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Works Council may request the List of severely disabled and Equivalent disabled Employees and Executives (Federal Labour Court, decision dated 09.05.2023 - 1 ABR 14/22)

Dear Reader,

Today we would like to inform you about a recent decision of the Federal Labor Court (BAG, decision dated May 9, 2023 - 1 ABR 14/22), which may lead to significant consequences in the future for employers in whose companies a works council is constituted.

I. Right to Information of the Works Council

The works council of a waste disposal service provider wanted to ensure that the company fulfilled its various obligations towards severely disabled and equivalent disabled employees in the company. For this purpose, the works council demanded that the employer provide it with a list of all severely disabled persons and persons with equivalent disabilities employed in the company. In order to dispel any possible data protection concerns on the part of the employer, the works council had already drawn up a comprehensive data protection concept in advance to safeguard the confidentiality of personal data.

Regardless of this, the employer refused to hand over the information and was content with the information that the threshold for the election of a representative for severely disabled persons in the company had been reached.

II. resolution and appeal procedure

This prompted the works council to assert its request for information in court by way of a resolution procedure.

The first two instances granted the works council's application in full, whereupon the employer lodged an appeal with the Federal Labor Court.

The appeal on points of law was unsuccessful with the exception of a subsidiary motion. Instead, the BAG finally granted the works council's request for information, with the following argumentation:

III. Obligation to promote severely disabled persons or persons of equal status

The BAG recognized that the works council not only has the task of working towards the election of a representative for severely disabled persons in accordance with Section 176 sentence 2 half-sentence 2 SGB IX. ("German Act on Social Responsibility") Rather, it has the task of promoting the integration of severely disabled persons or persons with equal status both in accordance with Section 80 (1) No. 4 BetrVG ("Works Council Constitution Act") and Section 176 Sentence 1 SGB IX. This uniform duty to promote is merely concretized by the tasks specified in § 176 sentence 2 SGB IX, but goes beyond this enumeration. In particular, the works council must ensure that the obligations incumbent on the employer under Sections 154, 155 and Sections 164 to 167 SGB IX are fulfilled for the benefit of severely disabled



persons and persons of equal status.

Within the framework of this, the works council should - already preventively and not only in the case of dispute - monitor whether the employer has, for example, set up the workplaces of severely disabled persons and persons with equivalent disabilities in a manner suitable for the disabled and equipped them with the necessary technical work aids or whether the employer - insofar as shorter working hours are necessary due to the type or severity of the disability - enables part-time employment.

In order to be able to fulfill its comprehensive monitoring duties, the works council is entitled to information on the names of severely disabled persons and persons with equivalent disabilities pursuant to Sec. 80 (2) Sentence 1 Half Sentence 1 BetrVG.

IV. Jurisdiction also for Executive Employees

The BAG also dealt with the question of whether the works council is also responsible for executive employees in this case, even if they are not employees within the meaning of the BetrVG and are therefore excluded from its responsibility in principle. The BAG confirmed this with reference to the duty of the works council under Sec. 176 SGB IX to promote the integration of severely disabled "people". According to the BAG, both the genesis of the provision and its meaning and purpose indicate that the legislator intended the most comprehensive and complete possible protection of severely disabled persons in the company. In

particular, the need for protection of these persons is exclusively due to their special needs; their respective position and powers in the company or enterprise, on the other hand, play no role in this context.

V. Admissibility under Data Protection Law

Finally, the BAG held that the disclosure of the data to the works council is generally permissible under data protection law pursuant to Section 26 (3) and Section 22 (2) of the German Federal Data Protection Act ("BDSG").

VI. Comprehensive Data Protection Concept

In addition, the BAG acknowledged the data protection concept prepared by the works council and found it to be sufficient.

In this specific case, the works council had stipulated that only the chairman of the works council or - if he was prevented from doing so - his deputy were authorized to receive personal data on paper. Only a predetermined e-mail box was to be used for electronic transmission. The data was retrieved via a password-protected computer located in the works council office. The password was only known to the members of the committee and only they had access to the lockable office. Any personal data in paper form was stored in a locked cabinet, the key to which was only available to the works council chairman or his deputy. The transfer of personal data to mobile data carriers was not prohibited in principle, but required the prior consent of the chairman or his deputy, which could only be granted under specific conditions. The



data was to be stored only for as long as the purpose of the processing required. In addition, every six months it was to be checked whether the stored data was still needed - if not, it was to be deleted immediately. Finally, the concept included requirements for raising the awareness of the committee members by providing information on data protection.

Conclusion:

It can be assumed that in the future works councils will assert claims for information with regard to severely disabled employees and employees with equivalent disabilities in the company with reference to the decision discussed here. However, the decision does not give works councils carte blanche or grant them a right to information per se and without further preconditions. Rather, this will only exist if the works council submits a comprehensive data protection concept with the request for information that does justice to the legitimate

interest of the employees concerned in dealing with sensitive personal data.

Our employment law team will be happy to answer any questions you may have on the subject of information claims and co-determination rights of employee representatives in your company.

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