

## LEGAL Q&A | EMPLOYEE REPRESENTATION

February 2020

German employment law provides for a sophisticated system of employee representation. The employees' representative body on operational level is the works council (*Betriebsrat*). The works council is to be involved in decisions on staffing, social matters and economic matters. Employee representation also exists on other levels, such as the supervisory board on board level and through trade unions on industrial level. This Q&A two pager gives an overview on how employee representation is handled in Germany.

### 1. Is a company obliged to establish a works council?

No, unlike in some other EU jurisdictions, in Germany there is no obligation of the employer or the employees to establish a works council. The election of a works council can only arise from the employees' or a trade union's initiative. However, the employer may not prevent or obstruct the election of a works council – interference may even entail criminal consequences.

### 2. How is the works council elected?

A works council can be elected in each operation (*Betrieb*) with at least five regular employees over the age of 18, including three employees who are eligible for election. All employees who have been employed at the company for six months are eligible to be elected as works council members. Managing directors, board members as well as executive employees are not eligible to vote, do not count for the threshold and are not being represented by the works council. The works council is elected through a formalized election procedure by a direct vote in a secret ballot. Statutory law provides for a sophisticated election process that has to be followed. Once established, regular works council elections are held every four years with the next election cycle starting in 2022. The costs of the elections must be borne by the employer.

### 3. As a works council can be established in each operation, what exactly makes an operation?

According to the Federal Labor Court, usually, every site as a unit of personnel and material with management responsible for taking employee-related decisions can be considered an operation. An operation is to be distinguished from the legal entity (e.g., GmbH), i.e., if there is more than one operation within a company, the company may consist of several works councils. In such case, the works councils

must establish a central works council (*Gesamtbetriebsrat*) which is responsible for all matters relating to the company as a whole or at least two operations.

### 4. How many members does a works council have?

Where an employer employs no more than 20 employees at an operation, one employee performs the functions of the works council. If there are more than 20 employees regularly employed, the number of works council members increases with the number of employees regularly employed at the operation, e.g., if 21 to 50 employees are employed, the works council consists of three members, if 51 to 100 employees are employed, it consists of five members, etc. There is no cap for the number of members in quite large operations. For example, the works council of an operation with 7,001 to 9,000 employees has 35 members.

### 5. What rights does the works council have?

The Works Constitution Act (*Betriebsverfassungsgesetz – BetrVG*) provides works councils with a broad range of participation rights of varying intensity. The information and consultation rights are the weakest form of the works council's participation while the co-determination rights empower the works council to co-decide with the employer on social, personnel or economic matters. For example, the works council has certain information and consultation rights when it comes to hiring and termination of employment. In case co-determination rights apply, the employer needs to seek the works council's approval before implementing a business decision. Where this is required, any acts implemented without the works council's proper involvement will be null and void. For example, in companies with regularly more than 20 employees eligible to vote, the employer must provide correct and complete information to the works council before implementing any change to the operation (*Betriebsänderung*), including a shutdown or reduction in force of considerable size, and must discuss and negotiate with the works council in an attempt to conclude a reconciliation of interests (*Interessenausgleich*). Typically, in a restructuring scenario, the works council has the power to impose a social plan (*Sozialplan*) on the employer which provides for severance payments and outplacement measures.

### 6. What if employer and works council cannot come to an agreement?

Where the works council has co-determination rights, either party may appeal unilaterally to a conciliation board (*Einigungsstelle*), which will come to a final binding decision.

The conciliation board is a committee either established permanently or *ad hoc*. It consists of an equal number of representatives from the employer and the works council as well as a mutually agreed chairman. In matters subject to mandatory co-determination by the works council, the management cannot make or enforce any decision without the works council's consent or a favorable decision of the conciliation board. The works council and the employer may seek review of the conciliation board's decision by the labor court, however, judicial review is restricted to the assessment of whether the conciliation board was actually competent to rule on this issue, and if so, whether its decision was generally reasonable.

### 7. How can the works council execute its co-determination rights?

The works council and the employer can conclude shop agreements (*Betriebsvereinbarungen*) regulating various employment conditions, such as rules regarding the end and the beginning of daily working hours (not the duration as such), vacation timetables, internal guidelines concerning social behavior, safety issues such as accident prevention, surveillance measures as well as general remuneration structures excluding individual salaries, etc. Shop agreements are binding upon all employees, excluding executive employees and managing directors.

### 8. Do works council members enjoy special employee protection rights?

Yes, members of the works council enjoy specific protection. They enjoy special protection against dismissal and can only be given notice for good cause, *i.e.*, if the employee has seriously violated obligations under the employment contract. In practice, these requirements will only be met in a few rare cases. Even where cause exists, the works council's or the labor court's prior consent is required. Notably, the same protection applies for employees who call for elections, members of the election committee, and candidates for the works council.

### 9. What advantages can an existing works council have for the company?

Cooperatively oriented works councils and company managements can provide attractive working conditions through the means at their disposal, such as shop agreements. Works council members usually know the company and its employees very well and can be helpful advisors and facilitators, notably in a restructuring scenario. In addition, where following the information and consultation process an agreement between employer and the works council has been reached, this agreement may facilitate the acceptance of the business decision by the whole staff.

### 10. What about employee representation at board level?

Certain companies (*e.g.*, GmbH) regularly employing more than 500 employees must establish a co-determined supervisory board (*Aufsichtsrat*) under the One-Third Participation Act (*Drittelbeteiligungsgesetz – DrittelbG*) with one-third of the members being employee representatives directly elected by the employees. The supervisory board monitors and advises the

company's management and notably has the authority to appoint and withdraw members of the management and to enter into or terminate their service contracts. If the number of employees in Germany exceeds 2,000, the company must even install a supervisory board consisting of an equal number of elected employees' and shareholders' representative members under the Co-Determination Act (*Mitbestimmungsgesetz – MitbestG*).

### 11. And what are the functions of the trade unions?

Trade unions are organizations outside a company which are entitled to negotiate collective bargaining agreements with individual employers or employers' associations on industrial level. Their right of formation and the right to join a trade union are protected by the constitution. Collective bargaining agreements primarily deal with remuneration and other working conditions such as holidays, notice periods, overtime regulations and other benefits on an industry-wide level. Collective bargaining agreements exist in several industrial sectors and employers bound by these collective bargaining agreements principally have to apply them if the employee is a member of the respective trade union that concluded the collective bargaining agreement. However, in practice, collective bargaining agreements very often constitute minimum standards for all employees, no matter whether union members or not. Trade unions monitor compliance with collective bargaining agreements and can call for strikes to enforce conclusion of collective bargaining agreements.

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