

Every Four Years ... Works Council Elections: What are the Options in the Case of Procedural Errors?

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German soccer fans can look forward to the World Cup, which takes place in early spring every four years. And, just a few weeks earlier, between 1 March and 31 May (§ 13 (1) of the Works Constitution Act (*Betriebsverfassungsgesetz* – BetrVG), the country's employees go to the ballot boxes to elect the country's works councils. Anyone who takes the time to read through the 43 sections of the Election Rules (*Wahlordnung* – WO) for the implementation of the Works Constitution Act) will quickly realize that holding an election is an undertaking that is fraught with pitfalls; every step of the way seems to present everyone involved with a potential legal snare.

That means employers have to ask themselves what they can do if irregularities should occur in the course of an election. After all, they are the ones who have to pay for the elections and then "live" with the works council elected for the next four years. On the other hand, candidates for election also occasionally have to familiarize themselves with their options if their interests are compromised. The purpose of this bulletin is to throw a little light on the procedural errors that can occur in the case of works council elections.

Distinction between irregular and void

The labor courts regularly make a strict distinction between elections that are "only" irregular and those that are void. Before going on to address the possible ways of reacting, we would first like to clarify the meaning of these terms and provide illustrative examples.

- **Irregularities:** The definition of an "irregular" election can be inferred from § 19 (1) of the Works Constitution Act. An election is irregular – and can therefore be contested – in the case of the violation of material rules governing the right to vote, the eligibility of candidates or the election procedure and failure to correct such violation unless the violation in question did not or could not have changed the outcome. The law does not, however, say what constitutes a violation of a "material" rule.

In any case, not every violation of an incidental formality will make an election ineffective. On the other hand, any irregularity that could have an effect on the outcome, i.e., allocation of votes or constitution of a majority – is considered material (causality requirement).

Example: If advertising or publicity for a list of candidates is obstructed, this can affect the outcome of the election; such an irregularity would make the election ineffective (§ 20 (1) of the Works Constitution Act).

Counterexample: If a ballot box containing five ballots is "forgotten", this would be irrelevant if these votes could not have had any effect on the results due to the lead of the successful candidate.

The following are among the irregularities that can cause an election to be declared ineffective:

- Failure to respect the definition of an establishment (Example: A *single* works council is elected for several establishments although the prerequisites pursuant to § 3 of the Works Constitution Act are not fulfilled)
- Failure to provide adequate information for foreign employees (§ 2 (5) of the Election Rules)
- Conduct of the election by an improperly constituted electoral board (§§ 16 of 17 of the Works Constitution Act)
- Incorrect indication of the minimum number of seats for the gender that accounts for a minority of personnel in the announcement of the election (§ 15 (2) of the Works Constitution Act)
- Inadequate announcement of the election (§ 3 of the Election Rules)
- Removal of candidates from a list of proposed candidates

- Admission of candidates lacking signatures of supporting employee (§ 14 (4) of the Works Constitution Act)
 - Differences in design of ballots
 - General admission of absentee ballots without control of eligibility (§ 24 of the Election Rules)
 - Failure to seal ballot boxes properly
- **Void elections:** A void election is a much more serious matter. A member of a works council elected in a void election has no rights or obligations. However, an election will regularly be declared void only under very exceptional circumstances; this presupposes a violation of the general principles underlying the election procedure that is so severe as to lack even a semblance of legitimacy. In such cases, the violation must be obvious and especially egregious. Given this standard, elections are considered void only in very few cases:
- Conduct of the election without an electoral board (e.g., a single individual put in charge of the organization of the election appointed by acclamation at the annual carnival party)
 - Vote through a show of hands at a meeting of employees
 - Vote through the Internet (“online election”)
 - Election of a works council for more than a single company (obvious and egregious failure to respect the definition of what constitutes an establishment)
 - Massive violations of duty to ensure a public vote count and intimidation of voters

Contesting the results of an election

In the case of an irregularity, the results of an election can be contested before the labor courts (§ 19 (1) of the Works Constitution Act). Action must be brought within a period of two weeks following announcement of the results of the election. Important: The works council will remain in office during the proceedings initiated to contest the election and may then also enter into works council agreements and will be fully empowered during that period. The tenure of such a works council will not end until such time as the findings of the court become final. In the case of failure to

challenge the results of an election within the two-week period, a works council that takes office on the basis of an “irregular” election will remain in office for the full four-year term.

On the other hand, it is *not* necessary to comply with the two-week time limit in the case of an election that is void. An employer can claim that an election was void at any time. If the court finds that an election was in fact void, the works council is removed from office retroactively. Its actions up to that time (e.g., works council agreements) then become legally inoperative. The members of the works council are then left with only the residual protection against dismissal afforded them as candidates. Since elections are rarely found to be void, employers will in any case be well advised to comply with the two-week period for challenging the results of elections.

Injunctive relief

It is often already possible to detect violations of election rules during the election itself. The question arises in such cases as to whether an employer must wait for the outcome of the election to challenge the results, which entails having to get along with the works council for a time. In order to avoid this, employers often attempt to obtain injunctive relief to have an election suspended. The Federal Labor Court (*Order of 27 July 2011, 7 ABR 61/10*) has made clear when and for what reasons it is possible to intervene in an ongoing election. According to the court, it is possible to consider suspension of an election only under extreme circumstances, namely, if it is virtually certain that the election will prove void. Mere irregularity will not suffice to justify suspension.

However, “constructive” motions at the level of the action brought to obtain injunctive relief remain possible. For example, it is possible to take corrective measures to eliminate the reason for which the election is contested. If, for example, a list of candidates is improperly rejected, it is possible to order that it be accepted.

Summary

Works council elections involve considerable work and are complicated. This primarily affects the electoral boards, but employers are advised to keep an eye on ongoing elections. If it should seem obvious that an egregious violation of the law is taking place, it

is advisable – in order to prevent a void election of a work council – to seek interim relief on a timely basis and have the election suspended or take constructive measures to ensure a proper election.

In view of the many possible sources of errors, procedural errors occur in virtually every election. However, employers should think carefully before deciding to challenge an election within the two-week period. On the one hand, a works council resulting from an

irregular election will remain in office and empowered during the proceedings. On the other hand, a new election will result in significant expense. Such decisions will often hinge upon the individuals elected. Important: Employers must always keep in mind that an election can also be contested by candidates or trade unions.

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 Jens Völksen on +49 221 33660-504 or by email to jvoelksen@goerg.de. For further information about the author visit our website www.goerg.com.

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