

A works council in Germany is elected by employees and the conduct and procedure of the election is a matter for them too. Nevertheless, the employer usually has an interest in the proper conduct of the election. An incorrect election procedure could result in higher costs for it, as well as unclear and unstable conditions in day-to-day dealings with the council and any collective agreements (“works agreements”) negotiated with representatives elected in an unlawful ballot.

Due to new case law and recent changes to the Works Constitution Act (BetrVG), the election procedure has been simplified. Employers are well advised to familiarise themselves with the recent amendments regarding the election process in good time to avoid subsequent disputes about the validity of the ballot.

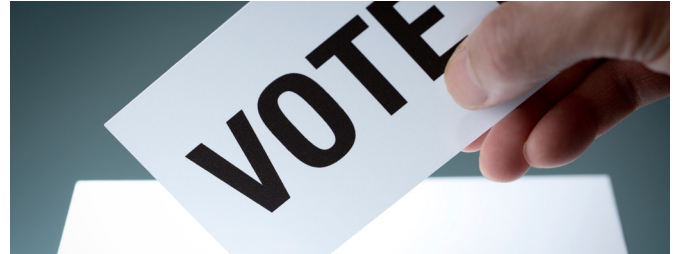
## 1. Timing

The next works council elections in Germany will take place between 1 March and 31 May 2022 in establishments where a works council already exists. An exception applies for those establishments that do not currently have a works council, where employees may elect their representative body outside this period.

## 2. Acceleration of Elections in Smaller Establishments

The number of employees, or the number of employees entitled to vote, in the establishment can have various implications for the election of the council, such as the number of representatives to be elected, as well as the electoral process itself.

**New:** The simplified election procedure applies to businesses with 5 to 100 employees entitled to vote (Sec. 14a BetrVG). In establishments with 101 to 200 employees entitled to vote, the election committee and the employer can agree to use the simplified election procedure; otherwise, the usual more formalistic election process applies.



## 3. Election Committee

The election committee, which consists of at least three employees who are entitled to vote, initiates and carries out the election. The committee is obliged to determine and announce the initiation and execution of the works council election, as well as the outcome. The term of office of committee members begins with their appointment and ends with the convening of the inaugural meeting of the newly elected works council.

**New:** The election committee can now choose to use digital communications and meetings via video and telephone conferences, with restrictions in place for certain activities that require a physical presence (e.g. checking and processing election documents or counting votes). However, there is no obligation on the committee to hold virtual meetings.

The tasks of the election committee are generally completed during its term of office. It is entitled to utilise the support of election workers (who must be employees entitled to vote) during voting and when counting the votes.

## 4. Support of the Election Committee by the Employer

To ensure that the election committee can properly prepare for and initiate the ballot, the employer must provide the necessary information about its employees, who is entitled to vote and who can be elected, upon the request of the election committee. This includes, for example, information about agency workers, executive employees, employees on long-term sickness absence or those on parental leave. Any refusal to provide this information promptly may be considered an interference with the election, which can have consequences under criminal law.

**New:** The election regulations provide for new notification obligations. For example, the election committee may decide to send absentee ballots to employees without their request if their employment is suspended (e.g. because of maternity or parental leave) or they are unable to work (e.g. long-term sickness).

## 5. Employees Entitled to Vote and Be Elected

**New:** The age of eligibility to vote has been reduced from 18 to 16. All employees who have reached 16 are now entitled to participate in the works council election (Sec. 7 BetrVG). This includes agency employees who have been employed for more than three months.

On the other hand, the right to stand for election remains unchanged. Therefore, only employees who have reached the age of 18 and have been at the establishment for at least six months can be elected as representatives (Sec. 8 BetrVG).

## 6. Election Process

Works council members may be elected via the standard or simplified election procedure. The main difference between the two is that under the standard procedure, votes are cast for candidate lists, whereas in the simplified procedure, individual candidates are elected (except where only one valid list of candidates was submitted).

**New:** Candidates for election in establishments with fewer than 20 employees eligible to vote will no longer require so-called "support signatures". In establishments with 21 to 100 eligible employees, candidates for election must be seconded by at least two employees who are entitled to vote, and where there are more than 100 employees eligible to vote, by at least 5% of them. Above this, the signature of 50 employees who are eligible to vote will be sufficient.

Immediately after the election, the election committee publicly counts the votes, announces the outcome of the election and informs the elected employees. Within one week after the election, the election committee must call the inaugural meeting of the newly elected works council. The council will then be in office for four years until the next election in 2026.

## 7. Election Costs

The employer must bear all the costs of the election. This means not only the costs of the election committee (e.g. for engaging a lawyer), but also the costs of any other individuals involved in the works council election. The employer must also bear all other material costs, such as the cost of writing materials, telephone expenses, ballot boxes, voting booths, forms for ballots and seminars for further training, etc. Furthermore, the employer must carry any costs associated with the elections being contested or determined invalid.



## 8. Special Protection Against Dismissal

Members of the election committee have special protection against dismissal and transfer, which begins at the time of their appointment and ends at the end of the committee's term of office. During that time, their employment may only be terminated in extraordinary circumstances (for good cause/a fundamental reason) if the works council gives its prior consent. In addition, members of the committee have protection against dismissal for six months after the announcement of the election results. During this subsequent period, any committee member can only be dismissed in extraordinary circumstances.

The same applies to candidates, whether successful or not: they also have this special protection against dismissal during their candidacy and for six months thereafter. Elected works council members have special protection against dismissal during their term of office plus one further year.

**New:** There is extended protection against dismissal in connection with the establishment of a works council. Instead of only three, the first six employees listed in the invitation to the election meeting now enjoy statutory special protection against dismissal, which only allows termination for good cause (Sec. 15 Para. 3a Dismissal Protection Act – KSchG).

Furthermore, new Sec. 15 Para. 3b KSchG extends the statutory special protection against dismissal to employees who have merely undertaken preparatory steps towards establishing a works council for the first time. Only ordinary terminations for operational reasons remain possible, as does termination for cause. To obtain this special protection against dismissal, it is necessary to submit a publicly certified declaration that the employee intends to establish a works council.

Many employees can, therefore, benefit from special protection against dismissal prior to and as a result of the works council election. If any restructuring is planned during the period of the election or shortly thereafter, it is urgently recommended that employers consider whether this should be postponed or modified.

## 9. Challenges and Invalidity

The completed election can be challenged before the Labour Court if the election breached fundamental regulations concerning the right to vote, eligibility for election or the election procedure, and corrective action has not been taken, unless the breach did not change or influence the final outcome of the election (Sec. 19 BetrVG). Parties eligible to challenge the election outcome include at least three employees entitled to vote, a trade union representative at the establishment or the employer. The election can only be challenged within two weeks from when the results are announced. The regime is different for "extremely serious" breaches that occur during the election; in such cases, it is possible to have a court determine that the election is void without observing the two-week deadline.

**New:** Employers should note that they will no longer be able to contest the works council election results on the basis of an incorrect voter list if the errors in the list are because of information provided by the employer. In this respect, employers are required to pay even greater attention than before to the accuracy and completeness of the employee lists they provide.

## 10. Impact of the Pandemic

In general, there is no reason to postpone works council elections because of the pandemic. However, a situation may arise in which an establishment is temporarily shut down after the election process has been initiated, or where such significant restrictions arise that it is hardly possible to cast a vote at the time specified in the election notice. This may be the case, for example, if a large number of employees are unable to enter the workplace due to quarantine restrictions. In such a situation, the election committee must decide whether it:

- Wishes to continue the election despite the restrictions
- Should postpone the election
- Cancels the election

Employers should bear in mind that the arrangement of a full absentee ballot is only permissible within the strict limits of the statutory regulations. An online election could be challenged and is, therefore, not recommended.

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