within the first step: the only criterion to be considered is the number of votes received.

In the event of proportional representation, the more complicated D'Hondt method must be applied. Under the D'Hondt method, each list's votes are repeatedly divided by whole numbers, starting with 1 (that is, first by 1, then by 2, then 3, etc.). The seats are then allocated to the quotients thus obtained, starting with the highest one (for a more detailed description, see Wikipedia, for example).

Things may become more complicated in both cases if the sex that is in the minority does not receive the share of seats on the works council that corresponds to its percentage of the workforce. In this case, the works council members from among the majority sex who have been determined using the aforesaid method are "deleted", starting with the member with the smallest number of votes or the smallest highest quotient, and are replaced by the next candidate of the minority sex. In extreme cases, this may result in a candidate from one list being replaced by a representative of the minority sex from another list, which may even lead to a change in the majority situation on the works council.

After the elected candidates have been determined and have accepted their election, the election result must be announced in the business and be made known to the employer and any trade unions represented in the business. The last act to be performed by the electoral board is to convene and chair the constituent meeting of the newly elected works council until a works council member has been designated who will conduct the election of the chairperson.

Simplified election in businesses with up to 100 employees entitled to vote

The rules described in this article apply only to larger businesses. Smaller businesses must carry out a so-called simplified election.

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Communication and duty of neutrality of the employer during works council elections

The works council election is the responsibility of the workforce and not of the employer: this principle is not only a general rule but also a legal requirement under works constitution law. Unlawful interference by the employer can have far-reaching consequences, which is why employers would be well-advised to comply with certain rules of conduct.

The employees are responsible for organising and holding works council elections. The German Works Constitution Act (*Betriebsverfassungsgesetz – "BetrVG"*) and the Election Rules (*Wahlordnung – "WO"*) contain very few provisions regarding the employer's involvement in works council elections. Pursuant to Section 2 (2) Election Rules, for example, the employer is obliged to provide certain information to the electoral board for the creation of the electoral roll, and Section 20 (3) sentence 1 German Works Constitution Act requires the employer to bear the costs. In short, the employer is only involved where its cooperation is indispensable.

No obstruction or interference

However, the German Works Constitution Act contains various obligations and prohibitions addressed to the employer. For example, it prohibits obstructing the election of the works council (Section 20 (1) German Works Constitution Act); in particular, no employee may be restricted in exercising his or her right to vote or to stand for election. This prohibition protects the external acts involved in the election process, i.e. the act of standing for election, the preparation of election proposals, the collection of support signatures, the canvassing and the casting of votes. In addition to this, it prohibits influencing the election of the works council (Section 20 (2) German Works Constitution Act). This means that the works council election must not be influenced by manipulating the voter's decision-making process which precedes the external acts involved in the election process.

Even though both provisions are worded in such a way as to address any person or body whatsoever – superiors, election candidates, trade union representatives – the prohibitions actually concern above all the employer's conduct and communication.

Duty of neutrality

In addition to these express prohibitions, it is assumed both in case law and in legal literature that the employer has a general duty of neutrality, regardless of the basis of such duty. This duty of neutrality is intended to ensure equal opportunities for all candidates participating in the election. However, the employer is not subject to a strict neutrality requirement in connection with the works council elections. Not every act or statement that might be susceptible of influencing the election is prohibited: the influence must be exerted by causing or threatening with disadvantages, or by granting or promising advantages (German Federal Labour Court (*Bundesarbeitsgericht – "BAG"*), decision of 25 October 2017 – 7 ABR 10/16, NZA 2018, pp. 458 et seq.). The employer acts as a kind of "referee" during the works council election: it must supervise the election and is prohibited from granting a certain group of candidates advantages, or denying another group of candidates the same advantages, and must also refrain from any other discrimination. The duty of neutrality serves electoral integrity and is intended to prevent the employer from influencing the election of the very bodies that are (later) supposed to monitor the employer.

The duty of neutrality is not an absolute duty, however, as the basic right to freely express one's opinion also applies, of course, to employers. The limits of how far the employer may go are fluid. It is clear that statements which contain (implied) threats of concrete disadvantages or promises of concrete advantages are unlawful. Acts that are generally punishable, such as insults or similar offences, are, of course, also prohibited. According to the rulings of the German Federal Constitutional Court (Bundesverfassungsgericht), the freedom to express one's opinion does not cover deliberate untrue factual claims or abusive criticism, so employers should refrain from expressing such claims or criticism, just like anyone else.

The duty of neutrality does not only mean that certain acts are prohibited: it can also be breached by the employer failing to act. This distinction is especially important for potential sanctions or legal consequences. The reason for this is that while violations of Section 20 (1) and (2) German Works Constitution Act are criminally sanctioned under Section 119 (1) no. 1 German Works Constitution Act, a breach of the duty of neutrality will, at the most, result in the works council election being contestable, provided that the breach falls within the scope of Section 20 German Works Constitution Act or of any other essential electoral rules within the meaning of Section 19 (1) German Works Constitution Act.

Case groups

The election is considered to be unlawfully obstructed if initiating or holding the election is made more difficult or even impossible. The election does not have to be prevented; it is sufficient that the election is significantly interfered with or made significantly more difficult. The employer is considered to behave unlawfully, for example, if it instructs any of its employees not to vote or not to stand for election, if it takes down election posters or if it issues cautions because of an election advertisement. Further examples of unlawful behaviour would be the employer's refusal to provide the documents needed to create the electoral roll, its refusal to release members of the electoral board from their obligation to work or the deliberate assignment of tasks to employees with a view to preventing them from voting.

By contrast, if the employer refuses to release an election candidate from his or her obligation to work so he or she can collect signatures for his or her election proposal, or if the employer reminds an executive employee of his or her status as an executive employee without expecting a particular behaviour, this does not constitute an obstruction of the election.

If the employer offers a group of candidates its PR department's assistance to create an election magazine or if, by order of the employer, an executive employee collects support signatures for a candidate in the business, this constitutes unlawful interference, according to case law. The employer is further considered to interferering with the works council election if it promises a promotion, or threatens to deny a promotion, in the event of a particular behaviour regarding the election, if it announces the cancellation of voluntary benefits or if the employer threatens to assign the employee a less favourable job, for example. Pointing out the importance of the election, on the other hand, is permitted, as this only constitutes an invitation by the employer to participate in the election and not support for a candidate.

Other unlawful acts include threatening an employee with individual disadvantages in the event that he or she stands for election, as well as announcing disadvantages of a general

nature, for example, that dismissals or the closure of the business can be expected if a certain list wins. The threat must be more than just a warning, however; this means that it must concern something bad in the future which the employer can actually (or allegedly) make happen.

Practical consequences

Employers are strongly advised to be particularly careful when granting special benefits. Furthermore, they should make sure that all obligations under the Election Rules are comprehensively fulfilled in due time. The managing directors and executive employees should completely refrain from commenting on any candidate or performance and/or examine very carefully whether the relevant comment is a lawful expression of their opinion.

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Online voting for works council elections?

The ubiquitous topic of digitalisation does not stop at works council elections. Companies have great interest in offering to hold their works council elections as an online election in order to increase voter turnout at the election, save costs and avoid mistakes. This involves certain legal risks, however.

Analogue elections to date

The exact way in which the works council election has to take place is set out in the German Works Constitution Act (*Betriebsverfassungsgesetz – "BetrVG"*) and the Election Rules (Wahlordnung – "WO").

Roughly speaking, they provide that the votes are to be cast in accordance with rules for analogue voting similar to those applicable in parliamentary elections: voters generally cast their votes on site (at the polling station of the relevant business). To this end, they put a cross next to their preferred list of candidates on the ballot paper, using a pen, and then put the ballot paper into a ballot envelope and place it into the ballot box (Sections 11 et seq. Election Rules).

In addition, it is also possible to vote in writing (Sections 24 et seq. Election Rules). However, unlike in the case of a postal vote in the election for the Bundestag, a written vote in works council elections is only permitted in exceptional cases. To vote in writing, the person entitled to vote must be absent from the business on the election day and, therefore, be unable to cast his or her vote personally on site at the ballot box. The term "written vote" is to be understood literally, which means that in this case, too, the voter must vote analogously by making his or her mark on the ballot paper using a pen, putting the ballot paper into the ballot envelope and then sending it back/returning it to the electoral board.

Proposals from practice

According to the above, statutory rules for online elections do not exist to date. What is more, the existing rules on the casting of votes cannot be interpreted in a way that would allow digital voting.

This outdated legal framework is being increasingly criticised in practice. More and more employees work digitally, from home or on the road, and with flexible hours. A ballot-box or postal vote seems very antiquated and deters young people, in particular, from voting.

A works council that enjoys high democratic legitimacy and represents the entire workforce is, however, essential to an effective works constitution. It is in everybody's interest to enable high voter turnout at elections. In the long term, this will only succeed with an – optional – offer of an online election. This would, at the same time, reduce costs and human error-proneness.

For this reason, various undertakings (e.g. T-Systems or Beiersdorf) have already made a conscious decision in past elections to offer online voting as an additional option. Their experience of proceeding in this manner has been positive without exception and they have especially been able to increase voter turnout at the elections.

It's the legislator's move now

The legislative reforms of recent years have not taken into account these considerations. The election procedure was modernised neither in connection with the general considerations regarding Work 4.0 (Arbeit 4.0) (see, for example, the "Arbeiten 4.0" white paper published by the German Federal Ministry of Labour and Social Affairs (*Bundesministerium für Arbeit und Soziales – "BMAS"*) in 2017) nor through the German Works Council Modernisation Act (*Betriebsrätemodernisierungsgesetz*), which recently came into force.

This is probably due above all to concerns about perceived security risks. Furthermore, in its 2007 ruling on voting computers (2 BvC 3/07), the German Federal Constitutional Court (*Bundesverfassungsgericht – "BVerfG"*) defined strict requirements that need to be met in order for the use of voting machines to be considered compatible with the principle of public elections. There are, however, providers whose software has been certified by the German Federal Office for Information Security (Bundesamt für Sicherheit in der *Informationstechnik – "BSI"*) and thus classified as secure.

The German legislator ventured at least a small step forward in 2020, albeit only in a peripheral area of social security law: as part of a model project, the election of the representatives of the insured may, for certain types of health insurance companies, additionally take place by online voting in 2023 (Section 194a German Social Code Book V (*Sozialgesetzbuch, Fünftes Buch – "SGB V"*)). Depending on the experience gained in those elections, the topic of digitally updating the works council elections might then also be put on the political agenda again.

Legal consequences of an online election

The holding of an online election constitutes a violation of the election procedure and results in the works council election being contestable (Section 19 German Works Constitution Act). The election may only be contested, however, if the violation is susceptible of altering or influencing the election result; furthermore, the election must be contested within the two-week period allowed for this purpose.

Whether the online election additionally results in the nullity of the works council election is doubtful. Unlike the lower court, the Regional Labour Court (*Landesarbeitsgericht – "LAG"*) of Hamburg held in a decision from the year 2018 (8 TaBV 5/17) that this was not the case.

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Legal protection options for the employer, as things do not always go well

The German Works Constitution Act (*Betriebsverfassungsgesetz – "BetrVG"*) and the Election Rules (*Wahlordnung – "WO"*) contain detailed provisions as to the requirements for an election and the election procedure. However, the large number of details also makes elections more susceptible to mistakes.

Correction order to correct mistakes

If mistakes become apparent in the ongoing election procedure, the employer may seek a preliminary injunction to have the mistakes corrected. As correcting mistakes is a less drastic measure than discontinuing the election, the claim for correction takes precedence.

What is required is a significant violation of the rules that is capable of distorting the election result. However, a right to demand corrections only exists if the corrections do not mean that mandatory time periods or deadlines of the election procedure will not be complied with. By contrast, if the correction can no longer be made in the current ballot (in particular because time periods would otherwise be shortened in an inadmissible manner and this would once more result in mandatory election rules not being observed), a correction order is inadmissible. Otherwise, the correction enforced in court would give rise to new reasons to contest the election.

High hurdles for an order to discontinue the election

According to case law, a works council election may only be discontinued in the event of serious violations. Even though the law only makes mention of contesting an election but not of discontinuing it, the employer should not be required to knowingly tolerate serious violations and be dependent on subsequent legal protection, particularly since the employer must bear the cost of the election that needs to be repeated.

The German Federal Labour Court (*Bundesarbeitsgericht – "BAG"*) takes the view that an application for a preliminary injunction seeking to discontinue the election is only justified if the works council election would presumably be null and void. This means that an order to discontinue an election may only be issued if "the general principles that apply to any proper election are violated to such an extent that even the appearance of an election that conforms to the law no longer exists." This is the case, for example, where a works council is intended to be elected for a business that already has a works council. In addition, this is the case where the body acting as electoral board has never been appointed. This strict criterion is not uncontroversial.

In terms of objective and legal consequence, a distinction must be made between discontinuing an election for good and discontinuing an election for the purpose of initiating a new election. If, for example, the unit for which a works council is intended to be elected is not eligible for a works council or a works council already exists, the only option will be to discontinue the election for good. By contrast, if the election can actually be initiated and held without any mistakes, discontinuing the election and initiating a new election will be the less drastic measure.

Contesting the election, or: Good decisions take time

The election may be contested within a period of two weeks after the announcement of the election result. If the election is contested, this will lead to a subsequent examination of whether there has been a violation of essential rules regarding the right to vote, eligibility or the election procedure, unless the violation could not have altered or influenced the election result.

Considering the two-week period allowed to contest an election, the duration of the proceedings when contesting an election is considerable. By decision of 29 April 2021 (7 ABR 10/20), for example, the German Federal Labour Court ruled on an action to contest an election held in 2018 in which it was disputed whether the electoral board had been wrong in not admitting a particular list of candidates.

In light of the detailed procedural rules and the legal framework, there are numerous sources of mistakes that result in an election being contestable. Violations can be committed both intentionally and unintentionally.

Examples from the past where a right to contest existed include a violation of the principle of secret ballot committed by supervising the casting of the votes, the admission of persons not entitled to vote to the election or, more recently, the casting of votes without using ballot envelopes.

If an election is successfully contested, it is established that the election was invalid. In this case, new elections must be initiated in the same way as elections are initiated in a business without a works council, except where the mistake can exceptionally be corrected following an action to partially contest the election – for example, if an application has been made to determine the correct election result. Any works agreements entered into in the meantime will remain effective though.

Nullity of the election if it does not even appear to be a proper election

The legal protection options are completed by the option to have the election declared null and void. Declaring an election null and void is only justified if the fundamental principles of electoral law have been violated to such an extent that the election does not even appear to be in conformity with the law. This will rarely be the case, however, which is why in judicial proceedings, the application to declare the election null and void is generally combined with an action to contest the election. Unlike in the case of an election that is contestable, the determination of the nullity of an election has retroactive effect such that any legal acts that have been performed by the works council in the past are ineffective.

Conclusion and recommendations for action

Employers should keep an eye on compliance with the legal framework during elections. Particularly in light of the long duration of judicial proceedings and the cost of repeating elections, we would recommend trying to have any mistakes corrected already during the election.

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Works council election: Who pays for the election?

The next works council elections are coming up. This regularly leads to the question of what costs will be incurred in this connection and who will bear these costs. Please find below our overview.

The employer generally bears the costs of the election

Pursuant to Section 20 (3) sentence 1 German Works Constitution Act (*Betriebsverfassungsgesetz – "BetrVG"*), the employer bears the cost of the works council election. In a joint business, the employers bear the cost of the works council election as joint and several debtors, as a rule. Recourse between the employers depends on the individual agreement made or, alternatively, on the respective total wages.

Scope of the obligation to bear the costs

1. Cost of materials

The obligation to bear the costs includes the cost of materials needed to prepare and hold the works council election. The cost of materials needed to prepare the works council election includes, for example, the cost of literature on works council elections, legal tests, office materials and rooms. The cost of materials needed to hold the works council election includes, in particular, the cost of ballot boxes, postage for the postal vote, lists of voters, ballot papers, ballot envelopes, voting booths and software to carry out the election. By contrast, the employer is not required to bear the cost of election advertising.

2. Personal costs of the electoral board

In addition to the cost of materials, the employer must also bear the personal costs incurred by the members of the electoral board in the context of a works council election. These costs include travel expenses and training costs. Each member of the electoral board must be granted training. If a motor vehicle is needed to carry out the election – for example, to transport election documents to other units of the business – the employer must make such a vehicle available or compensate the relevant member of the electoral board for the use of his or her private vehicle.

3. Limits to the obligation to bear the costs

The obligation to bear the costs is always limited by the rule that the costs must be necessary and reasonable. The employer is not required to bear unnecessary costs. Disputes about whether or not certain costs have to be borne by the employer are, on application, to be decided by the competent labour court in so-called decision proceedings (Beschlussverfahren), i.e. proceedings regarding collective employment law issues.

4. Lawyer's fees

In addition to the above, the employer must bear the cost of hiring a lawyer in the event of legal disputes in connection with a works council election. This includes, for example, the cost of proceedings to contest the election or the cost of a lawsuit to clarify the electoral board's rights. Courts generally tend to apply generous criteria when it comes to the costs incurred in connection with legal disputes in the context of a works council election. Costs are thus considered to be necessary as long as bringing an action does not appear to be a hopeless endeavour, or as long as claiming the costs does not constitute an abuse of the right to do so.

5. Cost of lost working hours

As a rule, the electoral board performs its duties during working hours. The employer must release the members of the electoral board from their duty to work, so they can carry out their activities for the preparation and holding of the election and must continue to regularly pay their wages. These costs must also be included in the overall budget for the works council election.

Practical advice

This means in practice that employers can expect to incur significant costs in connection with works council elections. Courts apply rather generous criteria when determining whether costs are necessary or not – a practice that is ultimately at the expense of the employer.

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Remuneration of works council members

After the upcoming works council elections, employers will once again be faced with the task of determining the remuneration of the individual works council members. The following post is intended to provide an overview of the statutory basis and of the risks involved for employers.

Legal Basis

The assumption of the office of member of the works council involves the performance of functions for the works council. Pursuant to Section 37 (2) German Works Constitution Act (Betriebsverfassungsgesetz – BetrVG), members of the works council are to be released from their work duties for the performance of these functions to the extent that the relevant activity for the works council is proven to be “necessary”. In this respect, a special rule exists according to which for companies in which 200 employees or more are normally employed, the irrefutable assumption is that the amount of work to be performed by the works council is equivalent to one or more full-time positions, depending on the size of the company. The employer is required to fully release from their work duties as many works council members as are specified for the relevant company size in Section 38 (1) German Works Constitution Act. The members to be released are determined by secret ballot of the works council (Section 38 (2) German Works Constitution Act).

The office of member of the works council is unpaid (Section 37 (1) German Works Constitution Act). However, the employee remains entitled to the remuneration payable according to his employment contract for any period of time spent working for the works council during which the employee cannot perform his regular professional duties. Pursuant to Section 38 German Works Constitution Act, this rule applies even if the employee is fully released from his work duties. This means that under German law, the employer remains obliged to pay the full remuneration to works council members who are released, in whole or in part, from their primary work duties for the purposes of performing their functions as members of the works council.

There is, however, often uncertainty about the amount of remuneration to be paid. Pursuant to Section 37 (4) sentence 1 in conjunction with Section 78 sentence 2 German Works Constitution Act, the employee is entitled to remuneration of no less than the remuneration paid to comparable employees who have followed the career that is usual in the business. The works council member must be placed in the position in which he would have been if he had continued his professional career, rather than working as a member of the works council. The employer is obliged to review and adjust the remuneration on its own initiative, without any requirement for the works council member to actively assert any rights in this respect.

This leaves the employer with the sometimes extremely difficult task of determining for each works council member the remuneration that meets these requirements without violating Section 78 (2) German Works Constitution Act by disadvantaging or favouring the respective works council member. Violations of the aforesaid provision are regularly the subject of decisions of the German Federal Labour Court.

Comparable employees

Pursuant to Section 37 (4) sentence 1 in conjunction with Section 78 sentence 1 German Works Constitution Act, members of the works council are entitled to remuneration comparable to that of comparable employees. This does not mean the average remuneration of a group of employees. Instead, the employer must determine at least one comparable employee for the purposes of determining the concrete remuneration of the works council member by objectifying the claim for remuneration. Comparable employees are employees of the same business who perform activities that are essentially comparable from an objective point of view. The comparability criteria to be taken into account include, in addition to the work performed, the professional qualifications, such as vocational training, further education and the previous career, as well as the personal qualifications, such as the level of education, the quality of the work results and the potential for development. This can already give rise to disputes about how to define the term “business” and, hence, about which employees should be included in the comparability check.

In addition, there is also dispute about how to proceed in the situation where no employee can be found who is comparable to the works council member on the basis of the aforesaid criteria. The question of whether in this case the remuneration should be determined by reference to the employee who is most comparable to the works council member or whether, as the comparability required by Section 37 (4) German Works Constitution Act does not exist, the remuneration should, in the light of Section 78 sentence 2 German Works Constitution Act, be determined exclusively on the basis of a hypothetical assessment has not been finally clarified.

It should be noted, however, that special developments in the comparable employees’ remuneration which are the result of special achievements that could not have been achieved by the works council member due to non-fulfilment of the relevant access criteria must be left out of consideration; the same applies to special achievements of the works council member that regard exclusively his work on the works council.

Conversely, periods during which the works council member has not worked, for example, because he has been unfit for work for a longer period of time, must be taken into account when determining the appropriate remuneration. This is because if the works council member had worked in his regular job, his remuneration would not have increased during such periods, either.

The relevant point in time for this determination of comparable employees is when the employee assumes the office of member of the works council for the first time. Consequently, even if the works council member’s term of office is renewed, the comparable remuneration at that point in time must be taken as a basis.

Promotion with adjustment of remuneration

Although the works council member is not directly entitled to a promotion under Section 37 (4) in conjunction with Section 78 sentence 2 German Works Constitution Act, Section 37 (4) in conjunction with Section 78 German Works Constitution Act can give rise to a claim for a corresponding increase in remuneration if the promotion is customary in the business and, therefore, comparable employees also get promoted. This is the case, for example, when certain promotions depend exclusively on the employee’s seniority. In addition, a claim for remuneration in excess of the customary remuneration may arise from Section 611a German Civil Code (Bürgerliches Gesetzbuch – BGB) in conjunction with Section 78 sentence 2 German Works Constitution Act in cases where, due to special qualifications, the works council member would have been assigned a better job that would have justified an increase in remuneration if he had not worked on the works council. In this case, however, the situation must be such that the member of the works council would have been preferred over the employee actually promoted on the basis of objective criteria.

In such cases, it may become necessary to determine the comparable employees anew.

Consequences of a new job

In the event that the employee is assigned a new job during his term of office as member of the works council, in particular because his previous job has ceased to exist after he has assumed the office of member of the works council, his remuneration will be determined based on this new job. In particular in the case of works council members who are fully released from their work duties, the employer must examine when determining the appropriate remuneration in what job the employee would, hypothetically, be employed. In this case, too, it may be necessary to determine the comparable employees anew.

Practical tip

Determining the remuneration to which a works council member is entitled is often extremely difficult in practice and can give rise to disputes. Especially in cases where an employee has been on the works council for many years and/or has been fully released from his work duties, the annual employee interview can, therefore, be used to help determine and review the remuneration payable to this employee. To this end, the works council member can be informed of the employees comparable to him and possible changes can be discussed.

It can also be helpful to make determinations about the comparable employees already at the time the works council member takes office and document these determinations in a staff list. This list can then be adjusted together with the works council member on the occasion of the annual employee interviews with him – for example, by adding new hires and by deleting employees who have left the company or employees with an exceptional career path. In this respect, it should be noted, however, that the determination of general remuneration rules that do not only apply to an individual works council member may be subject to co-determination by the works council. Apart from documenting information about comparable employees, the employer can also document the specific parameters of the job, the employee's professional and personal qualifications and the usual development opportunities, if any. These determinations can likewise be updated on the occasion of the annual employee interviews and supplemented with information about professional developments that have taken place on the part of the works council member. Such determinations at the beginning of the term of office can help avoid the situation where the comparable employees leave the company or cease to be comparable during the term of office and no new comparable employees have been determined.

Finally, employers would be well advised to ensure that the salaries of all members of the works council are reviewed regularly. This review can be carried out simultaneously with or shortly after the regular salary discussions in the business so as to be able to take into consideration the changes in the comparable employees' remuneration structure, if any. Developments that take place during the intervals between the regular reviews, such as appointments to existing or new higher posts or the elimination of jobs, must, however, also be taken into account.

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“Keep smiling...” – Smiley on ballot paper jeopardises works council election

German works council elections are held every four years between March and May, with the next periodic elections scheduled to take place in 2022. This is reason enough to take a closer look at the details of voting. In this post, we will look at what can happen when a voter adds an individual touch to his or her ballot paper.

Case study: Supervisory board election

According to a recent ruling of the German Federal Labour Court (*Bundesarbeitsgericht – “BAG”*, decision of 28 April 2021 – 7 ABR 20/20), a ballot paper decorated with a smiley is invalid under the German Election Rules Relating to the One-third Participation Act (*Wahlordnung zum Drittelbeteiligungsgesetz – “WODrittelbG”*). This decision could also be of interest when it comes to works council elections.

What happened in said case? Several persons had stood as candidates in the supervisory board election in a group of companies. One of the ballot papers was declared invalid because a smiley measuring about 1 cm in diameter had been drawn in the upper left corner outside the box intended for putting the cross on the ballot paper. This lead to a tie between two candidates. Candidate no. 1 lost the subsequent drawing of lots to candidate no. 2, who was elected to the supervisory board. In response to this, candidate no. 1 filed a lawsuit, demanding that the ballot paper which had been declared invalid be taken into account.

Decision of the Federal Labour Court: Smiley leads to invalidity

The Federal Labour Court clarified in the reasons for its decision that Section 13 German Election Rules Relating to the One-third Participation Act, which prohibits the marking of ballot papers, is a material electoral provision. This provision takes into account the principles of voting equality and secret ballot as fundamental basic principles by ensuring that a vote cast cannot be traced back to a particular voter.

A smiley also makes it possible to trace back the vote to a particular voter. Consequently, it is a distinctive feature that results in the ballot paper being invalid. It is not necessary that a specific person can actually be identified. Instead, it is sufficient that the additional marking of the ballot paper beyond the mark made by the voter to cast his or her vote might, in combination with other circumstances, allow conclusions to be drawn about the identity of the voter. In case of doubt, drawing conclusions about the identity of the voter should be deemed possible whenever the ballot paper contains an additional marking.

What does this mean for works council elections?

Although the Federal Labour Court's decision was made in connection with supervisory board elections in an undertaking, the formulated principles are likely to also apply to works council elections. This view is supported above all by the similar wording of the rule applicable to works council elections, according to which ballot papers that contain a distinctive feature are to be deemed invalid.

The ultimate goal is to guarantee the principle of free elections at the level of undertakings and businesses through the requirement of a secret ballot. The requirement of uniform ballot papers is an important element in guaranteeing compliance with this principle.

The secret ballot is already jeopardised if there is an abstract risk of a particular voter being identified. This risk exists, in my opinion, whenever the ballot paper contains an additional marking, of whatever kind. Where such a marking exists, the identification of its author ultimately only depends on the amount of resources employed. Works council elections are and will always be a serious matter. This should be clearly pointed out by the electoral board in the course of the preparations for the election. There is room for humour and simplistic, eye-catching communications during the election campaign. On the ballot paper, however, they lead to invalid votes and can unnecessarily increase the efforts and costs involved in the election.

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Is the employer liable when the works council violates data protection requirements?

Data protection is also an important issue in works council elections: Section 79a German Works Constitution Act (*Betriebsverfassungsgesetz – "BetrVG"*) requires the works council to comply with the provisions of data protection law when processing personal data, but designates the employer as the controller under data protection law and, hence, as the liable party. However, how can an employer monitor the works council, if at all, in order not to become liable?

Initial legal situation

The works council comes into contact with a large amount of personal data as part of its work (for example, in connection with rights to information, the hiring or transfer of employees or a reconciliation of interests agreement). Before Section 79a German Works Constitution Act came into force on 18 June 2021, there were no specific provisions regarding compliance with data protection law by the works council. According to the rulings of the German Federal Labour Court (*Bundesarbeitsgericht – "BAG"*), it was an established fact that the works council must take into account data protection requirements at least within certain limits. By contrast, it was a matter of dispute whether the works council is liable as an independent controller according to Article 4(7) GDPR or whether it is a dependent part of the controlling employer. This has now been clarified by the German legislator; the second sentence of Section 79a German Works Constitution Act reads as follows:

"*Insofar as the works council processes personal data in order to carry out the tasks for which it is responsible, the employer is the controller for the processing of the data within the meaning of data protection law.*"

This clarification is to be welcomed, at first glance. However, it raises questions in view of the introductory sentence of the new clause, which reads as follows:

"*When processing personal data, the works council has to comply with data protection law.*"

Pursuant to Article 4(7) GDPR, the German legislator may determine by law who is the controller, in certain cases. The only problem is that the German legislator has not adhered to the systematics of the GDPR as far as the further provisions of data protection law are concerned, but has instead divided the duties between employer and works council. Even if one disregards the question of whether such a division can be validly made at all from a European law perspective, this division leads to practical problems, in particular because the employer is ultimately liable for compliance.

Division of the responsibilities under data protection law between employer and works council

The German Works Constitution Act has complicated the relationship between works council and employer by choosing a middle path and distinguishing between control under the GDPR and obligation within the meaning of the GDPR. The employer is the controller under data protection law and must, therefore, ensure that the requirements under the GDPR are complied with. The employer can only do so, however, if it can give instructions to the works council with regard to data protection law and monitor the way in which the works council implements these obligations. The works council is autonomous, though, according to the structural principle of the works constitution, which means that it is not required to take instructions from the employer.

Nothing different results from Section 79a sentence 3 German Works Constitution Act, which requires the works council and the employer to support each other. This requirement does not define whether and to what extent the employer has monitoring rights under data protection law. This is because the German legislator wanted to maintain the works council's autonomy also in the area of data protection law, and that the employer continues to be prohibited from giving instructions to the works council with regard to data protection. The overall responsibility in data protection matters remains, however, with the employer.

The role of the data protection officer

The reference to the data protection officer in Section 79a sentence 4 German Works Constitution Act does not help the employer, either: the data protection officer is obliged to maintain confidentiality vis-à-vis the employer with regard to information that allows conclusions to be drawn about the works council's opinion-forming process. If the data protection officer becomes aware of a violation in connection with that opinion-forming process, it may not inform the employer about this violation. The fact that the data protection officer is not required to follow instructions and his or her independence might definitely make it more difficult for the employer to act in conformity with the law in such situations.

No possible way for the employer to justify itself and be released from liability

Unfortunately, Section 79a German Works Constitution Act does not provide for a possible way for the employer to justify itself or be released from liability. Even though the employer has no control over how the works council organises the protection of data, the undertaking is nevertheless liable for any misconduct of the works council under data protection law. In particular, the employer is unable to plead insufficient performance of the duty to provide support because insufficient performance of that duty does not change the fact that the employer is responsible. The situation created by Section 79a German Works Constitution Act thus constitutes an uncontrollable liability trap for the employer. The entire system set out in Section 79a German Works Constitution Act breaches the civil-law principle that everyone is only liable within the scope of his or her own fault and is, therefore, very problematic from a legal doctrine perspective. As a result of the inadequate statutory provisions, employers are ultimately forced to tolerate data breaches and then, if necessary, bring proceedings in accordance with Section 23 German Works Constitution Act.

Conclusion and approaches to solving the problem

Section 79a German Works Constitution Act is, frankly speaking, superfluous for the reasons set out above – it simply does not help anybody. There are no provisions that deal with the decisive question of how to handle such liability in practice, or possible means of control. The employer is unable to mitigate the above-described systematic liability. In our opinion, the only option available

to the employer is to establish binding rules together with the works council regarding compliance with data protection requirements. Where there are indications that the works council is careless in its work from a data protection perspective, the employer should always examine very carefully what information has to be disclosed to the works council for the performance of the works council's duties and what information need not be disclosed. This is because the works council will have to ensure the protection of personal data in particular within the scope of the general rights to information under Section 80 (2) German Works Constitution Act.

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Right to receive materials and training for the work on the works council

The works council must be able to act. The employer must provide the works council with the necessary materials and bear the cost of necessary training courses. However, what is necessary and what is not?

Necessary

As a general rule, the employer bears the necessary costs arising from the work council's work and must provide the works council with the materials needed for its work Section 40 (2) German Works Constitution Act (*Betriebsverfassungsgesetz – "BetrVG"*). What materials are necessary for the proper performance of the works council's duties depends on the type and nature of the business.

The works council has the right to demand to be provided with materials. The works council is not normally authorised to purchase the materials that it deems necessary itself and then charge the employer for these costs. The employer has the right to choose between various suitable materials.

The question of whether something is necessary is not answered by the employer, but by the works council. The latter chooses at its discretion after a due assessment of the circumstances, taking into account its needs and the employer's interests. If the employer takes the view that the materials that have been requested by the works council are not necessary, it must initiate so-called decision proceedings in order for the issue to be clarified by the competent labour court.

Materials

"Necessary materials" means all items needed by the works council for meetings, consultation hours and for the day-to-day operation of the works council. These materials mainly include office supplies. The works council has, in any case, a right to the joint use of the copying machines or printers available in the business; in view of the memory functions of modern devices and of how common such devices are today, the works council may even have the right to demand to be provided with its own

devices. The quality of such materials must correspond to the customary standard in the business.

The works council must normally be provided with a notice board where it can post announcements and notices for the purposes of informing the employees. This notice board must be installed at a suitable place that is accessible to all employees.

In addition, the works council must be provided with relevant specialist literature. This includes, in particular, the most important labour/employment and social law texts, an up-to-date commentary on the German Works Constitution Act and a specialist labour/employment and social law journal. Whether and, if so, what further literature is needed depends on the concrete work to be performed by the works council.

All materials remain the employer's property, with the exception of consumable materials, which become the property of the works council as a whole. If a new works council is elected, ownership of the existing files, for example, is transferred to this new works council.

Digital tools and equipment

To the extent necessary, the employer must provide the works council with the information and communication tools needed for its work.

In today's digital working environment, the basic equipment of the works council includes a computer with the usual accessories (monitor etc.), internet access and a telephone. The employer only has to provide further equipment (for example, laptops or smartphones) where the relevant operational requirements make such equipment necessary. This may be the case where works council members travel extensively or where it is necessary that they can be reached flexibly.

The customary amount and quality of equipment in the business and the communication tools used by the employer itself can be used as points of reference for determining whether any particular pieces of equipment or tools are necessary. Under no circumstances is the employer required to provide any equipment or tools that go beyond the regular amount and quality of equipment in the business. The mere wish for "equality of arms" between the works council and the management of the business does not suffice for equipment to be considered necessary.

If the employer uses an intra-company information and communication system (intranet), the works council must be given the opportunity to create its own pages where it can provide information in accordance with its duties, without the employer having the right to exert any influence.

Right to receive training

The works council must generally be enabled to acquire the knowledge needed to perform its duties. This includes not only basic knowledge about labour/employment and works constitution law but, depending on how the business is structured, also knowledge about special subject matters. In particular with regard to the latter, it must always be examined whether the situation in the individual business gives rise to questions or problems that require the involvement of the works council and for which training appears to be necessary in the light of the concrete level of knowledge of the respective works council member.

While training courses that provide basic knowledge will need to be attended by all works council members – except where such knowledge already exists – this is not the case with training courses dealing with special topics. With regard to the latter, it must be examined on a case-by-case basis whether knowledge about the topics dealt with in the training course is actually needed and, if so, how many members of the works council need to have that knowledge. Works council members who have received training can and should regularly be expected to share and use their knowledge.

Assumption of the cost of training and continued education

Pursuant to Section 40 (2) German Works Constitution Act, the employer must bear the cost of training courses and educational programmes that provide necessary knowledge. In the case of training courses providing knowledge that is needed for the works council's work (cf. Section 37 (6) German Works Constitution Act), the employer must always bear the costs. In the event that only part of the knowledge provided in a training course is needed, the employer only has to bear the costs in full if the topics needed account for more than 50% of the training course and participation cannot reasonably be limited.

As a formal requirement for the employer's obligation to bear the costs, the works council must adopt a decision approving its member's participation in the training course before the member participates. A subsequent decision approving the member's participation does not suffice.

The principle of proportionality must also be observed. The works council must always verify that the training costs are compatible with the size and capacity of the business, also taking into account the contents and scope of the knowledge provided. The employer only has a reimbursement obligation to the extent that the costs incurred are within the limits of what is reasonable in the circumstances. A particularly attractive training location is definitely not a criterion.

If attending a training course is necessary, the employer must additionally reimburse the travel expenses and the cost of accommodation and meals. These costs must also be necessary, however, which will be checked independently.

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The implications of mobile working and artificial intelligence for works constitution law

“Mobile working” and “artificial intelligence” have been hot topics for some time. Now, however, these terms have arrived not only in everyday business operations, but also in works constitution law. What does this mean for operational procedures and the work of works councils?

Works council’s right to participate in matters regarding artificial intelligence

1. What is artificial intelligence?

There is no legal definition for the term “artificial intelligence” (“AI”), so that disputes over whether AI is being applied are inevitable.

The German Federal Government’s Artificial Intelligence Strategy (www.ki-strategie-deutschland.de) focuses on “weak” AI, which is understood to mean artificial intelligence that “solves concrete application problems based on methods from mathematics and computer science, with the developed systems being capable of self-optimisation. To this end, aspects of human intelligence are also modelled and formally described or systems designed to simulate and support human thinking.” By contrast, “strong” AI is understood to mean systems that have the same intellectual skills as human beings, or even superior skills.

2. Use of AI

AI is increasingly being implemented in companies, in particular in the field of HR. Areas where AI can be applied include, for example, job application procedures/assessment centres, employee performance evaluations and internal training courses with tests to verify the progress made. Employers hope that this will lead to more accurate personnel decisions and more accurate resource utilisation, amongst other things. Outside HR, AI is also increasingly finding its way into our lives, for example, in assisted surgery, analytical image recognition or autonomous driving.

3. Works council's right to participate

In connection with the use of AI, works councils may now call on external expertise to understand and evaluate complex information technology issues and participate in shaping the relevant context. Section 80 (3) sentence 2 German Works Constitution Act (*Betriebsverfassungsgesetz – "BetrVG"*) now contains a new provision to the effect that the involvement of an expert in connection with the introduction or application of AI is considered to be necessary for the purposes of Section 80 (3) sentence 1 German Works Constitution Act.

This means that when introducing new software solutions, using new machinery or implementing digitalisation projects, the employer can now no longer prevent the works council from obtaining an expert's advice by claiming that this is unnecessary.

The German legislator ultimately created Section 80 (3) sentence 2 German Works Constitution Act in the hope that involving the works council in the introduction and application of AI systems will lead to more confidence and acceptance on the part of employees.

4. Influence of AI on work processes and works council's say in the establishment of selection guidelines

In addition, AI is now also taken into account in Sections 90 (1) no 3, 95 German Works Constitution Act.

The German legislator believes that employees might be influenced in their work procedures and processes by the use of AI. Section 90 (1) no. 3 German Works Constitution Act therefore provides that the employer must timely notify the works council of any plans to use AI, in all areas of work.

The addition in Section 95 (2a) German Works Constitution Act clarifies that the works council has a say, in particular in the establishment of selection guidelines for the hiring, transfer, regrouping and dismissal of employees, even in cases where the selection guidelines are generated independently by an AI application (use of so-called algorithmic decision-making systems (ADM systems)).

New co-determination right regarding mobile working under Section 87 (1) no. 14 German Works Constitution Act

With the introduction of Section 87 (1) no. 14 German Works Constitution Act, a new co-determination right has been created. According to said provision, the works council has a right of co-determination in the structuring of mobile working using information and communication technology.

1. The term "mobile working"

Mobile working is when employees perform the work owed regularly or on certain occasions outside the workplace, using information and communication technology. In Germany, this is usually understood to mean "working from home". By contrast, if employees are required to perform their work on the move, rather than at a specific location, due to the nature of their work (for example, lorry drivers, fitters or sales staff), this does not constitute mobile working.

2. Scope of the co-determination right

According to the explanatory memorandum accompanying the act, the co-determination right relates exclusively to the question of "how" things are done. This means that the works council has a say in the structuring of mobile working but not on the question of whether mobile working should be introduced. Consequently, the works council cannot force the employer to introduce mobile working. Aspects of "how" the mobile working is structured include, for example, the working hours for mobile working, the place of performance of the work, availability hours, the handling of work equipment provided and, in particular, data protection and safety aspects.

Section 87 (1) no. 14 German Works Constitution Act is ultimately a catch-all provision, as co-determination rights in connection with mobile working are already enshrined in Section 87 (1) no. 2 (working hours), no. 6 (use of technical devices) and no. 7 (health and safety at work) German Works Constitution Act, which continue to apply unchanged.

It therefore remains to be seen to what extent the new co-determination provision will be used in practice to fill the regulatory gaps, if any, and to what extent it will be considered to be more than just a catch-all provision.

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Daring more digitalisation: Working on a works council in a digital working environment

As a result of the COVID-19 pandemic, the level of digitalisation involved in the activities of works councils has increased. This development was initially only of a temporary nature. With the adoption of the German Works Council Modernisation Act (*Betriebsrätemodernisierungsgesetz*) with effect from 18 June 2021, the German legislator has now provided what it considers to be a permanent basis for the digital performance of works councils' duties and, among other things, has laid down rules for virtual works council meetings and works agreements. These rules will be presented below in a practical-focused manner, taking into account the most recent changes in law.

Legal basis enabling works councils to work digitally

The COVID-19 pandemic required the German legislator to intervene in all areas of the working world. The rule that had applied until then that works council meetings should be held as face-to-face meetings could not be maintained, for example. Quick solutions were needed. This is why, in March 2020, the German legislator hastily cobbled together Section 129 German Works Constitution Act (*Betriebsverfassungsgesetz – "BetrVG"*) for the performance of the duties of works councils, which permitted works councils for the first time to meet digitally, by video conferencing or conference call, and initially applied for a limited period that was set to expire on 30 June 2021. The German Works Council Modernisation Act to promote works council elections and works council activities came into force on 18 June 2021 and now provides a (permanent) new legal framework for digital works council meetings. Under said act, works council meetings may continue to held by "video conferencing or conference call"; the German legislator has, however, defined additional requirements for such meetings. The level of digitalisation within the context of the works constitution has additionally increased as a result of the fact that it is now possible to enter into works agreements digitally, as provided in Section 77 (2) sentence 3 German Works Constitution Act.

Requirements for the digital performance of a works council's duties

1. Requirements for digital works council meetings and digital works council resolutions

In the German Works Council Modernisation Act, the German legislator has maintained the option of holding virtual works council meetings, but has made such virtual meetings the "exception to the rule". This means that works council meetings must generally take place as face-to-face meetings, despite the pandemic and ever-increasing digitalisation. The reason given for the German legislator's decision is the experiences from the pandemic, namely the lack of social interaction, reduced intelligibility because of video and audio problems, as well as a growing trend towards monologuing, rather than exchanging ideas and discussing matters.

There are now three requirements for holding a virtual works council meeting (Section 30 (2) nos. 1 to 3 German Works Constitution Act), which must all be met at the same time: the conditions for holding a virtual meeting must have been defined in rules of procedure (a), no objection may have been raised in due time by at least one fourth of the members of the works council (b) and it must be ensured that no third party can obtain knowledge of the matters dealt with during the meeting (c).

a) Incorporation in the rules of procedure

The works council must define the conditions for virtual works council meetings in rules of procedure and, in doing so, is only required to observe the principle of priority of face-to-face meetings. According to the explanatory memorandum accompanying the act, this priority can be ensured, for example, by limiting the number of meetings that may be held in whole or in part by video conferencing or conference call, or by limiting such meetings to certain topics, to matters which, in the opinion of the works council, need to be dealt with as quickly as possible or in cases where such meetings serve the

purpose of protecting the works council members' health. The works council is additionally free to define the conditions for virtual attendance. We would recommend taking into account any past experience with virtual works council meetings when defining the conditions.

b) The new right to object

The German legislator additionally requires that the members of the works council are given the opportunity to object to a virtual works council meeting. An objection by a single member is not sufficient, however. Instead, in order for an objection to be valid, at least one fourth of all members of the works council must object to the planned virtual meeting within a reasonable time period to be determined by the chairperson. To this end, the chairperson should provide information about the planned use of a virtual meeting and the way this is intended to be done already when issuing the proper invitation to the meeting and set a reasonable deadline for objection. The objection must be addressed to the chairperson.

c) No knowledge of third parties

According to the act, it must finally be ensured that no third parties can obtain knowledge of the matters dealt with during the meeting. The act additionally contains an express provision to the effect that recording meetings is not permitted. In addition to the above, there is a duty to implement technical and organisational security measures. This is the works council's responsibility. Conceivable measures include the use of encrypted connections, the works council members' presence in non-public rooms during the meeting and a declaration that no persons who are not entitled to attend are present in the relevant rooms. If the works council violates one or more of these requirements, there is a risk that any resolutions made during such meetings will be null and void.

The German legislator hat attached particular importance to expressly stating that the recording of meetings is not permitted.

Employers should note that they are obliged under Section 40 (2) German Works Constitution Act to provide the required technology for the meetings and any other necessary means and bear the costs incurred in doing so. This obligation is only limited by the principle of proportionality, according to which the acquisitions, if any, must not be unreasonable for the employer, which regularly leaves ample room for interpretation in practice. In this respect, too, we would recommend proceeding in a coordinated manner and answering the following questions: what precisely is needed and how much should or may it cost?

2. Digital works agreements

Works agreements may also be entered into digitally in future, pursuant to Section 77 (2) sentence 3 German Works Constitution Act. Said provision deviates from Section 126a (2) German Civil Code (Bürgerliches Gesetzbuch – "BGB") by providing that if a works agreement is entered into electronically, the works council and the employer must sign the same document electronically. Thus far, electronic signatures had been held to be insufficient, most recently by decision of the German Federal Labour Court (Bundesarbeitsgericht – "BAG") from the year 2010 (decision of 5 October 2010, case no. 1 ABR 31/09) regarding the conciliation committee.

The "comeback" of Section 129 German Works Constitution Act

In addition to the German Works Council Modernisation Act, the German Bundestag decided on 10 December 2021 based on the current rate of new infections to revive Section 129 German Works Constitution Act in a modified form; Section 129 German Works Constitution Act in its new version is to apply initially for a limited period from 12 December 2021 to 19 March 2022. It especially contains provisions regarding aspects not yet covered by the German Works Council Modernisation Act, such as the virtual conciliation committee or the option of holding works council meetings and works meetings for young and trainee employees using audio-visual equipment.

Practical requirements and outlook

In practice, the German Works Council Modernisation Act provides an opportunity to organise the activities of works councils in a modern way and maintain them despite the pandemic. The German legislator has entrusted the works council with important aspects of concrete organisation, for example by requiring it to adopt rules of procedure that are tailored to the business. We would recommend that the works council and the employer consult with each other with a view to creating the best possible basis for the new meeting formats.

The new German coalition government of Social Democrats (SPD), Greens (Bündnis 90/Die Grünen) and Free Democrats (FDP) has also put the topic of digital works council work on its agenda.

According to the coalition agreement, it is planned that works council members may decide for themselves in future whether they wish to work using analogue or digital processes and technologies. We can, therefore, expect a further increase in the level of digitalisation in the activities of works councils. In this context, the current digitalisation is to be reviewed and the new act evaluated in order to ensure that works councils work as efficiently as possible in future.

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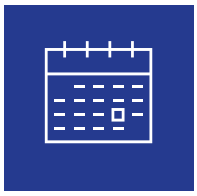
Events, publications and blog



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You will find our blog here.

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