01 | 2018
NEWSLETTER

GÖRG
YOUR BUSINESS LAWYERS

LABOR LAW

PREFACE

Our first Newsletter in 2018 deals with issues concerning works council elections, which will take place nationwide at the beginning of next year, and with issues related to the General Data Protection Regulation which will enter into force in May 2018. Employers should take the latter seriously, in particular due to the drastic increases in fines that it prescribes. The remaining contributions then cover amendments to the Company Pension Act as well as the latest court rulings on collective and individual labor law issues.

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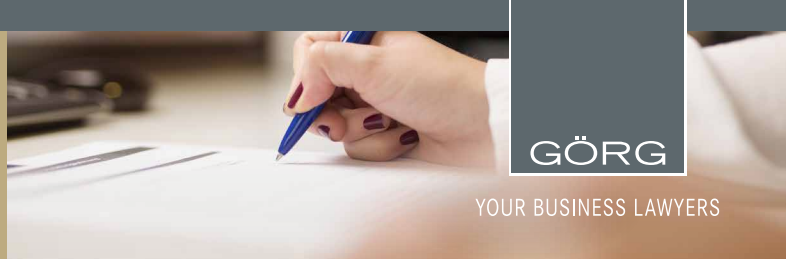


Every Four Years ... Works Council Elections What are the Options in the Case of Procedural Errors?

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.

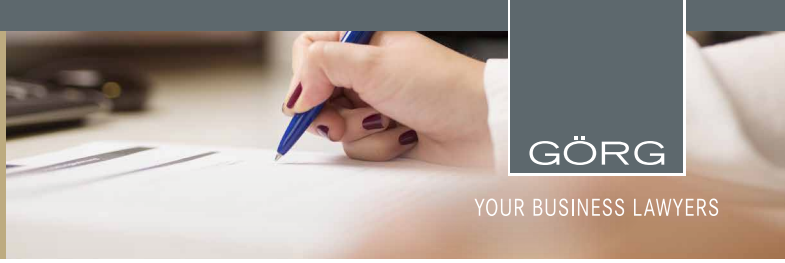
- **Irregularities:** The definition of an "irregular" election can be inferred from § 19 (1) of the Works Constitution Act. An election is irregular – and can therefore be contested – in the case of the violation of material rules governing the right to vote, the eligibility of candidates or the election 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

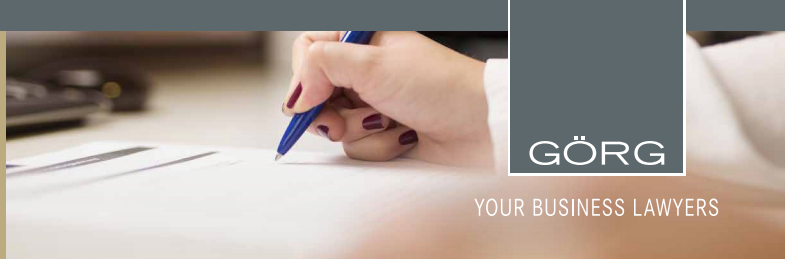
- **Void elections:** A void election is a much more serious matter. A member of a works council elected in a void election has no rights or obligations. However, an election will regularly be declared void only under very exceptional circumstances; this presupposes a violation of the general principles 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.

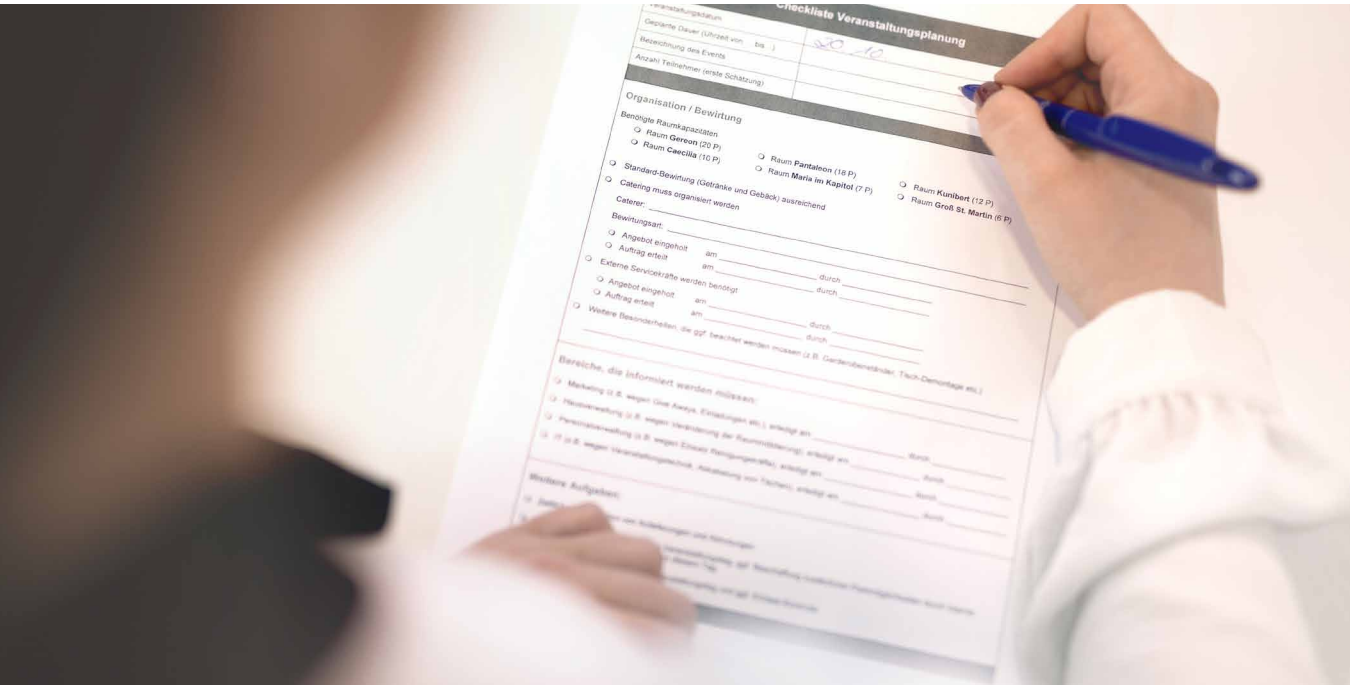
However, "constructive" motions at the level of the action brought to obtain injunctive relief remain possible. For example, it is possible to take corrective measures to eliminate the reason for which the election is contested. If, for example, a list of candidates is improperly rejected, it is possible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

JENS VÖLKSEN



General Data Protection Regulation – Protection of Employee Data

The General Data Protection Regulation (GDPR), which is intended to unify protection of personal data in all EU member states, will go into effect throughout Europe next year. The Regulation will be directly applicable and take priority over domestic law, but it will also leave national lawmakers the discretionary leeway required to enact their own provisions as long as they are not inconsistent with those contained in the GDPR. Germany's legislature has availed itself of this option and adopted the Act to Adapt Data Protection Law to Regulation (EU) 2016/679 and to Implement Directive (EU) 2016/680 as well as changes in the current version of the Federal Data Protection Act (Bundes¬daten¬schutz¬gesetz – BDSG). The revised version of the Federal Data Protection Act was announced on 5 June 2017. The new provisions will take effect as of 25 May 2018 along with the GDPR.

A complete presentation of the changes in the GDPR and the changes in legislation governing data protection that affect employment relationships would exceed the scope of this bulletin. The presentation below is therefore intended to provide an overview of changes regarding the protection of the personal data of employees, in particular as regards the provisions contained in § 26 of the Federal Data Protection Act (new version), as well as to show what companies and employees can expect in this regard in the future.

Introduction

The GDPR primarily reinforces the rights of individuals when their data are processed and, for example, Art. 13 and 14 of the GDPR contain expanded duties to provide data subjects with information that also apply as regards employees. In the future, the right of data subjects to obtain information on whether and how their personal data are being processed will be significantly expanded under Art. 15 of the GDPR.

Although the GDPR is intended to provide a uniform level of data protection, it contains many different mandatory and optional escape clauses that require or allow national legislatures to determine the actual form of implementation in certain areas. In the area of protection of the personal data of employees, Art. 88(1) of the GDPR allows the member states to regulate the processing of personal data of employees in the context of national legislation governing employment. The jurisdictional competency of the national legislatures is, however, limited to "more specific" rules. National legislatures will not have the right to deviate from the GDPR by lowering or raising the level of protection. The option of national legislatures to adopt more specific rules in respect of the protection of employee data pursuant to Art. 88 (1) of the GDPR will also not be unlimited. In fact, Art. 88(2) of the GDPR allows only measures that are suitable and adequately safeguard the fundamental rights and legitimate interests of the respective data subject.

In Germany, § 26 of the Federal Data Protection Act (new version) will replace the current § 32 of the Federal Data Protection Act as the central provision governing the protection of employee data. It is obvious that the legislature has modeled the revision of § 26 of the Federal Data Protection Act (new version) on the main regulatory structures, mechanisms and provisions of the previous § 32 of the Federal Data Protection Act.

Employee data protection pursuant to § 26 of the Federal Data Protection Act (new version)

Grounds

As already allowed in the past, the first sentence of § 26(1) of the Federal Data Protection Act (new version) allows

employers to process the personal data of their employees where "necessary" to establish, maintain or terminate an employment relationship. Pursuant to the second sentence of § 26 (1) of the Federal Data Protection Act (new version), it will also still be possible to process data for the purposes of criminal investigation under special circumstances. In addition, it will still be possible to process data when necessary to enable representatives of the interests of employees to exercise their rights or fulfill obligations under the law or a collective agreement. It will also most likely be possible to process the personal data of employees for purposes other than those related to the employment relationship on the basis of the consent provisions contained in Art. 6(1) or Art. 9(2) of the GDPR.

Necessity of data processing

It is also possible to infer from the explanatory memorandum on § 26 of the Federal Data Protection Act (new version) that it can be considered necessary to process personal data of employees only if such processing is suitable for achieving the purposes of the employment relationship, is the least invasive of all equally efficacious options available to the employer and, finally, is not outweighed by any legitimate interest an employee may have in refusal to consent to such processing. In line with the previous case law of the Federal Labor Court, the fundamental legal positions of the employer and employees must be weighed against one another and reconciled by means of a practicable agreement.

Collective agreements

§ 26(4) of the Federal Data Protection Act (new version) makes it clear for the first time that what are referred to as collective agreements, i.e., wage agreements, works council agreements or enterprise agreements for public servants, constitute legal provisions within the meaning of the Federal Data Protection Act and accordingly can constitute a suitable legal basis for processing employee data. These agreements must therefore now also meet the requirements and standards contained in Art. 88(2) of the GDPR.

Collective agreements must therefore include suitable and specific measures to safeguard the human dignity, legitimate interests and fundamental rights of data subjects. In particular, they must contain measures to ensure transparency as regards the processing of data. Appropriate measures must be taken insofar as works council agreements also involve the transfer of personal data within a group of undertakings or a group of companies engaged in a joint economic activity. The same applies accordingly to works council agreements on workplace monitoring systems.

It is important to bear in mind that neither § 26 of the Federal Data Protection Act (new version) nor the GDPR makes provision for exceptions for "old" cases. Existing collective agreements, in particular works council agreements that govern the processing of personal employee data, must now meet the same standards. In that regard, the question already arises as to whether these agreements must be identified as a "permissive rule" for the purposes of application of legislation governing data protection. In addition, agreements must be examined with an eye to determining whether the standards of Art. 88(2) of the GDPR have been met, whether the principles of legislation governing data protection pursuant to Art. 5(1) of the GDPR have been satisfied and whether the duty to provide information pursuant to Art. 12 of the GDPR has been implemented and a data protection impact assessment carried out. In the event shortcomings should become apparent in the course of such a review, the respective agreements must be modified accordingly.

Voluntary consent

In the past, the question as to whether the consent of an employee was a valid ground for processing that employee's personal data was a matter of dispute in the context of the protection of employee data, but § 26(2) of the Federal Data Protection Act (new version) now expressly qualifies consent as a possible ground for processing an individual's data. In addition, the new provision makes it clear that voluntary consent can exist despite the dependency inherent in an employment relationship if, for example, a legal or economic benefit accrues to the employee or both parties to an employment contract pursue similar interests. The explanatory memorandum cites "the introduction of company healthcare management to promote employee health" and the "permission for personal use of company IT systems" as typical examples.

Before they can give their consent, data subjects must be informed of the purpose for which their data are to be processed and their right to withdraw consent pursuant to Art. 7(3) of the GDPR. If special categories of personal data within the meaning of Art. 9(1) of the GDPR are to be processed with the consent of the data subject, the data subject must also be expressly informed of the possibility of withdrawing his or her consent in such cases. Any consent form should be carefully formulated to keep the possibility of invalidity of the consent to a minimum.

After revision, § 26(2) sent. 3 of the Federal Data Protection Act (new version) will still contain a written-form requirement that will apply except under special circumstances that justify a different form.

Application to "analog" data processing

With § 26(7) of the Federal Data Protection Act (new version), the legislature will continue to allow application of the provisions of legislation governing data protection in cases in which data processing is not automated and analog means are used instead.

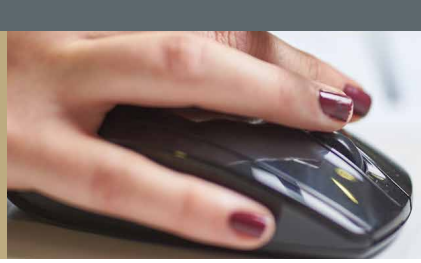
Expanded sanction

The pending changes and new standards contained in the GDPR are already attracting considerable attention due to the fact that the economic risks associated with violations of legislation governing data protection will be significantly greater in the future. For example, the authorities responsible for data protection will be able to impose much higher fines. Art. 83 of the GDPR calls for fines of up to 20 million or up to 4% of total worldwide turnover.

Conclusions

Data protection, particularly when data of employees are involved, has become increasingly topical in corporate practice due to the pending changes in the Federal Data Protection Act and the GDPR, which will go into effect in May next year. One reason for this can be found in the higher fines for violations of legislation governing data protection. Many questions still remain unanswered in this context. Despite the shift in focus from the national level to the European level due to the GDPR and thorough revision of the Federal Data Protection Act, and in particular its § 26, much will remain unchanged as regards the protection of employee data. Although the changes in the area of protection of data of employees may seem minor, the work that may be required should not be underestimated. For example, the more stringent requirements in terms of documentation and information on data processing that companies will generally face in the future will also apply in the employment area. As regards employee data protection in particular, companies and employee representatives may find themselves faced with numerous new duties due to the possible need to review and revise collective agreements that are already in effect or will be concluded in the future. The latter would therefore be well advised to review their current collective agreements for compliance with the GDPR and the new Federal Data Protection Act on a timely basis and initiate talks to adapt existing arrangements to new requirements.

PHILLIP RASZAWITZ



Act to Strengthen Occupational Pensions of 2018: Overview of New Developments in Labor Law

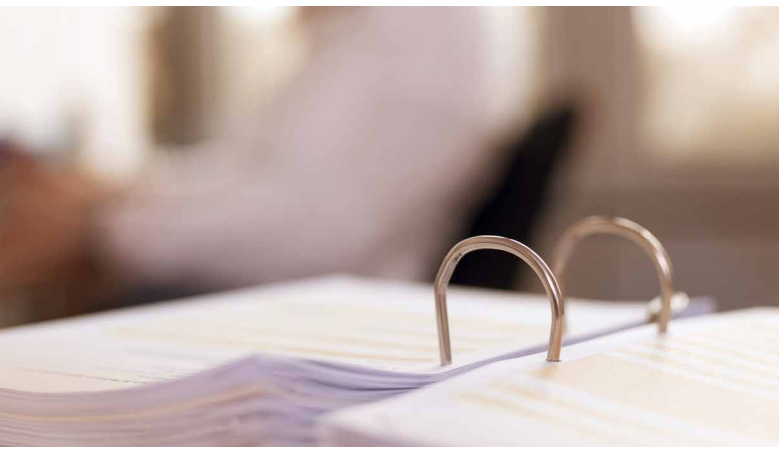
Introduction

When it enters into effect on 1 January 2018, the Act to Strengthen Occupational Pensions will trigger a series of changes in legislation governing company retirement benefits. In addition to the Company Pension Act, (Betriebsrentengesetz – BetrAVG), another fifteen laws and regulations – including in particular the Income Tax Act (Einkommensteuergesetz – EStG) – will be amended. The intent of the legislature is to make company retirement benefits available to more employees, in particular those who work for smaller and medium-sized companies or have low incomes.

The changes in legislation governing employment as a result of the Company Pension Act that will have the greatest impact upon companies are presented below.

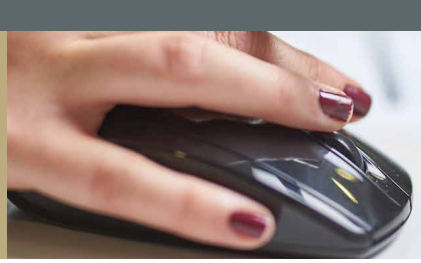
Pay-and-forget model

The key change in this legislation will be the introduction of a new pension model that limits the responsibility of employers to payment of the corresponding contributions (defined contributions). Employers will in the future be able to finance retirement benefits called for in works agreements or employment contracts by making payments to a pension fund, pension society or direct insurer if allowed by or on the basis of collective agreements that contain the requisite escape clause. Pay-and-forget arrangements consisting of direct payments or payments into a providence fund will on the other hand not be permitted. In the case of employers who are not covered by a collective agreement, it will still be possible to include a provision in employment contracts that calls for the application of an arrangement modeled after a collective agreement.



Whereas the courts have in the past refused to accept the use of pay-and-forget arrangements for the purposes of providing company retirement benefits within the meaning of § 1 of the Company Pension Act (see Federal Labor Court 7 Sept. 2005, NZA 2005, 1239 and 1241), such arrangements will in the future flank the models that already exist, i.e., defined benefits, contribution-based benefits and payment of contributions with guaranteed minimum benefits. In the case of pay-and-forget arrangements, contributions can be financed either by employers or their employees and treated as deferred compensation pursuant to § 1a of the Company Pension Act. In the latter case, § 23(2) of the Company Pension Act (new version) requires that agreements between parties to a collective agreement stipulate that the employer must pay an additional 15% of the deferred compensation to the pension insurer if the deferred compensation results in a reduction of the respective employer's social-security contributions.

The unique feature of the pay-and-forget model lies primarily in the fact that the employer's obligation towards employees consists "only" of payment of the contributions to the corresponding pension insurer; unlike current models, the pay-and-forget model makes no provision for minimum or guaranteed benefits. According to the second sentence of § 22(1) of the Company Pension Act (new version), the amount of the benefits may not be guaranteed. The possibility of providing



company retirement benefits in the form of a one-time lump-sum payment does not exist under the pay-and-forget model since this model only makes provision for payment of regular benefits, i.e., in the form of a monthly old-age pension.

Benefits, insofar as they have to do with retirement, become vested immediately. Under the pay-and-forget model, the pension insurer, i.e., the pension fund, pension society or direct insurer, is solely responsible for payment of all benefits to employees. As a result, the liability of the employer that would otherwise be mandatory pursuant to § 1(3) of the Company Pension Act does not exist in the case of the use of the services of an external pension provider. The same applies as regards the duty of employers to review and adjust the amount of contributions pursuant to § 16 of the Company Pension Act and the legal obligation to obtain insurance against insolvency through the Pension Security Association (Pensionssicherungsverein – PSV) pursuant to §§ 7 to 14 of the Company Pension Act. On the other hand, § 23(1) of the Company Pension Act (new version) stipulates that the parties to the collective agreement "should" agree upon payment of an additional amount to secure the pay-and-forget commitments. Since this is, however, (only) a recommendation, failure to make provision for such an arrangement will neither affect the validity of the collective agreement nor result in any liability on the part of the parties to the collective agreement.

Employees that leave a company will be able to remain in the plan of the same pension insurer and continue to pay contributions on their own. Within the year following their departure, they may also opt to have their accrued benefits transferred to another pension insurer if their new employer pays contributions to that other insurer under a pay-and-forget model.

Optional deferred compensation models

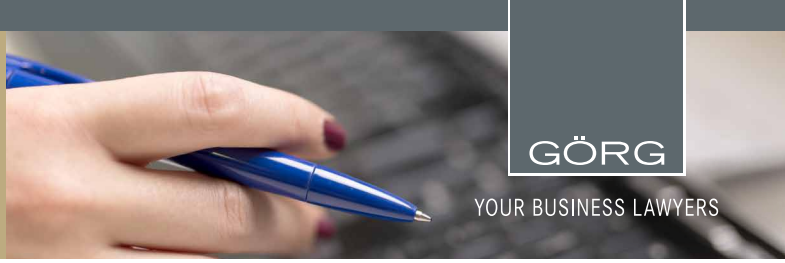
A further change in the area of deferred compensation lies in the fact that § 20(2) of the Company Pension Act (new version) will in the future make provision for collective agreements that enable employers to introduce automatic deferred compensation for all of their employees, for a group of employees or for individual establishments. The employees affected will, however, have the right to object to such automatic allocation of part of their gross compensation within a specific period set for that purpose.

Employers that are not party to any collective agreement can unilaterally introduce a system of options based on a relevant collective agreement or – in the case of establishments with a works council – a works agreement or employment contracts.

Conclusions

The changes in the law that that will accompany the Act to Strengthen Occupational Pensions represent welcome developments and in any case "a step in the right direction" in terms of making company retirement benefits more attractive for companies. The pay-and-forget model will enable employers to achieve much greater cost and planning certainty as regards the introduction and future expansion of company retirement benefits than is now the case with existing models. This applies all the more so in view of the persistent low-interest environment since – unlike in the past – the investment risk is shifted to employees in the case of the pay-and-forget model. In particular smaller and medium-sized companies will – if the parties to the corresponding collective agreements take advantage of their options – be able to choose from among attractive models to offer employees company retirement benefits. However, larger companies that already have retirement plans in place will also be free to take advantage of the greater flexibility and the lower risk (liability) offered by the new possibilities under the law. In such cases, it will be necessary to determine whether and under what conditions systems already in place can be adapted to or replaced by new possibilities on the basis of the specific circumstances.

DANIEL GRÜNEWALD



Customer feedback app = Control of performance subject to consultation of works council?

Decision

In its order of 8 June 2017 (File Ref.: 8 BV 6/16), the Heilbronn Labor Court ruled that an employer was under no obligation to consult his company's works council in connection with the use of a customer feedback app. The court found that a feedback app is not a technical device designed to monitor the conduct or performance of employees within the meaning of § 87(1) no. 6 of the Works Constitution Act (Betriebsverfassungsgesetz – BetrVG) if the employer does not request information on the performance and conduct of personnel and such information is not processed electronically. In the case at issue, the app enabled customers of the employer to provide feedback on specific branch locations. The feedback submitted via the app was manually assigned to various thematic categories and then forwarded to the corresponding various locations of the employer.

Implications for practice

According to § 87 (1) no. 6 of the Works Constitution Act, works councils have a right to be consulted in the case of the introduction and use of technical devices designed to monitor the conduct or performance of the employees. Technical devices are "designed" to monitor conduct or performance if they can be objectively considered suitable for collecting and recording information on the conduct or performance of an employee; the subjective intention of the employer to monitor conduct or performance is irrelevant. Although it is objectively possible to monitor employee conduct and performance through the use of a feedback app, the constellation underlying the decision did not involve independent collection of data by the technical device or automated processing of information. There could be no question of independent collection of data by the technical device since the data were transmitted by third parties who were not asked to do so by the employer, and no automated processing technology was involved since the incoming feedback was sorted and distributed manually. The app was therefore ultimately nothing more than an "electronic mailbox".

The Federal Labor Court had already been called upon to rule on customer feedback on the Facebook page of an employer in the year 2016 (Federal Labor Court 13 December 2016 File Ref.: 1 ABR 7/15). According to the Federal Labor Court, a Facebook page operated by an employer that permits postings on the conduct and performance of employees by selecting "Visitor Posts" is a technical device designed to monitor employees. The availability of the "Visitor Posts" function can therefore be construed to give the works council a right to be consulted. Whether the order of the Heilbronn Labor Court is consistent with the case law of the Federal Labor Court will be determined at the level of the appeal.

Conclusions

Even in the absence of any intention to monitor employee performance, it is still always advisable to carefully determine whether the works council has a right to be consulted before introducing a digital feedback function. In addition, negative customer feedback on the performance and conduct of employees can also have implications at the level of general labor law, for example, in terms of the legal relevance of misconduct reported by customers for the purposes of issuing formal disciplinary warnings.

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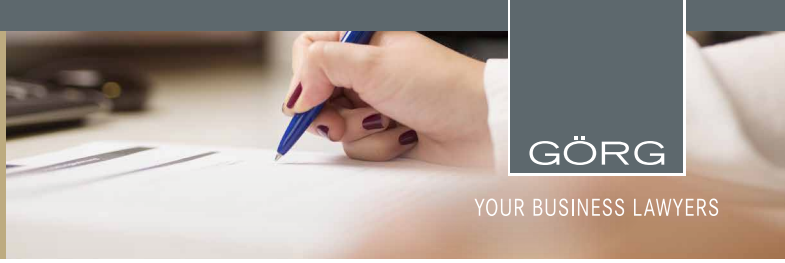


Extended periods of notice in employment contracts

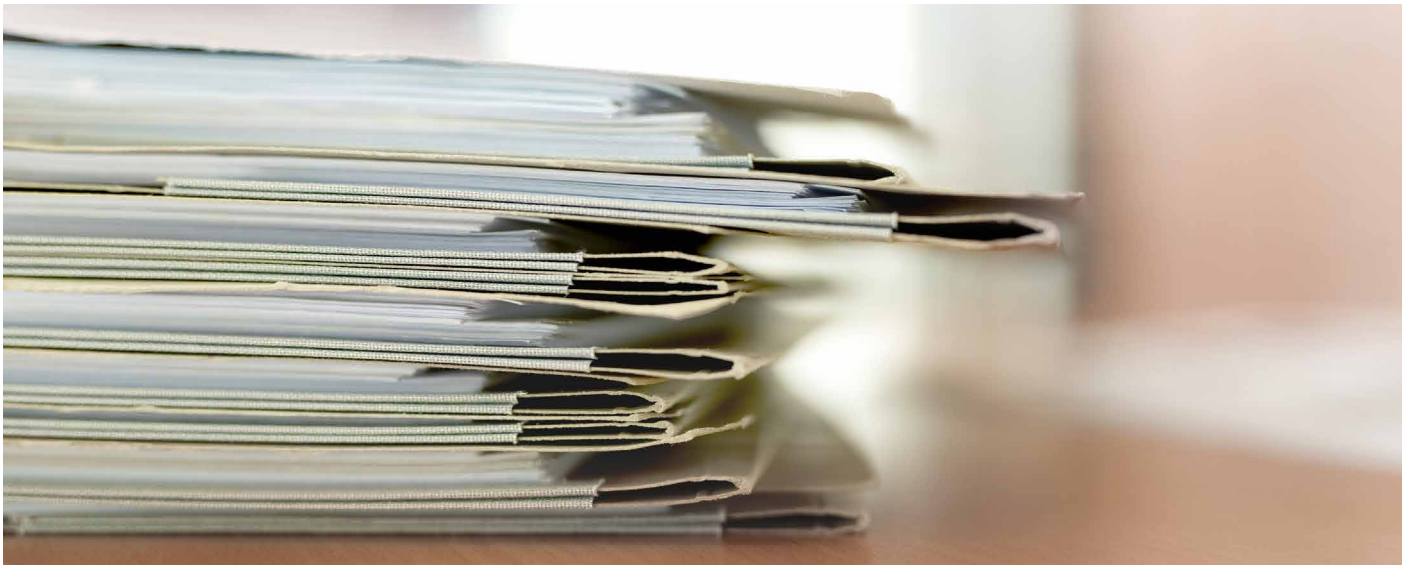
Introduction

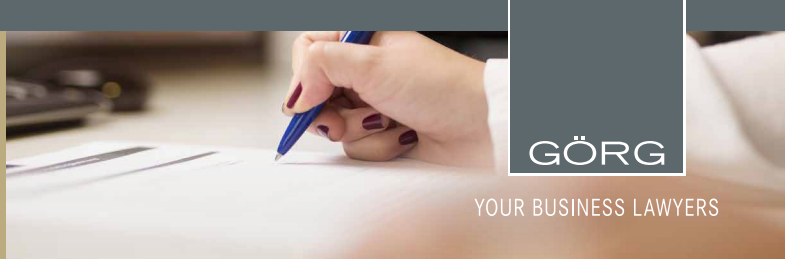
It is often difficult to find suitable employees in today's labor market. That is therefore also one reason to ask what employers can do to retain skilled employees (longer). For example, the design of employment contracts offers certain possibilities, e.g., longer periods of notice. However, the judgment of the Federal Labor Court of 26 October 2017 (File Ref.: 6 AZR 158/16) underscores the fact that it is not legally possible to retain employees indefinitely through the use of contractual constraints.

Decision

A company employed a forwarding agent at a gross salary of 1,400 per month. An addendum to the employment contract called for the possibility of termination by either of the parties with effect as of the end of any month upon three years' notice as well as an increase in the employee's monthly salary to a gross 2,400.00. The possibility of any further pay increase in the course of the next three years was expressly excluded. On 27 December 2014, the employee served notice of termination with effect as of 31 January 2015, which was in compliance with the legal period of notice. In its judgment of 26 October 2017, the Federal Labor Court ruled that the employee was under no obligation to honor the contractual extension of the legal period of notice to three years and that the corresponding provision was invalid.

The court argued that the period of notice formulated by the employer did to be sure lie within the limits prescribed by § 622(6) of the German Civil Code (Bürgerliches Gesetzbuch – BGB) and § 15(4) of the Act on Part-Time Employment and Fixed-Term Contracts (Teilzeit- und Befristungsgesetz – TzBfG), but was significantly longer than the regular period of notice contained in § 622(1) of the German Civil Code, which meant that the clause was invalid pursuant to the first sentence of § 307(1) of the German Civil Code since it placed an unreasonable burden on the employee. After weighing all of the circumstances involved in the specific case, the court found that the extended period of notice represented an unreasonable limitation of





the employee's occupational flexibility, one reason being that this disadvantage was not outweighed by the increase in salary, which was explicitly capped for three years.

Comments

As far as can be told, the highest courts have up to now not ruled on contractual arrangements that extend the period of notice to be observed by employees when terminating their employment. The judgment of the Federal Labor Court therefore provides an elucidating look at the options available for designing contracts, albeit against the background of a rather atypical situation.

According to the statutory model, either of the parties can terminate an employment contract with effect as of the fifteenth or the end of any calendar month upon four weeks' notice. In the case of termination by an employer, the period of notice increases with time up to a maximum of seven months to the end of a calendar month for an employee with 20 years of service pursuant to § 622(2) of the German Civil Code. On the other hand, the statutory period of notice to be observed by the employee remains unchanged. These statutory periods of notice may, however – provided that § 622(6) of the German Civil Code is respected – be extended on the basis of agreements with individual employees. This will also regularly hold if the contract is formulated by the employer. According to § 622(6) of the German Civil Code, however, the contractual period of notice required of an employee may not be longer than the period of notice called for in the case of dismissal by the employer. In addition, § 15(4) of the Act on Part-Time Employment and Fixed-Term Contracts limits the duration of contractual commitments; in the rare case of a long-term employment contract that is, for example, entered into "for life" or for a term in excess of five years, the employee has the right to terminate the employment contract with six months' notice after five years. Otherwise, however, contractual arrangements that make provision for termination by either of the parties, for example, as of the end of a quarter after giving six months' notice, will regularly be permissible and also binding upon the employee.

However, the present judgment of the Federal Labor Court underscores the fact that periods of notice that remain within the limits imposed by § 15(4) of the Act on Part-Time Employment and Fixed-Term Contracts and comply with the provisions contained in § 622(6) of the German Civil Code can also be invalid under exceptional circumstances. When reviewing pre-formulated extensions of periods of notice of termination, it is especially important to make sure that the occupational flexibility of the employee is not unduly restricted. The lower court, the Saxony Higher Labor Court, indicated that the possibility of a period of notice longer than one year can therefore practically be excluded in the case of "normal" positions. The situation may be different when unusual positions in the areas of science or business are involved.

Conclusions

Parties to an employment contract may agree to an arrangement that calls for the same period of notice for the employee as for the employer. In any case, periods of notice longer than a year will regularly not be acceptable if they unreasonably restrict the occupational flexibility of employees, at least as regards positions that are not particularly unusual. Given this background, it is advisable to review contracts calling for extended periods of notice. In the event an agreement is found to be invalid, the statutory arrangement for termination by employees will apply, i.e., four weeks' notice with effect as of the fifteenth or the end of a calendar month. On the other hand, as the party benefiting from the invalid clause, the employer must comply with the extended period of notice.

DR. ADRIAN LÖSER,
JANINA ELLSÄSSER

Manual timekeeping. Always permissible without consulting works council?

Today, companies normally either monitor the time worked by their employees electronically, which requires consultation of the corresponding works council pursuant to § 87(1) no. 6 of the Works Constitution Act (Betriebsverfassungsgesetz – BetrVG), or not at all. However, in the event an employer cannot come to a satisfactory understanding with his company's works council regarding the use of an electronic timekeeping system, the use of a manual time and attendance system can be considered. According to a decision of the Berlin-Brandenburg Higher Labor Court of 22 March 2017 (File Ref.: 23 TaBVGa 292/17), such systems do not require consultation of the works council.

Factual Background

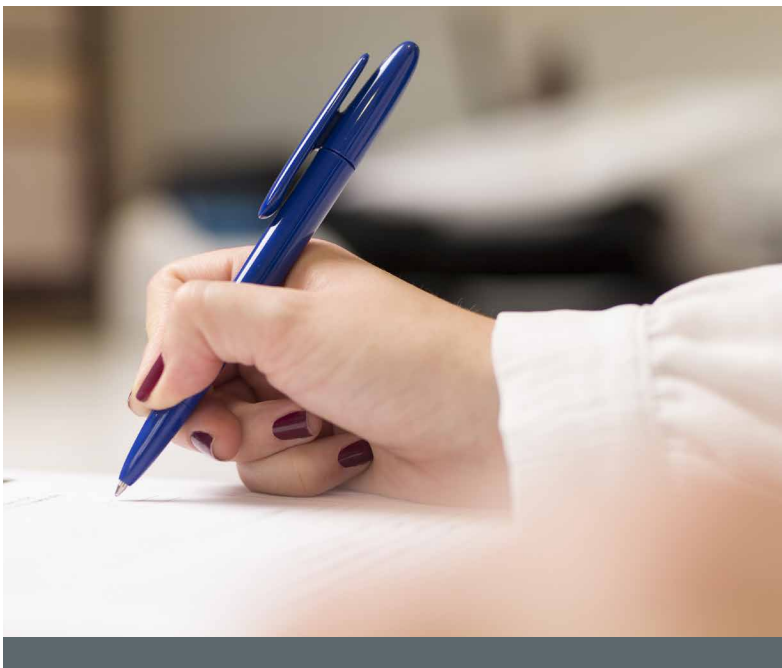
The employer operates two call centers in Berlin that employ several team leaders. Prior to creation of the works council, the attendance of employees at the two locations was recorded electronically without taking into account breaks After the works council was formed, the parties to the works agreement agreed to do away with automated attendance monitoring. The system was deactivated, but the employer then required that a record of the actual beginning and end of the various employees' shifts be kept manually.

The various team leaders were not consistent in the way they recorded the information. Two team leaders recorded the hours of attendance of the employees in their teams themselves, but another team leader instructed employees to report to their superiors punctually at the beginning and end of each shift to have the time recorded by the latter. The employer did not consult the works council on this measure. The works council then requested to no avail that attendance no longer be recorded.

Decision

The proceedings initiated by the works council to obtain a temporary injunction proved unsuccessful. As had the Berlin Labor Court in the first instance, the Berlin-Brandenburg Higher Labor Court denied the works council's petition for injunctive relief. According to the court, such relief presupposes violation of the right of the works council to be consulted by a measure taken by the employer, which was not the case in the situation involving instructions to record attendance manually.

In particular, the court reasoned, no right to consultation existed pursuant to § 87(1) no. 1 of the Works Constitution Act, which makes provision for such a right in matters relating to the rules of operation of the establishment and the conduct of employees in the establishment if they are not regulated by law or collective agreement. But, according to the court, mandatory consultation is limited to matters involving rules governing the conduct of and collaboration between employees in the establishment, in which case consultation of the works council ensures that employees have an equal say in the formulation of rules governing their conduct within the establishment.



However, the court argued, the manual timekeeping at issue in the present case does not have anything to do with conduct, but rather relates to the work of the employees, which is not subject to consultation; it serves specifically to define and obtain information on duties of employees and is exclusively intended to ascertain whether employees comply with the prescribed working hours as regards when they commence and when they end their work. As regards the distinction between rules governing employees and rules governing their work, the court continued, it is in particular irrelevant whether the employees were actively involved in the manual recording of working hours and that attendance is not necessarily also working time

Comments

The decision is to be sure essentially encouraging; it evokes a practicable method for recording attendance and working time without the necessity of consulting the works council, for example, during protracted negotiations with the works council at the level of the conciliation committee concerning the introduction of automatic timekeeping systems.

However, employers contemplating the introduction of manual timekeeping without involving their works council should not rely completely on the decision of the Berlin-Brandenburg Higher Labor Court, for the case law (judgment of the Federal Labor Court from 9 December 1980, File Ref.: 1 ABR 1/78) and scholarly literature acknowledge that works councils must be consulted when attendance lists are kept and employees must report to the individuals keeping the list to have their names entered if they come late to work. This is intended to detect tardiness. In the present case, at least one team leader imposed a similar procedure on employees by requiring that they report to their superiors punctually at the beginning and end of each shift to enable the latter to keep a record of employee attendance. This arrangement ultimately also serves to detect tardiness. It is therefore not possible to exclude the possibility that another Labor Court would recognize a duty to consult the works council on the grounds that the employer's actions pertained to the general conduct of employees.

DR. HAGEN STRIPPELMANN