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Special Newsletter Employment Law

Works Council Elections 2026

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■ EDITORIAL

Dear readers,

The next regular works council elections are scheduled for spring 2026. Our special newsletter provides guidance on the wide range of organisational and legal issues surrounding this complex topic and brings you up to date.

In the following articles, we shed light on the key issues surrounding works council elections from a variety of perspectives.

Isabel Schäfer, Amelie Räßle and Elaine Tolksdorf from our Hamburg office start with the “basics” – a checklist of the ten most important aspects that play a role in works council elections for every employer. We then turn to more complex corporate structures: Astrid Schnabel and Kevin Brinkmann deal with the topic of defining the scope of a business, i.e. where a business begins and ends in the context of works council elections – a question that is highly relevant in practice and has far-reaching implications. Christoph Corzelius from Cologne then analyses the individual voting rights of employees in cross-company and cross-business matrix organisations.

With the election process, the role of the employer in the election and the issue of postal voting, which has recently been dealt with several times by the BAG (Bundesarbeitsgericht / Federal Labour Court), we also address other topics that are relevant to all employers. Sandra Sfinis and Anna Mayr additionally explain the principles according to which an election can be contested or even declared null and void, accompanied by vivid examples.

Our advice and recommendations however do not end with the election itself, but go beyond it: Katharina Müller-Ehrlichmann outlines the conditions for the necessary consideration of the minority gender in the allocation of seats on the elected works council. Finally, Leif Born from Essen provides an overview of the basics of works council remuneration – a topic that is repeatedly the subject of dispute.

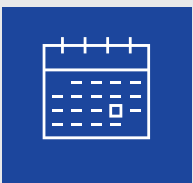
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Yours

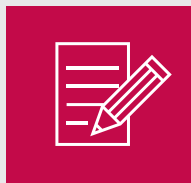
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■ TOPICS

Checklist for works council elections: the ten most important points

Holding a works council election presents employers with a variety of organisational and legal challenges. To begin with, here is an overview of the answers to ten basic questions.

1: When are the elections held?

Regular works council elections are held every four years between 1 March and 31 May – the next one will be in 2026. Outside of these regular elections, an extraordinary works council election may be held if, for example, there is no works council (yet), the works council has resigned, or the total number of works council members has fallen below the statutory minimum threshold after all substitute members have taken their seats.

2: Who is eligible to vote and be elected?

All employees of the company who have reached the age of 16 are eligible to vote; the decisive factor is the time of voting. The formal requirement for this active right to vote is that the employee is registered on the so-called electoral roll. Any employee with active voting rights who is at least 18 years of age and has been with the company for six months is eligible to be elected (passive voting right). The formal requirement here is also that the employee is registered on the electoral roll and included in an election proposal. In a company that has been in existence for less than six months, employees who were employed at the company when the election was initiated and who meet the other requirements for eligibility are eligible for election. Anyone who has lost the ability to obtain rights from public elections as a result of a criminal conviction cannot be elected. Members of the executive staff are not eligible to vote or stand for election.

3: Who initiates the election?

A works council can be elected in companies that regularly employ at least five employees who have the right to vote and three of whom are eligible to stand for election. The election is initiated by appointing an election committee. If a works council already exists, it appoints the election committee. In the regular election procedure, the election committee must be appointed at least ten weeks before the end of the current works council's term of office, and four weeks before the end of the term of office in the simplified election procedure. If a central works council exists, it appoints the election committee, otherwise any existing combined works council does so. If there is neither a central works council nor a



combined works council, or if these have failed to appoint an election committee, the election can be initiated by a trade union represented in the company or by at least three employees who are eligible to vote, by inviting their colleagues to a works meeting. There, an election committee can then be elected by a majority of the employees present. If this attempt fails or if the works council fails to fulfil its obligation to appoint an election committee, the labour court may appoint the election committee at the request of at least three employees eligible to vote or a trade union represented in the company.

4: How is the election initiated and by whom?

The election committee issues the so-called election notice – in the regular election procedure, no later than six weeks before the first election day. This contains, among other things, information on the place, date and time of voting, as well as the number of works council members to be elected. A copy of the election notice must be displayed in a clearly legible manner in one or more suitable locations in the company that are accessible to those eligible to vote, from the day it is issued until the last day of voting. In addition, the election notice can be published using the information and communication technology available in the company (e.g. by e-mail). The election committee is also responsible for drawing up the electoral roll. This contains all eligible voters with their full names and dates of birth, separated by gender. For this purpose, the election committee has a right to information from the employer.

5: Who is allowed to make election proposals?

Once the election notice has been issued, those eligible to vote can submit their nominations. The nomination (in the case of elections for more than five works council members, by means of nomination lists) names one or more candidates for the works council office to the election committee. All employees who are actively eligible to vote and the trade unions represented in the company are entitled to submit nominations.

6: How does the election work?

The works council election is conducted in writing by secret and direct ballot, either using the regular or the simplified election procedure. The simplified procedure is designed specifically for smaller companies and is mandatory in such with 5 to 100 eligible voters; in companies with 101 to 200 eligible voters, it can be used by agreement between the employer and the election committee. The simplified election procedure is characterised by shorter deadlines. The normal election procedure is intended for larger companies (> 100 employees). Compared to the simplified election procedure, it is significantly more complex and time-consuming (for more details, see the article by *Robert von Steinau-Steinrück* and *Paulina Noppeney* in this newsletter). The election committee is responsible for organising the election, i.e. in particular preparing the ballot papers, counting the votes and announcing the election results.

7: Can votes be cast by e-mail or letter?

Works council elections are generally conducted by ballot box, so voting by post is the exception. Under certain circumstances, e.g. for parts of the company located far away from the main site or for very small companies, the election committee may decide to allow postal voting across the board. Postal voting is also permitted if an employee is unlikely to be at work at the time of the election and is therefore unable to vote in person. This may be due to the nature of the employment relationship (e.g. for field staff) or other reasons, in particular if the employment relationship is suspended, for example due to parental leave, maternity leave or special leave (see the article by *Dominik Ledwon* and *Lotte Blumhoff* for details). Online voting is not permitted.

8: What must employers bear in mind when dealing with the electoral bodies?

From the start of their activities, members of the election committee and candidates on a list of nominations enjoy special protection against dismissal with notice, Sec. 15 KSchG (Kündigungsschutzgesetz / Protection against Dismissal Act). This special protection against dismissal begins as soon as they are appointed to the election committee or the list of nominations is drawn up and also applies to substitute members and initiators of a works council election with regard to certain circumstances of dismissal. The employer must not obstruct the works council election; furthermore, they must not influence the election by inflicting or threatening disadvantages or by granting or promising advantages due to Sec. 20 BetrVG (Betriebsverfassungsgesetz / Works Constitution Act). They must not simply make it difficult or impossible to initiate and conduct the election (for more details, see the contribution of *Klaus Thönißen* and *Jan Hächtebrock* later in this newsletter).

9: How can errors in works council elections be addressed?

If the election violates essential provisions on voting rights, eligibility or the election procedure and when there is a possibility that this has changed or influenced the election result, the works council election can be challenged in court or even declared null and void (for more details, see *Sandra Sfinis* and *Anna Mayr* in their article below).

10: Who bears the costs of the election?

The employer. All material and personnel costs must be reimbursed insofar as they are necessary for the proper initiation and conduct of the election. This includes, for example, the costs of premises, specialist literature, ballot papers, voting booths and any travel expenses or training for members of the election committee. The costs of (non-wilful or abusive) legal proceedings to clarify disputed issues in connection with the election are also generally borne by the employer. However, the employer does not have to cover the costs of election advertising (see the article of *Kristina Gutzke* below).

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Delimitation of the workplace in the context of works council elections

“Where does the company begin – and where does it end?” This question of demarcation is crucial for works council elections, as misinterpretation of the term “company” can lead to the election being contested. The following article highlights the stumbling blocks that repeatedly arise in practice and the criteria that must be taken into account when defining a company.



Company or (qualified) part of a company?

According to the case law of the BAG (Bundesarbeitsgericht / Federal Labour Court), a company within the meaning of the BetrVG is an organisational unit where the entrepreneur, together with the employees he employs, continuously pursues certain work-related purposes. The tangible and intangible resources available at the place of business must be combined, organised and used in a targeted manner for the purpose or purposes pursued, and the human workforce must be managed by a uniform management structure. The decisive factor is therefore not how a company describes its (operational) structure on paper, but where personnel authority actually lies. Notwithstanding the structures required by the BetrVG, additional options for structuring the company are available under Sec. 3 BetrVG through tariff agreements.

Option 1: Independent operation

If managers make the key personnel decisions in a business, that business has independent management authority. If the other requirements for the existence of a business are met, it is a business in accordance with Sec. 1 (1) Sentence 1 BetrVG. Consequence: Each business conducts its own works council election.

Option 2: Dependent part of a business

If, on the other hand, personnel decisions are made centrally, the necessary independence is lacking. These are then dependent parts of a business. The consequence here is that a joint works council election is held for those parts of the business that together constitute a business. However, caution is advised: even a small shift in competence can – depending on the organisational structure – make the difference between the existence of many, possibly small works councils in establishments that are classified as establishments within the meaning of the BetrVG, and one large works council for an establishment comprising several establishments.

Option 3: Qualified parts of the business – fiction of an independent business

If a dependent part of the business is so far removed from the main business that proper representation of the employees by the works council cannot be expected, or if the part of the business is organisationally independent, a separate works council is elected in it – in the case of works council eligibility – whose size, composition and scope of co-determination are based solely on the employees in the qualified part of the business. However, the employees of the qualified part of the business have the right to vote and can participate in the election of the main works council instead of electing their own works council.

Option 4 – Small units not eligible for a works council

Small units that are not eligible for a works council (fewer than five employees and/or fewer than three eligible employees) participate in the election of the main works council and are assigned to it in accordance with Sec. 4 (2) BetrVG.

Typical demarcation problems

In practice, various detailed demarcation issues arise that regularly pose challenges for companies.

Joint operation

If (at least) two legally independent companies work so closely together that personnel are deployed uniformly and management authority is exercised jointly, this constitutes a joint establishment pursuant to Sec. 1 (1) Sentence 2, (2) No. 1 BetrVG. The consequence: only one joint works council may be elected for the establishment. This works council is responsible for the employees of both companies working there.

Matrix structures

Many corporate groups today work in matrix organisations, in which work results are achieved across countries and companies. Employees often have a disciplinary manager in the line and, at the same time, a technical project manager. What looks clear on the organisational chart quickly leads to demarcation problems in practice. The decisive factor is who makes the key personnel decisions. If line managers decide on hiring, transfers and dismissals, there is much to be said for a line-based operation to which the respective employee is assigned. If, on the other hand, the project management is given independent authority, individual technical organisational units can be considered independent operations or at least parts of the company eligible for a works council. In reality, however, companies often operate in a hybrid form. Framework decisions are made centrally, but operational measures are taken within the project. In such cases, case law makes it clear that actual practice takes precedence over formal structure. The decisive factor is not who actually calls the shots. Against this background, it is also possible for an employee to be assigned to two companies and, accordingly, to have the right to vote in both companies, for example (BAG, decision of 22 May 2025 – 7 ABR 28/24; for details, see the article by *Christoph Corzeli* below).

Temporary workers

The assignment of temporary workers must also be taken into account. According to Sec. 7 Sentence 2 BetrVG, they are also entitled to vote at the hiring company if they are employed there for more than three months. At the same time, they have the right to vote at the lending company.

Consequences

The question of defining the scope of a business is not merely a formal issue. It has significant practical implications, for

example with regard to legal risks – an incorrect definition can lead to the works council election being contested or, in extreme exceptional cases, declared null and void. New elections, disputes, legal costs and additional organisational expenses also place a strain on both human and financial resources. There are also consequences for co-determination: a works council formed for a larger entity – consisting of various operating sites that qualify as parts of the business – can cover large parts of a company and make supra-local co-determined regulations. This can have advantages and disadvantages compared to many small works councils. Ultimately, the distinction depends on the organisation on the employer's side and the structures chosen. This should be reviewed in good time so that adjustments can be made if necessary. The conclusion of structural agreements in accordance with Sec. 3 BetrVG may also be considered.

Recommendations

So what can be done to ensure effective works council elections?

- **Early structural analysis:** Check where the key personnel decisions are (or should be) made – at the company headquarters or locally at the place of work – and how independently the places of work are organised.
- **Reality over formality:** Organisational charts and contracts are important, but what matters most is how things are done in practice.
- **Documentation:** Responsibilities should be set out in writing and decision-making processes documented in order to ward off any subsequent legal disputes.
- **Early communication:** Election committees and, if applicable, trade unions should be involved at an early stage in the demarcation process, if possible, in order to avoid unnecessary conflicts.
- **Conflict? – Off to the labour court:** In the event of unresolved disputes, a decision-making procedure before the labour court pursuant to Sec. 18 (2) BetrVG (with sufficient advance notice) enables a legally binding determination of works council-eligible units before the start of the election.

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The election procedure for works council elections

The legal requirements and practical procedures for works council elections can be complex. This article takes a detailed look at the preparation, submission of nominations, conduct and evaluation of the election.

Interests

The proper conduct of works council elections is of great importance for employers and employees. Errors in the procedure can lead to the election being contested or even declared null and void. It is therefore essential to comply strictly with the legal requirements. These can be found primarily in Sec. 7-20 BetrVG and in the WO (Wahlordnung) – Election Regulations.

Preparation of the election procedure

The election can be conducted either in a regular or simplified procedure. The election committee is responsible for organising the election. Every employee who has reached the age of 16 and is integrated into the company is eligible to vote. A key element is the creation of the electoral roll, separated by gender and in alphabetical order, with complete details of the employees eligible to vote. The employer must provide the election committee with all the necessary information for this purpose. Only those who are entered in the electoral roll have

the right to vote and stand for election. The list and the text of the WO must be displayed in the company from the start of the procedure; electronic publication is only permitted if all employees have access to it.

Objections to the accuracy of the electoral roll may be lodged within two weeks of the election notice being issued. No later than six weeks before the first election day, the election committee shall issue an election notice, which must be signed by the chairperson and at least one member of the election committee. It must contain the minimum information listed in Sec. 3 (2) WO (e.g. the location where the electoral roll and the WO are available for inspection and the number of works council members to be elected) and must also be published in the relevant foreign languages, especially in the case of international workforces.

Submission of election proposals

Election proposals may be submitted by employees who are eligible to vote as well as by trade unions represented in the company. Employees who have reached the age of 18 and have been with the company for six months or who have worked mainly for the company as home workers are eligible for election. However, their application must be signed by other employees. Depending on the size of the company, there are different requirements for the signing of nominations: In small companies with up to twenty eligible voters, no signatures are required; in companies with 21 to 100 eligible voters, nominations must be signed by at least two eligible voters, and in companies with more than 100 eligible voters, by at least one-twentieth of the eligible voters. In any case, however, the signatures of 50 eligible voters are sufficient. Each nomination must contain a list of candidates – in recognisable order – each with a consecutive number and stating their surname, first name, date of birth, type of employment in the company and a written declaration of consent from each candidate to stand for election. However, a candidate may only appear on one list of nominations; lists may not be combined.

It should also be noted that the signature of an employee eligible to vote only counts on one list of nominations. If employees eligible to vote has signed several lists of



nominations, they must declare which signature they wish to maintain at the request of the election committee within a reasonable period of time set by the committee, but no later than three working days. If this declaration is not made, the signature will only count on the list submitted first. In the case of lists submitted at the same time, the decision will be made by lot. The election committee will then promptly – if possible within two days – check the validity of the nomination lists and, in the event of objections, inform the list representative in writing, stating the reasons.

Conduct of the election procedure

The works council election is conducted by secret ballot and directly by casting ballot papers. In principle, proportional representation applies; however, if there is only one valid nomination or if the works council is to be elected in a simplified election procedure, majority voting applies. Voting is then carried out by casting ballot papers. After voting has been completed, the election committee shall conduct a public count, followed by the determination of the result and the allocation of seats. Minutes of the election must be taken promptly. These must be sent immediately to both the employer and the trade unions represented in the company. The elected members shall then be notified in writing. The result shall be announced by notice.

Postal voting is the exception, but is permissible if an employee is prevented from voting in person. Reasons for such personal prevention may include parental leave, maternity leave or special leave. In addition, the election committee may, under certain conditions, collectively decide to hold a postal vote, for example for parts of the company that are located far away from the main company premises. Online voting is not yet provided for by law, but was at least mentioned as a plan in the coalition agreement of the current German government.

Counting of votes and announcement of the election results

The votes must be counted immediately after the end of voting in a public meeting. Since the amendment to the WO in 2021, all votes cast in person and by postal vote must be counted together like this. All employees eligible to vote must therefore be notified of the place and time of the counting and must have free access to it. If this requirement of publicity is violated, for example because the place or time was not communicated or there is no unhindered access, this may justify a challenge, even without concrete evidence of a

different result; the abstract risk of possible manipulation is sufficient (see Higher Labour Court of Hessen, decision of 21 May 2015 – 9 TaBV 235/14).

Legal protection

Decisions of the election committee can be reviewed in resolution proceedings. However, interim injunctions with the aim of stopping the election or correcting a decision of the election committee are only permissible if the election would otherwise be invalid; mere contestability is therefore not sufficient (BAG, decision of 27 July 2011 – 7 ABR 61/10). The hurdles for such preliminary injunction proceedings are therefore high.

Practical advice and conclusion

Compliance with all formal requirements is crucial for a legally compliant works council election. Careful preparation, implementation and accurate documentation can minimise the risk of challenges and at the same time strengthen confidence in the election result. Specifically, the following is recommended:

- **Careful documentation:** All steps of the procedure should be recorded in writing. This facilitates subsequent reviews and can serve as evidence in any legal proceedings.
- **Transparent communication:** The workforce should be informed at an early stage about deadlines, requirements for proposals and special features of the procedure.
- **Legal basis:** Regular updates to laws and regulations should be checked.

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Voting rights in cross-company and cross-business matrix structures

One of the employer's core obligations in the run-up to a works council election is to provide the election committee with the documents it needs to draw up the electoral roll, Sec. 2 (2) and 28 (2) WO. This inevitably raises the question of who is eligible to vote in the respective company – especially if they work in matrix structures.

The basis: the active right to vote

In the case of a homogeneous structure of employment relationships, in which the business owner is also the employer of all employees working in the business, the answer to the initial question is very easy. However, the issue becomes more complex in situations where persons who are not in an employment relationship with the business owner are also working in the business or its environment. This becomes particularly acute in cross-business and cross-company matrix structures – i.e. when employees who are undoubtedly eligible to vote issue instructions to or receive instructions from persons who are not in an employment relationship with the business owner. The legal basis for drawing up the electoral roll can be found in Sec. 2 (2) and 28 (2) WO in conjunction with Sec. 7 and 8 BetrVG. The electoral roll must include employees within the meaning of Sec. 5 BetrVG who are actively eligible to vote, i.e. who have reached the age of 16 and belong to the company.

For many years, the case law of the BAG decided the question of who belonged to the company by applying the so-called two-component doctrine. According to this doctrine, two elements were essential for belonging to a company: firstly, an existing employment contract with the company owner and, secondly, the actual integration of the employee into the company's organisation. However, the BAG broke with this doctrine in cases involving the deployment of third-party personnel and ruled in the context of temporary employment that a differentiated assessment was required in the case of a "split employer position" (BAG, decision of 5 December 2012 – 7 ABR 48/11) – which meant that an employment contract with the business owner was no longer a necessary prerequisite. This aspect is rounded off by a recent decision of the BAG, according to which matrix managers may also be eligible to vote in companies other than their "home companies" within the meaning of Sec. 7 BetrVG (BAG, decision of 22 May 2025 – 7 ABR 28/24).

Length of service pursuant to Sec.s 7, 99 BetrVG

So far, only the BAG's press release on the latter decision is available, but it indicates that length of service is based on integration into the company organisation. This circumstance leads to a consideration that runs parallel to the definition of employment in Sec. 99 (1) BetrVG, where integration into the company organisation is decisive. According to the established case law of the court, recruitment (and thus length of service) pursuant to Sec. 99 (1) BetrVG occurs when a person is integrated into the company in order to achieve a work-related purpose together with the employees already employed there by performing work under instruction. However, this does not require the employee to perform their work on the company premises. The decisive factor is rather whether the employer pursues the work-related purpose with the help of the employee. The business owner must therefore promote the purpose of the respective business through the targeted deployment of employees – a criterion that has not yet been defined in a way that is practicable in view of (cross-company) matrix structures.

Recommendation for practical application

Nevertheless, the BAG has established criteria that are necessary for integration to exist and that can help employers to determine the group of employees eligible to vote under Sec. 7 BetrVG.

Cooperation with employees in the company

The employees in question must cooperate with the employees working in the company. There must therefore be an exchange between the relevant persons that goes beyond mere trivialities and can be understood as a division of labour. General, simplistic guidelines from matrix managers are probably not sufficient for this, but close professional guidance is. The more matrix managers play an essential role in the day-to-day operations of the employees working in the company, the more likely it is that the criteria will be met.

Realisation of the business purpose

The person's activities must promote the purpose of the business – which inevitably leads to the question of what the purpose of the business (under labour law) actually is and which activities promote it. However, when viewed in the light of day, these vague legal terms offer no added value; even if there is a single, clearly defined purpose of the business, there are a multitude of activities that realise or at least promote it. The indeterminacy of this characteristic can be illustrated by a manufacturing company: even if the core of value creation is undoubtedly the production of certain goods, the purpose of the business is also realised through supporting activities. In the case of an employee in HR, the promotion of the purpose of the business is just as undeniable as in the case of a cleaner or a porter.

Activity subject to instructions

The fact that the employee is bound by instructions is therefore likely to be of significant importance – ultimately, this is nothing more than the “split employee status” that was the reason for abandoning the two-component doctrine in the first place. Only if the business owner is legally able to issue the employee with instructions typical of an employer can he

also deploy him in a targeted manner to promote the business purpose, as required by the BAG. Without an activity dependent on the business owner, there is therefore a lack of integration and thus also of voting rights.

Summary

The question of who is actively eligible to vote in works council elections, which seems simple at first glance, becomes quite complex in complex matrix structures. Depending on the specific nature of a job within the matrix and the rights granted in each case, membership of one or more companies may well be considered – which may also have an impact on the size of the committee (Sec. 9 BetrVG) and the number of exemptions (Sec. 38 BetrVG). Even before the matrix structure is established, the desired works constitution assignment should therefore be included in strategic planning.

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Postal voting in the works council election

During the COVID-19 pandemic, many employers introduced mobile working. As a result, the option of postal voting in works council elections was also used more frequently. The BAG recently specified the requirements and scope of postal voting.

Background

Sec. 24 WO allows postal voting under certain conditions as an alternative to in-person voting. According to this provision, the election committee must hand over or send the election documents to eligible voters at their request or if they are absent from the workplace. In addition, the committee may generally order postal voting for employees in geographically distant parts of the company and in small parts of it. As many employers established home office structures during the COVID-19 pandemic, questions about the admissibility of postal voting have recently increased – which is why this has naturally become a matter of dispute.

The current decisions of the BAG

Knowledge of absence from work – BAG, decision of 23 October 2024 – 7 ABR 34/23

At Volkswagen, postal voting documents were sent to both mobile workers and all employees affected by short-time working without an express request. This led to a number of employees contesting the election. The BAG clarified that if the requirements of Sec. 24 (2) WO for voting in writing are not met, the transmission of election documents violates the principle of free elections because psychological pressure is exerted. The election committee may only send documents without request if it is aware that the persons concerned are actually absent during the election. Positive knowledge of this is sufficient; there is no obligation to investigate.



Reasons for requesting a postal vote – BAG, decision of 22 January 2025 – 7 ABR 1/24

During a works council election at a railway company, some eligible voters requested postal voting documents by e-mail without giving any reasons and received them without a prior resolution by the election committee. Despite the availability of an information sheet, four of the ballots cast were folded incorrectly and were subsequently deemed invalid. The four individuals concerned took the view that this constituted an inadmissible interference with their right to vote, which is why they contested the election. The BAG then ruled that a mere request for postal voting documents was sufficient. The election committee's obligation to send the election documents did not require either a justification or a resolution on the delivery of the documents, unless there were objective doubts as to whether the requirements were met.

Order for all employees to vote in writing – BAG, decision of 22 January 2025 – 7 ABR 23/23

A food discounter ordered a postal vote only for a works council district with several branches. The election documents were to be sent to those eligible to vote without being requested. However, there was no main establishment in the district concerned. Some employees subsequently claimed that the election was invalid. The BAG ruled that the election committee could not decide on written voting for the entire company in accordance with Sec. 24 (3) WO. The provision requires the existence of a main establishment. An analogous application was also out of the question.

Consequences

Absence from work pursuant to Sec. 24 (2) WO

Certain conclusions can be drawn from the interaction between the legal provisions and the decisions of the BAG. According to the court, employees who work remotely or from home, those affected by short-time working and field staff are absent from work. It is questionable whether and in which other cases absence from work should be considered – because the employer must inform the election committee of its own accord about the absence from work, while the election committee must officially check the requirements for postal voting without request. Regardless of the specific job title, it is sufficient that the employee in question is regularly or predominantly absent from the workplace due to their employment relationship. However, this does not apply to employees who perform their work outside the workplace but start or finish their work there nevertheless.

Sec. 24 (2) WO lists cases of permanent absence from work, explicitly including, for example, the suspension of the employment relationship or incapacity to work. This also covers periods of parental or care leave, maternity leave, voluntary military service, federal voluntary service or unpaid special leave. The expected absence must be at least six weeks. If an employee is only expected to be absent on election day or to be back at work by then, no election documents may be sent to them without request. This would lead to the works council election being contestable. The employer must check the absence from work and inform the election committee thereof.

Knowledge within the meaning of Sec. 24 (2) WO

It is sufficient for the chair of the election committee to have positive knowledge of the actual circumstances of the respective employment relationship. This is therefore lacking in the case of ignorance or mere knowledge, as well as in the case of knowledge of the expected presence. Mere knowledge of the expected presence is therefore certainly not sufficient. Election committees are not obliged to conduct their own investigations. The employer must provide the information about absences.

Request for postal voting by employees

According to Sec. 24 (1) WO, the election committee must send the election documents to the eligible voter upon request if the eligible voter is expected to be absent on

election day. The eligible voter must actually be prevented from attending. The election committee may generally assume that the request for postal voting is justified. Only in cases of doubt or positive knowledge of the voter's inability to attend should the election committee be obliged to investigate. However, for reasons of practicability, there is also no requirement to provide justification. A resolution by the election committee on postal voting requests from eligible voters is generally not required. However, if there is at least some doubt about the voter's absence, the election committee is required to examine the conditions for postal voting in more detail.

Postal voting for all employees, Sec. 24 (3) WO

In exceptional cases, the election committee may decide to allow postal voting for parts of companies and small businesses that are located far away from the main company premises. However, the BAG has rejected the application of this provision to consolidated companies. Such an application could only be justified dogmatically with a teleological reduction of the characteristic "main establishment", for which § 24 (3) WO, however, may not provide for an exception to the requirement of a main establishment under BetrVG, which must be rejected. The exception provision deliberately refers to the existence of a main establishment.

Deviation from Sec. 24 (3) WO or determination of a main establishment

The above finding depends on whether the parties to a tariff agreement have the authority to adopt deviating provisions or to designate a part of the business as the main establishment. The BAG has recognised the need for such regulatory authority, but left the question open. It should be noted that the organisational provisions of the WO are mandatory. Deviation from its provisions is not possible. Such authority would not help in this case, as there would still only be one organisational unit under works constitution law; postal voting would be ordered for the entire establishment, which is not permitted under the standard. However, if there is a main establishment, the employees of the combined establishments may decide to participate in the works council election at that main establishment. If this is located far away from the other parts of the establishment, postal voting may be ordered for this purpose.

Feasibility of online voting?

Under current law, online voting is not permitted, but the coalition agreement between the current German governing parties CDU/CSU and SPD includes plans to enshrine the option of online voting in works council elections in law. The advantages would include, in particular, better accessibility for voters, more efficient counting and conservation of resources. In addition, there would be lower costs and less controversy about the validity of the election, provided that confidentiality and security are guaranteed.

Outlook

The electoral law under the BetrVG and the WO is no longer appropriate. Physical presence at the workplace is no longer the norm. Even the introduction of a generally permissible postal vote would make the practical implementation of works council elections considerably easier and contribute to legal certainty. However, the latest decisions by the BAG have at least made voting easier: eligible voters do not have to justify their request for a postal vote, and the election committee is not required to verify their eligibility. It remains to be seen whether the legislature will introduce online voting, but this would greatly benefit the works council election process.

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Election campaigning

Election campaigning in works council elections is permitted in general. However, both election campaigning by company employees and campaigning by trade unions represented in the company must be permitted by the employer within the legal framework. The boundaries between permissible and impermissible election campaigning are fluid.

Election campaigning as a constitutionally protected part of works council elections

Election campaigning is one of the measures directly related to the preparation of works council elections and involves calling on voters to elect a specific list or specific individuals. It is protected under constitutional law by the freedom of expression under Art. 5 GG (Grundgesetz / German Basic Law) and the freedom of association under Art. 9 (3) GG; it is an essential part of the election. This special protection was already clarified in 1965 by the BVerfG (Bundesverfassungsgericht / Federal Constitutional Court) (decision of 30 November 1965 – 2 BvR 54/62). Both employees and the trade unions represented in the company are allowed to campaign. The employer may therefore neither prohibit nor hinder permissible election campaigning; nor may those campaigning suffer any disadvantages.

Principle of equal opportunity

The principle of equal opportunity takes precedence over all permissible election campaigning. The opportunity to engage in election campaigning must apply equally to all election candidates. This is an unwritten principle that is not expressly formulated in either the BetrVG or the WO. However, it is a mandatory consequence of a democratic election. According to this principle, every candidate should have the same opportunities in the competition for votes. What the employer grants to one candidate must also be granted to all others.

When is election campaigning permitted?

This equality of opportunity can only be guaranteed if all election candidates are allowed to start campaigning at the same time. There is no specific case law or legislation that specifies this point in time. In any case, once the election notice has been posted and the election process has begun, specific election campaigning must also be permitted. It should be noted, however, that initial preparatory activities such as collecting supporting signatures or recruiting employees for an election list are regularly required beforehand and are permitted as a form of advertising. This can lead to difficulties if measures are taken before the



election notice is issued which involve necessary preparatory activities but also contain a specific call to vote for a list. It is therefore advisable to carefully analyse the respective content, as a hasty ban on the advertising material by the employer can be considered an obstruction of the election.

What is permitted and what is not?

In principle, all advertising measures that do not disrupt operational processes are permitted. In particular, there is no disruption if the advertising takes place outside working hours, i.e. during breaks and before or after working hours. Flyers and leaflets, as well as posters and employee events, are particularly suitable as advertising materials. These measures should, in principle, provide information and not exert any undue influence within the meaning of Sec. 20 (2) BetrVG.

Comparative advertising is also permitted during election campaigns. Critical discussions with other election candidates are just as permissible as those with the employer, as long as they remain objective and do not contain personal attacks. However, unobjective or defamatory statements are not permitted, such as defamation, unfounded accusations, deliberate and grossly untrue misinformation, misleading statements and smear campaigns against other election candidates or lists. The limits of permissible advertising are

also reached when advantages or disadvantages are promised and such influence restricts the freedom of choice of voters. In accordance with Sec. 20 (2) BetrVG, threats, favours or promises of advantages are therefore expressly prohibited. However, small promotional gifts of minor value, such as ballpoint pens, are permitted.

Consequences of violations

A violation of the principles of permissible election advertising can have serious legal consequences. Under the conditions of Sec. 19 BetrVG, it is possible to contest the election. In addition, criminal sanctions may be imposed in accordance with Sec. 119 (1) No. 1 BetrVG if the violation was committed intentionally. In particularly serious exceptional cases, the election may even be declared null and void (for details, see the following article by *Sandra Sfinis* and *Anna Mayr*).

Costs of election advertising

According to Sec. 20 (3) Sentence 1 BetrVG, the employer generally bears the costs of the works council election. However, the costs of the election campaign are an exception to this. In particular, the costs of individual election advertising by the election candidates are not to be borne by the employer. Above all, the employer is not obliged to make financial contributions to groups of employees in order to create equal opportunities for election candidates if other groups receive funds from outside (e.g. through their trade unions).

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Employers in works council election campaigns: how far does freedom of expression go?

The role of the employer is particularly challenging in the context of works council elections: the BetrVG sets clear limits to protect freedom of choice, but at the same time leaves room for the expression of opinion. This article examines the legal framework, distinguishes between permissible freedom of expression and impermissible influence on the election, and provides practical recommendations on how employers can behave in a legally compliant manner during works council election campaigns.

Context

The BetrVG expressly prohibits any form of influencing the election through threats or promises. At the same time, the German Constitution guarantees freedom of expression – including for employers. This results in a complex balancing act with legal, but also great practical relevance. The BAG has since clarified that employers are not subject to an absolute duty of neutrality, but may represent their position objectively and openly within the framework of the statutory requirements for fair elections. Nevertheless, the limits remain narrow, in particular to protect the internal decision-making process of those eligible to vote.

The legal framework of Sec. 20 BetrVG

While the organisation and conduct of works council elections is primarily the responsibility of the workforce under the BetrVG and WO, with employers merely having to provide the necessary framework for the election and bear the costs,

Sec. 20 (1) and (2) BetrVG expressly prohibit any obstruction or influence on the election by all parties involved: by employers as well as by employees, trade unions or members of the election committee. The aim is to protect free and secret voting and thus to preserve freedom of choice. The scope of application ranges from the appointment of the election committee to the implementation of any appeal procedures.

Obstruction of elections according to Sec. 20 (1) BetrVG

Obstruction of elections occurs when unlawful conduct significantly disrupts, impedes or renders impossible the external conduct of the election; it is not necessary for the election to fail completely. Specifically, obstruction may consist, for example, of the employer failing to fulfil its obligations to cooperate or restricting employees in the exercise of their active or passive voting rights. Such restrictions may relate to standing as a candidate, participating in works meetings pursuant to Sec. 17 BetrVG or



casting votes. However, measures under labour law such as dismissals, transfers or changes to the organisation of work may also constitute an obstruction of elections, particularly if they are taken specifically to undermine the election or individual candidacies. On the other hand, there is no unlawful obstruction if a reorganisation or restructuring takes place which may have an impact on the election but which, due to the co-determination rights under Sec. 111 BetrVG, cannot have any direct effect on the election procedure anyway.

Influencing elections pursuant to Sec. 20 (2) BetrVG

More difficult to grasp is the prohibition of influencing elections, which is regulated in Sec. 20 (2) BetrVG. Unlike in the case of election obstruction, the focus here is no longer on the external conduct of the election, but on the internal decision-making process of the employees, i.e. influencing their decision through psychological or substantive pressure. No one may influence the election of the works council by inflicting or threatening disadvantages or by granting or promising advantages. Promises of financial advantages, gifts or salary increases, targeted vote buying and the unilateral provision of operating resources for certain candidates or lists are inadmissible, as are disadvantages such as the threat of dismissal, transfer or non-promotion for participating in the election. Election campaigning itself, on the other hand, is not prohibited (for more details, see the previous article *by Kristina Gutzke*).

Against this background, the employer's freedom of expression, which is guaranteed by the German Basic Law, must also be taken into account. In practice, this does not result in a mere "fine line", but rather a space between permissible expression of opinion and impermissible influence on the election that requires careful consideration.

Legally, freedom of expression only ends where statements violate legal provisions or infringe on the equal opportunities of candidates. Defamatory criticism, defamatory statements or untrue assertions that are likely to influence the election decision exceed the limits of permissible election influence in this respect. General references to business contexts – such as fears of negative effects of a particular list – are permissible, however, provided they are factual, transparent and not accompanied by threats.

No duty of neutrality on the part of the employer

In this context, the BAG has rightly rejected the assumption of an absolute duty of neutrality on the part of the employer in its case law: Employers are not obliged to exercise complete restraint, but are permitted to express their opinions within the framework of the legal requirements. They may express sympathy or displeasure towards certain candidates or lists, as long as these remain objective and are not discriminatory or intimidating. According to the court, it is therefore also permissible for management to claim that the current works council chairperson is someone who "hinders the work of the company" and at the same time recommend that a "sensible list" be drawn up for the next election. The managing director's statement that suitable employees should be sought for a new works council, as well as the personnel manager's subsequent remark that anyone who votes for the current chair is committing "treason", were also classified by the BAG as permissible expressions of opinion, as they neither inflicted or threatened disadvantages nor granted or promised advantages.

In practice, employers often held back for fear of election challenges – even in cases of justified criticism or when it came to supporting suitable candidates. As in any democratic election process, however, a certain degree of maturity and discernment on the part of voters must be assumed in the workplace context. Election campaigns always involve a battle of opinions. The only decisive factor is that no legally inadmissible means are used. A general duty of neutrality in the course of works council elections is neither practicable nor legally justifiable. On the one hand, statements made in the past (by the employer) may still influence the outcome of the election. On the other hand, such a duty of neutrality would have to apply to all parties with regard to the scope of application of Sec. 20 (2) BetrVG – but then all statements made by trade unions and employees would also be prohibited. Only statements that are already relevant under

criminal law, such as insults or deliberately untrue factual claims, are not protected. Such statements regularly constitute a violation of Sec. 20 (2) BetrVG.

Consequences of violations

If an employer violates Sec. 20 (1) or (2) BetrVG, those affected have various legal remedies at their disposal. For example, an injunction can be sought from the ordinary courts to prevent unlawful actions. In urgent cases, the labour court can also take action in summary proceedings to prevent the election from taking place in violation of essential provisions. In the worst case, violations of the prohibition of obstruction and influence may also lead to criminal liability under Sec. 119 (1) Sentence 1 BetrVG. However, any violations will only be prosecuted upon request, Sec. 119 (2) BetrVG. In addition, according to Sec. 18 (1) Sentence 2 BetrVG, the employer is not entitled to dismiss members of the election committee or influence its tasks.

How employers can position themselves in a legally compliant manner

Although employers are allowed to express criticism and make recommendations, they should do so with the necessary degree of restraint, not least with a view to the working atmosphere and future trust-based cooperation with the works council. Freedom of expression also protects the

expression of opinion, but not every form of influence. Neither the election itself nor the free formation of opinion among employees may be impaired: all actions and statements by employers that may influence the outcome of the works council election must always be assessed in light of Sec. 20 (2) BetrVG. Employers should therefore carefully consider whether their behaviour entails risks such as election challenges or criminal consequences and whether it does not (indirectly) promise advantages or threaten disadvantages. From a practical point of view, it is advisable to provide good reasons for voting recommendations or critical comments and to refrain from exerting pressure on individual employees. It is permissible to express one's own point of view objectively, especially if it relates to cooperation with the previous works council, business conditions or structural challenges. It is crucial that such statements are made transparently, in a balanced manner and without threats. The following guiding principle is helpful when weighing up the situation: always discuss the issue – never attack a person.

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Contestability and nullity of a works council election

In works council elections, it is essential to be aware of the legal consequences of possible errors in the election process. This article therefore highlights the most important aspects of contesting and invalidating a works council election.

The contestability of the election

The proper conduct of works council elections is essential for the legitimacy of the body. However, errors in the election procedure can also have serious consequences for its formation – ranging from mere contestability to the absolute nullity of the election. The election can be contested if essential provisions governing voting rights, eligibility or the election procedure have been violated and the violation has not been rectified, Sec. 19 (1) BetrVG. A further prerequisite is that the violation could have changed or influenced the election result. Below are a few examples that could lead to a challenge.

Admission of ineligible employees as election candidates

Voting by employees under the age of 18, employees without voting rights or senior executives may lead to the election being contested. In practice, the question of voting rights arises in particular in matrix structures with regard to matrix managers who only exercise technical authority over the employees reporting to them (see the article by *Christoph Corzelius* above).

Deletions or additions to the electoral roll

Deletions or additions to the electoral roll without the requirements of the WO being met constitute grounds for contesting the election (BAG, decision of 21 March 2017 – 7 ABR 19/15).

Unlawful influence on the election

Unlawful influence on eligible voters by the election committee, the election candidates or the employer is affirmed, for example, in the case of financial or other support for a particular group of candidates in election campaigning by the employer (BAG, decision of 4 December 1986 – 6 ABR 48/85) or if the election committee includes election advertising for a list in the postal voting documents (Higher Labour Court Baden-Württemberg, decision of 27 November 2019 – 4 TaBV 2/19).

Formal errors and violations in the counting of votes

Formal errors in the announcement of the election notice or its incorrect interpretation constitute grounds for contestation (BAG, decision of 21 January 2009 – 7 ABR 65/07). Violations that lead to the election being contested occur, for example, if the vote count is conducted publicly or if it begins before the time specified in the election notice (Higher Labour Court Hamm, decision of 30 January 2015 – 13 TaBV 46/14).

Right to contest, procedure and deadline

At least three employees eligible to vote, a trade union represented in the company or the employer are entitled to contest the election, Sec. 19 (2) BetrVG. The contestation must be submitted to the Labour Court within two weeks of the election results being announced. If the election is successfully contested, it is declared invalid and a new works council must be elected. However, the elected works council remains in office and can act effectively until a final decision is made. Only when the challenge is successful does its legitimacy lapse retroactively.

Nullity of the election

The nullity of a works council election is an extreme exception with serious consequences and is only accepted in particularly serious exceptional cases if fundamental principles of electoral law have been violated in such a flagrant manner that it can no longer be considered an



“election”. However, the accumulation of electoral violations cannot lead to the nullity of a works council election. Examples of nullity are:

Failure to comply with legal requirements or lack of works council eligibility

If an election is held without the appointment of an election committee, it is void (BAG, decision of 27 July 2011 – 7 ABR 61/10). The same applies if a committee is elected even though the company employs fewer than five employees who are eligible to vote and is therefore not eligible for a works council (Higher Labour Court Hessen, decision of 22 November 2005 – 4 TaBV 165/05).

Arbitrarily compiled voter list

The election is also invalid if the election committee uses unsuitable, incomplete information of unclear origin to compile the electoral roll, e.g. from a telephone list circulating in the company, the accuracy of which is also unknown – and at the same time does not attempt to verify the information in order to check the eligibility of the persons listed on the roll (Higher Labour Court Thüringen, decision of 24 June 2020 – 4 TaBV 12/19).

Obvious manipulation or abuse of the election procedure

If members of the election committee collude with election candidates to influence the election result, the election is also void.

Assertion, procedure and legal consequences

Anyone with a legitimate interest can assert the nullity of the election. This includes, in any case, those entitled to contest the election, but also individual employees of the company concerned. The nullity can be asserted at any time – even outside the two-week period. The assertion is not bound to any specific procedure. It is possible that the nullity will be decided as a preliminary issue, e.g. in unfair dismissal proceedings, or that it will be determined in the context of labour court proceedings. A null and void election has no legal effect whatsoever, as no effective works council has existed at any time. Any actions taken are invalid and the

works council members do not enjoy any special protection against dismissal. There is only the special six-month after-effect protection against dismissal due to the status as an election candidate or election committee member due to Sec. 15 (3) KSchG. In general, it is recommended that in order to avoid lengthy legal disputes and uncertainties in the company, comprehensive documentation of the entire election process should take place.

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Practical implementation of minority gender representation in the allocation of seats on the works council

The election and composition of the works council is subject to strict requirements under the law. Sec. 15 (2) BetrVG stipulates that the gender that is numerically weaker in the company must be represented on the works council in a proportion at least corresponding to its share of the workforce. This provision is intended to prevent discrimination and ensure a balanced representation of interests.

Determining the minority gender and calculating the minimum number of seats

The election committee must determine which gender is in the minority based on the number of employees. All employees eligible to vote – including part-time and marginal employees – must be taken into account. In this regard, the Higher Labour Court Hamm once clarified that incorrect recording of individual employees by gender can make the election contestable because it distorts the quota for the minority gender (decision of 17 December 2008 – 10 TaBV 137/07). Seats are allocated according to the “d’Hondt method”, Sec. 5 (1) WO. The number of seats on the works council is distributed among the genders according to their numerical strength. Here, too, a calculation error or incorrect rounding can make the election contestable. The BAG has repeatedly emphasised that the election committee must carry out the calculation carefully and document it (see, for example, BAG, decision of 13 March 2013 – 7 ABR 67/11).



Implementation in proportional representation and majority voting systems

In the list voting system, the seats are first distributed according to the number of votes, Sec. 15 (1) WO. If the prescribed minimum quota for the minority gender is not reached, a replacement is made within the list concerned: members of the majority gender with the lowest number of votes are replaced by members of the minority gender due to Sec. 15 (5) WO. In the majority voting system, the candidates with the most votes are elected to the works council. If the minimum quota is not reached, members of the minority gender replace the last elected candidates of the majority gender.

Dealing with the third gender (“diverse”)

The issue of the third gender is also becoming relevant in the context of works council membership due to the legal introduction of the gender category “diverse”. The election committee must therefore check whether and how persons of this gender are taken into account in the quota calculation. The Labour Court Berlin has ruled that the protection of the minority gender under Sec. 15 (2) BetrVG must primarily be examined between the traditional genders (male/female). Excessive preferential treatment of persons with the entry “diverse” may be unlawful at the expense of the gender that is actually numerically weaker (usually women). The works council election in question was declared invalid (Berlin Labour Court, decision of 7 May 2024 – 36 BV 10794/23).

Typical practical problems

In practice, difficulties regularly arise when implementing the legal requirements for seat allocation and gender quotas in works councils. In addition to the problems already mentioned, typical sources of error repeatedly occur which can jeopardise the validity of a works council election. These include, for example, unclear gender information in personnel data, as this is often out of date or does not contain a clear gender assignment, especially since the introduction of the category “diverse”. This makes it difficult to calculate the numbers in a legally compliant manner. The same applies to the issue of the cut-off date, where errors arise if employees joining or leaving the company around the cut-off date are not taken into account. The treatment of employees on parental leave or long-term sick leave also raises questions in practice.

Problems also come up from a conflict between quota regulations and the will of the majority: It regularly leads to acceptance problems among the workforce when candidates with higher numbers of votes are displaced in favour of the minority gender, even if this is required by law. Similarly, errors in the succession rules have an impact: if a works council member is replaced during their term of office, the gender quota must also be maintained in the succession procedure. This is often overlooked in practice and raises questions such as the consequences of changing the gender entry of a works council member during their term of office – and whether this has an impact on the already determined distribution of seats. Incorrect communication can also have an impact in the election notice, because even if the calculation is correct, a misleading presentation there can make the election contestable.

Recommendations for election committees

All of this results in certain basic recommendations for action:

- **Careful data collection:** Recording of all employees by gender (m/f/d) on the cut-off date
- **Documentation:** Record all calculation steps and decisions in a comprehensible manner
- **Correct calculation:** Application of the d'Hondt method and verification by several members
- **Election notice:** Specify the seats for the minority gender with precise justification
- **Dealing with the third gender:** Document decisions in accordance with current case law
- **Succession procedure:** Observe the quota rule here as well

Information for employers

Employers must remain neutral when conducting elections, but may provide organisational support to the election committee. Permissible activities include providing personnel data on gender distribution, making rooms and equipment available, or providing (neutral) information on legal requirements. However, it is not permissible to influence candidacies or the drawing up of lists, to campaign in favour of certain candidates, or to exert pressure, make threats or offer incentives to employees. Crossing this line can be considered obstruction of the works council election (Sec. 20 BetrVG) and may even be punishable by law.

Conclusion

Taking the minority gender into account when allocating seats on the works council is a central component of the election process. Errors in determining, calculating or implementing this can make the entire election contestable. The case law of the Labour Courts shows that even minor oversights can have significant legal consequences. Election committees should therefore work carefully, document everything and seek advice in case of doubt. Employers, for their part, are

required to ensure fair elections without exerting undue influence. This is the only way to ensure the legitimacy of the works council.

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Remuneration of works council members

The remuneration of works council members is a sensitive and legally challenging issue for employers, which entails considerable liability risks and requires particular care to avoid undue advantages and disadvantages.



Principle: Continued payment of remuneration under the employment contract

Pursuant to Sec. 37 (1) BetrVG, works council members perform their duties on an honorary basis and do not receive any remuneration for their works council activities. However, they are entitled to continued payment of their regular remuneration if and to the extent that they are released from their obligation to perform the work owed in order to perform their works council duties, Sec. 37 (2) BetrVG. The principle of “loss of earnings” applies, i.e. the works council members’ contractual remuneration entitlement remains in full, including all allowances and supplements, even though they are not performing any work. The calculation requires a hypothetical consideration of what remuneration the works council member would have earned without the exemption from work.

The remuneration agreed to date serves (initially) as the basis for calculation. This also applies to permanently exempt committee members.

Adjustment of remuneration

Simply continuing to pay the agreed remuneration can lead to discrimination, particularly in the case of permanently exempt works council members. Because they devote themselves exclusively to their works council duties, they are no longer able to pursue their actual job. This means that they run the risk of their professional development being impaired and of not being considered for promotions and salary increases. In order to prevent such discrimination, the legislator has regulated a minimum remuneration entitlement in Sec. 37 (4) BetrVG. In addition, case law has developed the concept of a fictitious promotion entitlement, which can also lead to an entitlement to an adjustment of remuneration.

Remuneration protection

According to Sec. 37 (4) BetrVG, the remuneration of works council members may not be lower than that of comparable employees with normal career development within the company. The standard is intended to protect works council members from discrimination by ensuring that they receive as minimum remuneration the amount they would have received if they had followed the normal career path within the company. This is determined on the basis of the career development of comparable employees at the time of taking office. Employees are considered comparable if, at the time of taking office, they performed similar tasks to those of the

works council member, required essentially the same qualifications, and were equally qualified in terms of professional and personal skills. This forms the basis for the works council member's entitlement to an adjustment of remuneration, so that they can claim salary increases to the extent that the salaries of comparable employees have been increased.

The professional development of comparable persons who, due to individual special achievements or other reasons specific to these employees, cannot be assessed as customary in the company is not to be taken into account. However, Sec. 37 (4) BetrVG not only gives rise to a claim for payment of the minimum remuneration, but also to an obligation on the part of the employer to grant it. The employer must therefore continuously review the remuneration of works council members and make adjustments if the remuneration remains below the minimum remuneration in accordance with the provision.

Fictitious entitlement to promotion

In addition, a claim for adjustment of remuneration may arise from Sec. 611a (2) BGB (Bürgerliches Gesetzbuch / German Civil Code) in conjunction with Sec. 78 Sentence 2 BetrVG. Case law derives from the prohibition of discrimination and preferential treatment regulated in Sec. 78 Sentence 2 BetrVG that the employer must guarantee works council members a career development that corresponds to what they would have experienced without their official duties. If it is established that the committee member did not take a certain career step up solely because they took on the works council position, they can demand that the employer remunerate them as if the career step up had taken place.

The fictitious promotion entitlement may exist in three cases:

1. An application by the works council member was unsuccessful precisely because of their works council activities and/or because of time off for works council activities.
2. A works council member who has been granted leave of absence did not apply for a job precisely because of their leave of absence for works council activities, and an application would have been successful without the leave of absence.

3. In the two aforementioned cases, an application would only have been unsuccessful because the works council member lacks the skills and knowledge for the position precisely because of the leave of absence for works council activities.

The requirements of case law for demonstrating a fictitious promotion claim are very strict because, as a rule, remuneration exceeding the amount specified in Sec. 37 (4) BetrVG constitutes an inadmissible advantage for the works council member. Therefore, payment of higher remuneration on the basis of a fictitious promotion claim should only be possible if the works council member can prove that they would have been promoted without their works council activities. Employers should always observe the principles of voluntary work and loss of earnings when remunerating their works council members. Works council members are not to be remunerated for their work on the works council, but rather their employment contract remuneration is to continue to be paid to them during their works council activities.

After the election: Determination of comparators

For each new works council member elected to the works council, a comparison group should be determined and documented immediately after the election. Since remuneration protection applies to all works council members, regardless of whether they are exempt from their professional activities, a comparison group should be determined for each works council member. The decisive point in time is when they first take office. In the case of re-elected works council members who have been in office for a long time, a comparison group should therefore have been determined in the past. If this has not been done or has not been documented, it should be determined retrospectively after the next election at the latest which employees were comparable when they took up their works council positions.

The comparison group should be as large as possible so that it allows conclusions to be drawn about the normal development within the company. This also means that it has less of an impact if employees leave the company or are no longer comparable to the works council member due to an individual special career path. As a rule, only employees who belong to the same company may be included in the comparison group. If there are no comparable employees there, employees from another establishment of the same group may be used as a basis if uniform remuneration

regulations and provisions for professional development apply within the company.

Ongoing: comparison of remuneration with the minimum wage

The remuneration of works council members should be compared with the remuneration development of the comparison group on an ongoing basis, at least at annual intervals. A works council member may be entitled to an increase in remuneration according to the following criteria:

- If the remuneration of all employees in the comparison group is increased by a certain percentage, the works council member is entitled to the same percentage increase.
- If the increases vary, but the majority of the comparison group has received a remuneration increase of a certain percentage, the works council member is entitled to the same percentage increase.
- If no uniform or majority remuneration increase can be determined, the average of the remuneration increases in the comparison group may be used as a basis. In individual cases, particularly in the case of very small comparison groups, the median of the remuneration increases may be decisive instead of the average.

Conclusion of a works agreement

In 2024, the legislator expressly included in Sec. 37 (4) Sentences 4 and 5 BetrVG the possibility of regulating the procedure for selecting comparable employees and the selection itself in a works agreement. Judicial review of such a works agreement is then limited to gross errors. In this respect, the conclusion of such an agreement can be an effective means of creating legal certainty. The difficulties that may arise in determining the remuneration of comparable employees have less of an impact as only gross errors lead to the invalidity of the determined remuneration. In addition, such a works agreement also contributes to the transparency of works council remuneration and can strengthen acceptance among both the workforce and the works council members concerned. However, the works council cannot enforce such a works agreement.

No solution: payment of excessive remuneration

In order to avoid disputes with works council members over their remuneration, employers may be tempted to set the remuneration too high in case of doubt. However, this is strongly discouraged, particularly in view of the criminal law risks involved. If a works council member is paid excessive remuneration, i.e. remuneration that exceeds the amount specified in Sec. 37 (4) BetrVG and to which there is no entitlement under the fictitious promotion entitlement, this constitutes an inadmissible advantage within the meaning of Sec. 78 Sentence 2 BetrVG. According to the case law of the BGH (Bundesgerichtshof / Federal Court of Justice), the granting of excessive remuneration to a works council member in violation of the prohibition of preferential treatment may constitute embezzlement within the meaning of Sec. 266 (1) StGB (Strafgesetzbuch / German Criminal Code) (decision of 10 January 2023 – 6 StR 133/22).

Practical consequences

In summary, it is advisable to identify comparable employees for each works council member after their initial election to the works council and to document this. The remuneration of the persons concerned should be reviewed regularly and compared with the development of the comparable persons. A legally secure solution may be to conclude a works agreement. If this agreement regulates a procedure for determining comparable employees, it can only be reviewed by the labour court for gross errors. The same applies to a mutually agreed determination of the comparable persons with the works council.

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■ GENERAL INFORMATION

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