

LEGAL UPDATE LABOUR AND EMPLOYMENT LAW

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Remuneration of members of the Works Council – legal certainty resulting from changes in the law?

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Members of the Works Council carry out their work as volunteers. The wages they would receive during their leave of absence is paid in accordance with the loss of earnings principle. Section 78 sentence 2 of the Works Council Constitution Act (BetrVG) states that members of the Works Council should not be disadvantaged or benefit from their position on the Council. In addition, the BetrVG also states that the wages of Works Council members should not be less than the wages received by comparable employees with usual professional development.

A decision of the Federal Supreme Court (Bundesgerichtshof, BGH) (BGH, judgment dated 10 January 2023- 6 StR 133/22) on the question of fraud in the event of breaches of the enrichment ban under Works Council constitutional law has in the past led to legal uncertainties when applying the stated principles.

These inconsistencies should now have been dealt with as part of the 2nd Act to amend the BetrVG (Bundesrat, document 564/23).

BGH: Fraud possible in the event of excessive remuneration of Works Council members

The BGH's judgment from January 2023 and the legal uncertainties which subsequently arose form the basis of the draft bill.

The BGH held that in the event of excessive remuneration of a member of the Works Council alongside a breach of the BetrVG can result in the fulfilling of the requirements for the criminal offence of embezzlement (section 266 (1) of the German Criminal Code (StGB)). With this decision, the BGH had overturned the acquittal of four HR managers working at Volkswagen who had for years approved increased wages and voluntary bonus payments for members of the Works Council.

Although the BGH in its decision referred to the case law of the Federal Labour Court (Bundesarbeitsgericht, BAG), it was not completely clear, however, how the BGH determined the remuneration of the Works Council members.

In addition, the draft bill takes into consideration the previous case law of the BAG on the prohibition of discrimination against members of the Works Council in a financial and professional

respect (previously [BAG, judgment dated 23 November 2022 - 7 AZR 122/22](#)) and defines it more precisely.

Aim of the draft bill: Certainty regarding remuneration of members of the Works Council

Reducing the risk of infringing the prohibition on enrichment and discrimination

The draft bill should make it easier under Works Council constitution law for employers and public officials to adhere to the prohibition on enrichment and discrimination. The bill envisions changes and additions in regard to [section 37 \(4\) BetrVG](#) and [section 78 BetrVG](#).

Section 37 (4) BetrVG

Up until now, [section 37 \(4\) BetrVG](#) 'only' states that the wages of members of the Works Council may not be significantly less than that of a comparable employee with the usual professional development, including a period of one year after the end of their term of office. This should now be supplemented by the provision that the time of becoming a member of the Works Council is taken into account for determining this comparable employee, provided there are no objective grounds for this to be re-determined later.

Furthermore, it will be possible to conclude a Works Agreement (for the current permissibility of such a Works Agreement see [BAG, judgment dated 18 January 2017 - 7 AZR 205/15](#)), which regulates the procedure for determining comparable employees. This should restrict the leeway for Works Agreements to gross negligence for errors.

As in so far as there are no provisions for determining the criteria, this is to be orientated in accordance with the case law of the BAG, where

there is a comparison made with the other employees who carried out a similar, mostly the same job at the same time as the member of the Works Council took up their position and were therefore qualified in the same way from a professional and personal point of view (cf. [BAG, judgement dated 23 November 2022 - 7 AZR 122/22](#)).

Taking into account these provisions, gross negligence has occurred where the comparative criteria are not orientated on this, are incorrect or the criteria were assessed in a disproportional manner or not at all (cf. [Bundesrat, document 564/23](#)).

Section 78 BetrVG

[Section 78 BetrVG's](#) prohibition on enrichment and discrimination is to be supplemented for the avoidance of doubt that the enrichment or discrimination in terms of the wages has not occurred, if the corresponding member for granting wages fulfils the required operational requirements and criteria and the determination of wages was not incorrectly assessed.

Practical outlook

Should the law be adopted as envisaged this would contribute to clear statutory regulation in relation to the remuneration of members of the Works Council. This would also provide incentives for employers and Works Councils to design the comparisons of employees to be more open and transparent. It, however, remains to be seen whether the draft bill would implement any groundbreaking new regulations, as it is more orientated towards the existing current case law of the BAG, which is, in particular, demonstrated in the explanatory memorandum.

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Sarah Cordes by phone +49 40 500360 755 or by email scordes@goerg.de by email to hjansen@goerg.de or by phone +49 221 33660 534. For further information about the author visit our website www.goerg.com.

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