

# 10 Important Facts About the 2018 Works Council Elections in Germany

## An Overview for Employers

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### 1. When Will Works Council Elections Take Place in Germany?

The next works council elections will take place in Germany between 1 March 2018 and 31 May 2018 in businesses where a works council already exists. Works council elections principally take place at German companies every four years in the same election year, i.e. 2018, 2022, 2026, etc. An exception from the aforementioned years only exists for businesses where, for example, a works council did not exist in the past or where the works council has not been in office for 12 months since the announcement of the election results.

### 2. Size of the Works Council to Be Elected

The size of the works council that is to be elected depends on the number of employees who are entitled to vote, or the number of employees of the business. If, for example, the business normally has five to 20 employees who are entitled to vote, one works council member must be elected; in the case of 21 to 50 employees entitled to vote, three works council members; in the case of 51 to 100 employees, five works council members; in the case of 101 to 200 employees, seven works council members, and so on.

### 3. The Concept of a Business

Where a business exists, a works council can be elected. A business is an organisational unit with uniform leadership powers where the employer, together with its employees, continuously pursues certain operational objectives. The concept of a business must not be confused with the concept of an enterprise. An enterprise is the employer. Therefore, the employer can maintain multiple businesses (for example in Berlin, Frankfurt, Munich, etc.). This means that a works council can be elected at each individual business. Under certain conditions, businesses of different enterprises can elect a combined works council. The law permits exceptions.

### 4. Election Committee

There are various election procedures. In the normal election procedure, the works council is obligated to appoint an election committee that consists of at least three employees entitled to vote no later than 10 weeks prior to the expiration of its term of office. If necessary, the number of election committee members can be increased in order to properly execute the election. Generally, a substitute member is also appointed for each election committee member in the case of his or her absence. Election committee members have the right to receive comprehensive training on how to execute the election. The employer must bear the training costs.

The election committee is obligated to determine and announce the initiation and execution of the works council election, as well as the outcome of the election. The term of office of the election committee members begins with their appointment and ends with the convening of the inaugural meeting of the newly elected works council. The tasks of the election committee are generally completed during its term of office. The election committee is entitled to utilise the support of election workers during voting and when counting the votes.

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

In order to ensure that the election committee can properly prepare for and initiate the election, the employer is obligated to provide the necessary information about employees, who are entitled to vote and who can be elected, upon request of the election committee. This includes, for example, information about leasing employees and executive employees. Any refusal to provide this information, or the delayed handover of such information, may be considered an interference with the election, which can have consequences under criminal law.

### 6. Employees Entitled to Vote and to Be Elected

Employees who are entitled to vote are those employees who have reached the age of 18 on the date of the works council election. This includes leasing employees, who will prospectively be employed for more than three months. Executive employees within the meaning of Section 5(3) of the German Works Constitution Act (*Betriebsverfassungsgesetz*) are not considered employees who are entitled to vote. However, the requirements for defining who is an executive employee are very high: An executive employee is anyone who, according to the employment contract and position within the company or business, is authorized to independently hire and dismiss other employees or has a general power of attorney or commercial power of attorney (*Prokura*), and the commercial power of attorney is not insignificant in the relationship to the employer, or who regularly performs other duties, which are important for the existence and development of the enterprise or business and require special experience and knowledge, whereby they are able to freely make decisions without instructions. Employees who can be elected are all employees who are entitled to vote and have belonged to the business for at least six months, except for leasing employees.

## 7. Execution of the Election

When electing the works council, there are different election procedures, the simplified and the normal election procedure. In addition, members can be elected individually or via proportional representation. In the normal election procedure, the election committee issues a so-called election notice and prepares and publishes the electoral roll. Employees entitled to vote can then submit election nominations or election lists. If they receive enough signatures, they will be accepted for the upcoming works council election. The votes are cast on election day or in advance by postal vote. Immediately after the election, the election committee publicly counts the votes, announces the outcome of the election and informs the elected employees. One week after the election day, the election committee must convene the inaugural meeting of the newly elected works council members. The newly elected works council will then be in office for four years until the next works council election in 2022.

## 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 election committee's term of office. During their term of office, their employment relationships may only be terminated extraordinarily (for an important reason) and without notice with the consent of the works council. In addition, members of the election committee have subsequent protection against dismissal for a period of six months after the announcement of the election results. During this subsequent period, any election committee member can only be dismissed extraordinarily. Furthermore, candidates 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 and for one year thereafter. However, election workers do not have any special protection against dismissal. As can be seen from the above, many employees can obtain special protection against dismissal prior to and as a result of the works council election. If any restructuring is planned during the time period of the works council election or shortly thereafter, it is urgently recommended to check whether this can be postponed.

## 9. Election Protection and Election Costs

It is prohibited to prevent or obstruct the election of the works council. Furthermore, it is not permitted to influence the election of the works council by creating or threatening disadvantages or granting or promising advantages. If the employer takes such actions, this is considered a crime, which is punishable by imprisonment.

The employer must bear all costs of the works council election. This means that the employer not only bears the costs of the election committee, but also the costs of any other individuals who are involved in the works council election. Therefore, the employer must bear all other material costs, such as the costs for writing materials, telephone expenses, ballot boxes, voting booths, forms for ballots, applicable laws and seminars for further training. The same applies for the costs that are necessary for engaging a lawyer for the election committee. Furthermore, the employer must bear all costs for any contestation or determination of the invalidity of the works council election.

## 10. Challenges and Invalidity

The 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 such breach could not have changed or influenced the outcome of the election. Parties who are entitled to challenge the election include at least three employees entitled to vote, a trade union represented at the business or the employer. The election can only be challenged within two weeks from the date on which the election results are announced. If an extremely serious breach took place during the election, it is possible to have a court determine that the election is invalid. There is no deadline for determining the invalidity of the election. Any procedure to challenge or determine the invalidity of the election can take several years until a final and legally binding decision is made.

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