

## Is a Member of the Works Council Entitled to a Smartphone?

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A works council member is entitled to a smartphone if having one is necessary so as to enable him to properly perform his tasks. He or she has a personal discretion in this regard (Hesse Higher Labour Court, Order of 13 March 2017, 16 TaBV 212/16).

### Decision

The employer maintains social services and health institutions at various locations (hospitals, homes for senior citizens, etc.), which are located up to 20 km apart from one another. Many of the employees do shift work or work nights.

The chairman of the works council (who had been released from the duty to work) requested that his employer provide him with a smartphone and the related data plan. He justified his request by stating that he did not only have to be reachable during the day, but also at other times for shift workers. Moreover, he often moved around at the various locations. He asserted that he would be able to perform his works council activities much more efficiently if he had a smartphone, because he would be able to coordinate requests for appointments and deal with them immediately. The employer responded by contending that a smartphone was not necessary since the works council member did not have a lot of appointments outside the business. It argued in addition that only a few of its other employees had a company smartphone.

The Hesse Higher Labour Court allowed the application by the member of the works council for a company smartphone. The court explained that § 40 (2) of the Works Constitution Act (Betriebsverfassungsgesetz – BetrVG) gave the works council member a discretion, which was subject to judicial review. In its view, the works council member was entitled to use modern information and communication technology appropriate to performing his official tasks. He did, however, have to

take into account the company's internal circumstances at all times.

The Hesse Higher Labour Court found that under the specific circumstances of the case before it that a smartphone was necessary. This did not in any case exceed the works council member's exercise of his discretion. The court held that a smartphone would make it considerably easier for the works council member to carry out his activities since the employer had many business locations and applied a multitude of working time models in its business. It also found that the employer could reasonably be expected to bear the costs of the phone (approximately EUR 16 per month).

### Implications for Practice

The type of technical devices which employers are required to provide to works council members is perennially a "hot topic" in co-determination law. Court rulings reflect the technological and social advancements that have been made. However, they often do this after many years of delay.

For example, the Federal Labour Court held even as recently as 2007 that a works council member did not have a general entitlement to his or her own personal computer. The courts have also had a "difficult" time dealing with mobile phones.

Nonetheless, one can now safely assume that a computer with internet access and a phone are part of the standard technical equipment of a works council member. Everything else depends on the company's internal circumstances. Consequently, the Hesse Higher Labour Court's ruling must be classified as one of many decisions based on the facts in the individual case at hand. Businesses in which a smartphone is really needed for day-to-day works council activities will remain in the minority. If an employer decides to provide such a device, it should ensure that the device is configured in

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such a way that it can only be used for business purposes, e.g. by restricting the user's use of services and apps. If the works council member violates usage rules, he or she could be removed from office or even have his or her employment terminated.

Naturally, the court's ruling can also be applied to the employee bodies of church organisations, since they too are entitled to use technical aids to carry out their official tasks.

## 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](mailto:jvoelksen@goerg.de). For further information about the author visit our website [www.goerg.com](http://www.goerg.com).

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