



Press Release

CAN THE WORKS COUNCIL BAN THE EMPLOYER FROM HAVING A FACEBOOK PAGE?

Munich, 12 December 2016 – The German Federal Labour Court (BAG) will decide this Tuesday if a works council has any right to co-determination regarding the set-up of a Facebook page by a company (file reference: 1 ABR 7/15).

These proceedings are based on the following case: A blood donation service is operating a Facebook page with the aim of attracting new donors. Facebook users can leave comments on the page. Approximately ten employees of the blood donor service have the authorisation to maintain the page via their own administrator access and to contribute posts. In addition, the administrators also received anonymous access during the course of the court proceedings. After blood donors had posted two comments criticising employees of the blood donor service and some employees had raised concerns regarding the operation of the Facebook page, the group-wide works council claimed a "co-determination right" regarding the operation of the Facebook page vis-à-vis the employer.

The council argued that the operation of the page was a measure to "control the behaviour and performance" of employees "by means of technology" and furthermore served to "influence the behaviour" of employees. Pursuant to the German Works Constitution Act, an employer may only implement such measures upon prior consent by the works council (so-called "enforceable co-determination"). In this case at hand, it is not only possible for blood donors to review the behaviour of the employees on the Facebook page it is also possible to identify when an administrator and which administrator publishes a post on the page. The works council now requests that the blood donor service shuts down the Facebook page because the council was not involved in setting up the page. While the Dusseldorf Labour Court granted this request, the Dusseldorf Regional Labour Court overturned that decision. The works council has subsequently lodged an appeal.

"Should the BAG, against all expectations, agree with the group-wide works council, companies would actually have to shut down their Facebook pages upon the works council's request. It is true that the prerequisite for this to happen would be that the council did not



Press Release

approve the set-up of a Facebook page beforehand. However, my guess is that not many companies have obtained the consent of their works council regarding a Facebook page", says *Wolfgang Lipinski*, Labour Law Specialist at the international commercial law firm BEITEN BURKHARDT. "Shutting down such pages would significantly damage the reputation of the companies affected." Being asked about putting this decision into a legal context, *Lipinski* states: "The present legal issue is of paramount importance in practice as many companies have a Facebook page. I am of the opinion that the works council does not have a claim for injunction. A customer's negative comment about an employee does not constitute a technical measure for the employer to monitor their employees. In many cases, Facebook is merely one of several advertising platforms and/or communication channels for companies. What is more, the works council has no claim for injunction either if clients complain about an employee by letter, email or telephone."

Regarding cases where employers set up a Facebook page for the first time, the lawyer explains: "Should the BAG, against all expectations, accept an enforceable co-determination right of the works council regarding the set-up of an employer-operated Facebook page, the employer does have an option to set up a page even if the works council rejects the employer's request. In this case, the employer can enforce this against the will of the works council by means of so-called conciliation board proceedings led by a neutral chairman. In general, however, the employer would definitely not be allowed to set up a Facebook page without involving the works council anymore."

Dr. Wolfgang Lipinski is a Labour Law Specialist and a Partner at BEITEN BURKHARDT's Munich office.

He is available for further information, statements and guest contributions.

Contact:

Dr Wolfgang Lipinski

Phone: +49 89 350 65 - 1133

Email: Wolfgang.Lipinski@bblaw.com



Press Release

Public Relations (Labour & Employment Law)

Markus Bauer

Phone: +49 89 350 65 - 1104

Email: Markus.Bauer@bblaw.com

Information about BEITEN BURKHARDT

- BEITEN BURKHARDT is an independent international commercial law firm with a focused range of services and some 280 lawyers working in 8 locations.
- Through our long-established offices in Germany, Brussels, China and Russia we advise large and mid-sized companies and corporate groups from various industries, banks and financial institutions as well as the public sector.