

Modern Times – The Works Council Modernization Act is coming!

INTRODUCTION

On May 28, 2021, the Bundesrat approved the Works Council Modernization Act (full title: „Act for the Promotion of Works Council Elections and the Tasks of Works Councils in a Digital Work Environment“), preparing the way for the law to come into effect soon.

One reason in particular for the enactment of the Act was the realization that the representation of employees in Germany by works councils is in decline. To counteract this, legislators want to make it easier to elect employee representatives and to furthermore prevent the obstruction of works council elections by improving protections from termination. In addition, new rights for works council members and a permanent legal basis for holding works council meetings via video conference have been created with a view to the increasing challenges of the digital work environment. The main innovations will be summarized in the following overview:

EXPANSION OF THE SIMPLIFIED VOTING PROCESS

The scope of application of the so-called “simplified voting process”, which differentiates it from the usual process through shorter deadlines and simplifications of process, has been expanded. Where this had initially only been provided for operations with up to 50 employees, the simplified process will now be possible for operations with up to 100 employees. In operations with 101 to 200 eligible voters, there will also be the possibility for the electoral committee and the employer to agree to the simplified voting process (previously 51 – 100 employees).

REDUCTION OF NUMBER OF SUPPORTING SIGNATURES IN SMALLER OPERATIONS

The number of signatures required to support a nomination has been reduced. In operations with up to 20 eligible voters, supporting signatures will not be required at all. In operations with 21 to 100 employees, two supporting signatures will suffice. In operations with more than 100 eligible voters, the prior requirement that at least one-twentieth of the employees eligible to vote must sign the nomination remains unchanged.

RESTRICTION OF THE RIGHT TO CHALLENGE ELECTIONS

Section 19 Works Constitution Act in the new version restricts the possibility to challenge a works council election in cases in which the contestation is to be

based on errors in the voting lists. For reasons of legal security, the ability to challenge an election with this argument is excluded in the future if the possibility to raise an objection in an ongoing electoral process has not already been used.

In addition, the ability to raise a challenge is specifically ruled out for employers if the incorrectness of the voting list is based on information provided by themselves.

EXPANSION OF PROTECTION FROM TERMINATION

Section 15 of the Protection against Unfair Dismissal Act, which had already provided protection from terminations for works council members, electoral committee members and candidates or people inviting to an election, is being expanded. In future, employees who merely undertake preparatory actions aiming at the establishment of a works council and who have made a publicly certified declaration (Section 129 German Civil Code) stating their intention to establish a works council will also be protected.

The Act expands the protection against termination to the so-called „preliminary initiators“. As examples for relevant preparatory actions, the legislative reasoning for this clause lists conversations with co-workers in the context of the intended election or contact to a trade union with the goal of obtaining information on how to conduct an election.

WORKS COUNCIL MEETINGS VIA VIDEO CONFERENCE

The possibility of holding works council meetings via video or telephone conference which had been temporarily added to the Works Constitution Act in the context of the Corona pandemic will be made permanent. These provisions will in future be found in Sections 30 et seq. of the new version of the Works Constitution Act.

In addition, the Act now expressly provides for the opportunity to enter into works agreements by way of a qualified electronically signed document (Section 126a German Civil Code) executed by both parties instead of the traditional written form. The same opportunity will apply for the resolutions of the conciliation board.

DATA PROTECTION RESPONSIBILITY OF THE EMPLOYER

Section 79a Works Constitution Act is a completely new provision which answers the not quite uncontroversial question posed by the GDPR of the responsibility under data protection law for personal data processed by the works council. This responsibility is now clearly assigned to the employer. The reason given by legislators for this assignment of responsibility is that a works council is not an institution with independent powers in relation to the outside world, but that it processes the personal data of the workforce as a dependent element of the employer who is responsible for maintaining data protection.

Because the works council undoubtedly exhibits more than insignificant independence within the internal organization and is not subject to employer directions in its actions, the Act also contains the wording that the employer and the works council must “support” one another in complying with the data protection regulations. It is to be expected that this reciprocal support will give rise to more than one practical question.

USE OF ARTIFICIAL INTELLIGENCE

The bill also reacts to the increased use of artificial intelligence (AI) in work environments. It is acknowledged that works councils require the support of an expert to execute their duties when evaluating the introduction or application of AI. However, the employer and the works council must still enter into an agreement on the involvement of the expert.

It is further clarified in Section 95 (2a) of the new Works Constitution Act that the co-determination rights of the Works Council also apply with regard to so-called selection guidelines where AI is used in their creation. This can be the case, for instance, if an AI application creates the selection guidelines on its own or within a set framework. Furthermore, the right to be informed under Section 90 (1) no. 3 Works Constitution Act expressly extends to the use of AI.

CO-DETERMINATION IN THE CASE OF MOBILE WORK

In the central provision of works constitution law, Section 87 (1) Works Constitution Act, a separate co-determination right of the works council is established with regard to the design of mobile work which is carried out via information and communications technology. Mobile work in this sense is carried out if an employee renders their work using information and communications technology outside of the site of business operations at a site selected by them or at a site agreed to with the employer, but not if the employee must exe-

cute performance at a specific place because of the nature of the work (e.g. sales representatives, technician/installer).

As can already be seen in the wording of the Act (“design”), the co-determination right is only related to the “how” of mobile work. The decision on the introduction of mobile work as such (“whether”) remains with the employer.

EXPANSION OF CO-DETERMINATION INTO THE AREA OF OCCUPATIONAL TRAINING

Under Section 96 (1) Works Constitution Act, the works council already has the possibility of making suggestions concerning the occupational training of employees. The employer is then obliged to consult with the works council. The rights of the works council in this context have now been additionally strengthened in that it may call on the conciliation board if no agreement is reached. However, a duty to reach conciliation does not exist here as well. The conciliation board must merely attempt to reach an agreement between the parties.

SUMMARY

The above comments are merely an overview of the major changes. Further details which would spill out well beyond the scope of this information can be expected to give rise to discussion. Should you have questions related to this topic, please feel free to contact us at any time. We look forward to assisting you.

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