

Works Council Compensation

1. Principles of Works Council Compensation

Under German law, members of the works council shall perform their duties free of charge. However, they are exempted from their obligation to work while payment of their contractual remuneration continues. Additionally, members of the works council must not be disadvantaged or favoured when performing their duties pursuant to Section 78 Sentence 2 of the Works Constitution Act (*Betriebsverfassungsgesetz – BetrVG*). This applies in particular with regard to their occupational development. Section 37 (4) of the Works Constitution Act specifies this prohibition of discrimination to the effect that the remuneration of a works council member may not be lower than the remuneration of “comparable employee with the customary occupational development within the business unit”. The prohibition of disadvantageous and preferential treatment is particularly relevant in cases where works council members are released from their work duties. This also includes cases in which works council members are not completely released but nevertheless do not have the same development as comparable employees because of their workload as a works council member.

2. Determination of the comparison group

The customary development of comparable employees is determined by firstly identifying the employees comparable with the works council member at the time of assuming the works council position. Employees who are carrying out **similar tasks with essentially the same qualifications** and who are professionally and personally qualified to the same extent as the works council member when taking up his position form the comparison group. Although, the question of comparable qualifications cannot only be assessed based on formal criteria (e.g. educational level), such criteria can nevertheless be used as indicators.

3. Prohibition of discrimination and preferential treatment

As mentioned above, the prohibition of discrimination and preferential treatment means that released works council members may not be deprived of their professional development because of their works council office. Otherwise, they would be discriminated compared to the comparison group. Therefore, the **customary occupational development of the members of the comparison group** has to be considered when determining the works council member’s remuneration. However, such professional development must be so typical that, due to the circumstances and usual course of events, it can be expected with regard to at least the majority of comparable employees. The assignment of higher-value activities can e.g. only be

seen as customary, if this happens in accordance with the usual business practice (e.g. regular promotions) or if the majority of comparable employees has achieved such promotion. If only one comparable employee exists, the works council member’s remuneration adjustment is determined based on this one comparator only.

4. Ongoing remuneration adjustment

Therefore, a continuous adjustment of the assessment basis to the salary of comparable employees is required. The employer must continuously adjust the remuneration of the works council member according to the remuneration development of comparable employees with customary occupational development. If the employer finds that an incorrectly adjusted remuneration was granted in the past, the employer is obliged to adjust the works council member’s remuneration retroactively while observing preclusion and limitation periods.



5. Hypothetical promotion

In addition, a claim for a higher remuneration may also arise from the fact that the works council member currently or in the past would have been promoted to a higher-remunerated position in accordance with customary company selection criteria. This presupposes that (i) a promotion position existed in the past or will exist in the future and that either (ii) an actual application has been unsuccessful due to the release of the works council member from work duties or (iii) that a fictitious application, which was not submitted due to the release, would have been successful without the release.

6. Which other compensation components are to be granted?

There may be no deviation from the so-called lost remuneration principle that is applied for works council members. This also applies to other remuneration components. The following simple principle applies: **If the works council member receives remuneration components as a compensation for the work as a works council member, then it must continue to be granted during a release. If, however, a payment serves the purpose of reimbursement of expenses, which no longer occur during the release, then it is not to be granted any longer.** According to this principle, Christmas bonuses, holiday pay, attendance bonuses and capital formation payments, for example, must continue to be paid to the works council member. This generally includes overtime allowances as well. The same applies to company cars, if private use is permitted and this is considered a monetary advantage. However, a company car for private use may not be made available to a works council member without any further considerations. If the works council has no claim to private use of a company car due to his occupational activity, he would also not have such a claim according to the prohibition of preferential treatment just because of his position as a works council member.

7. Consequences

A violation of the prohibition of discrimination and preferential treatment can sometimes have serious consequences, up to and including imprisonment, for the violating persons. According to the Works Constitution Act, the person who discriminates against or favours a works council member for the sake of his activity faces a prison sentence of up to one year or a fine. In addition, the works council or a trade union represented in the company may file a cease and desist application with the labour court. Additionally, the violating person can also commit a criminal offence vis a vis the company. For example, the prohibition of the deduction of operating expenses often threatens to make the company liable to prosecution for tax evasion in the event of a prohibited preferential treatment. It is also conceivable that the offender could be punished for embezzlement. The fact that a conviction is not only theoretically but also practically possible is shown not the least by a decision of the German Federal Court of Justice in 2009. In this case, the released works council chairperson of the VW group received salaries at manager level and was sentenced to imprisonment for aiding and abetting serious embezzlement and inciting works council favours. His manager was also sentenced to probation and a fine for embezzlement.

8. Practical guidelines

In particular, due to the partly drastic possible consequences of wrong works council remuneration, employers are urgently advised to exactly document, who is considered as a comparable employee and how the comparison group is determined. This is supposed to happen at the beginning of the activity of a works council member, at the latest by the time of a release from work duties. This can also be done by means of an informal agreement with the works council. Furthermore, the remuneration of works council members should be reviewed at regular intervals, e.g. within the framework of standard company salary discussions.