

Excused Absence of Members of the Works Council to Attend Council Functions

Among other things, section 46, paragraph 2, German Federal Personnel Representation Law (subsequently referred to as "the law"), stipulates that the loss of working time that is necessary for the orderly performance of works council functions shall not result in a reduction of salaries and wages. In the following, guidance is provided which is based on prevailing case law established by German courts on this highly sensitive legal provision.

The members of the works council have been elected to an office controlled by law. As such, they must have the time to duly exercise their official functions. Although the activities performed by the works council are not duties owed by virtue of the employment contract, as a rule they have priority over the regular duties of the member since they are considered necessary for the accomplishment of the appropriate and orderly duties of the works council.

The loss of working hours does not result in loss of pay provided that the loss is required, i.e., objectively necessary for the orderly performance of works council functions. In individual cases, the question of objective necessity can be an issue. However, the determining factor is whether or not the works council member, based on a mature evaluation of the facts and circumstances, can reasonably consider the loss of working time to be just and proper.

By virtue of the above legal provision, the release from duty to perform works council functions is granted in general. That means that even a works council member, who is not released from duty full-time for the exclusive performance of works council duties, may discontinue his or her regular duties on a particular occasion to perform a works council function. He or she does not need the supervisor's approval but is compelled to make the decision to do so according to his or her best judgment. For instance, it would be practically impossible for a works council member to receive an employee grievance if he or she had to request concurrence from the agency chief to discontinue his regular duties for this purpose. The same holds true for leaving the work site; no concurrence of the agency chief is needed. On the other hand, visiting individual employees at their work sites or inspections of work sites are only authorized in agreement with the agency chief.

The functions of the works council normally occur at the agency. Some of these functions are meetings such as the monthly meeting with the agency chief, office hours, receipt of grievances, all advance work (e.g., study of documents) to exercise the right of cooperation and codetermination, consultation with employees, etc. However, functions of the works council may also occur outside of the agency, e.g., activities at outlying parts of the agency, negotiations with the intermediate level works council, attendance at labor court hearings with the works council being party to the litigation, etc. All functions that are not explicitly assigned by the law or cannot be directly derived from it are not part of the functions to be duly performed by the works council. Such matters include for example, representation of employees in court, attendance at court hearings in which the works council is not a party to the litigation, attendance at functions which the works council member attends for his or her own personal benefit, etc.

As a rule, the works council member does not have to file a formal request for release from contractual duties in order to perform a legitimate works council function. He or she must simply inform the supervisor that the performance of a works council function requires his or her temporary release and the time required for performing the function. There is no requirement to describe the type of the works council function requiring the temporary release (Federal Labor Court decision of 15 Mar 95, case file number 7 AZR 643/94). The works council member is by no means required to disclose the name of the employee visited or to release details on the problems or issues to be discussed. However, even if in the works council member's opinion a

request for release from duties has unjustifiably been denied in the works council member's opinion, he or she may not leave the work site against the orders of agency chief. This would be incompatible with the principles of German labor law in general as well as with the principle of cooperation in mutual confidence vested in section 2 of the law. On the other hand, an unfounded refusal of the agency chief to grant release from duty would violate the so-called hindrance prohibition (*Behinderungsverbot*) according to section 8 of the law..

Working time lost due to the performance of works council duties must be necessary. The function which causes the loss of working time may not involve the handling of a matter which does not require negotiations (*nicht verhandlungsbedürftig*) or which is fictitious altogether. Negotiations may not be extended beyond the time actually needed. The agency may retroactively review the necessity of the working time lost. In cases of disagreement, neither the agency chief's nor the works council's unilateral decisions are binding since in the last analysis, the labor court will have to render a final and binding decision.

Abuse of the entitlement to be released from duty for the performance of works council functions is not only a violation of the respective works council member's employment contract which can be used as a basis for disciplinary action but at the same time a gross dereliction of duty in the meaning of section 28, paragraph 1 of the law, which can serve as a basis for a management initiated court action for the exclusion of one or more members from the works council or the dissolution of the entire works council.