

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

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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.

## 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 Pia Pracht on +49 221 33660-524 or by email to [ppracht@goerg.de](mailto:ppracht@goerg.de). For further information about the author visit our website [www.goerg.com](http://www.goerg.com).

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