Bloomberg BNA

Daily Labor Report®

NLRA

After workers at a Volkswagen plant in Chattanooga, Tenn., rejected an attempt by the United Auto Workers to gain representation, the company continued to express interest in bringing in a German-style works council, Kristin L. Oliveira of Hirschfeld Kraemer LLP and Jan Tibor Lelley of Buse Heberer Fromm write in this BNA Insights article. Although works councils are typically required in the European Union and nearly every VW plant in Europe has one, U.S. labor laws may prevent their implementation, the attorneys say.

A U.S. company wishing to voluntarily introduce such a system must carefully weigh the pros and cons of operating a business with this level of employee input, the authors say. The real challenge for American businesses, they say, is whether such a process would provide benefits to the company and workers or place undue restrictions on management's ability to operate its business productively and profitably.

Can Works Councils Be Legally Imported From the EU and Germany?

BY KRISTIN L. OLIVEIRA AND JAN TIBOR LELLEY

A Volkswagen plant in Chattanooga, Tennessee, was recently in the news when its workers rejected an attempt by the United Auto Workers to establish a union at the auto factory. Even though management did not campaign against that effort, the UAW still lost by a slim margin. The plant was opened in 2011 and employs 2,500 workers.

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Following the vote, local management continued to express interest in bringing a German-style works council to the Chattanooga plant in an effort to allow its employees meaningful input into the plant's operations. The secretary-general of VW's German works council issued a statement that the rejection of the union ''has not changed our goal of creating a works council in Chattanooga.''

These works councils are typically required in the European Union, and nearly every VW plant in Europe has one. The challenge, however, is that U.S. labor laws may prevent the implementation of such a process and American unions see this effort as threatening their future. After all, if workers can have a say in how their working lives are impacted by virtue of a works council, why do they need to pay union dues?

Works Councils in the EU and Germany

In the European Union (EU) and Germany, works councils exist on the cross-border and the national level. A cross-border works council is called a European Works Council, which must be established according to

 ISSN 0418-2693

an EU directive, if an employer in the EU has 1,000 or more employees with at least 150 employees in two member states of the EU. A European Works Council has no less than one member for each member state of the EU where the company operates. In contrast to the German national works councils, the European Works Council has only information and consultation rights, but no ''co-determination'' (or co-decision making) rights with management.

In Germany, works councils exist at the group, company and plant level. The most important level is the plant level, where works councils are elected for a four-year period. The Works Constitution Act stipulates the election process in detail, which is run by an election committee with active involvement of all unions who have a membership in the respective plant.

The number of candidates elected to the works council depends on the number of employees in the plant and can vary from one to over 35 participants. For example, if German law were to apply to VW's Chattanooga facility with its 2,500 workers, 19 members would be elected to a works council.

The works council represents the employees of an employer's branch or office, and exercises various information, consultation, and co-determination rights with the employer. For example, the employer may not implement workplace monitoring or bonus schemes without the works council's prior consent.

The works council must be informed (although the council's consent is not required) a week in advance before issuing a notice of termination of an employee's employment contract. Any termination without such prior information to the works council is legally invalid.

If the employer and the works council cannot reach agreement regarding their disputes, they will need to institute proceedings in front of a conciliation committee. Rulings and decisions made by the conciliation board replace the consent of the management and works council.

The German works council system in its current form has been in place since 1952, with a substantial amendment occurring in 1972. It is widely seen as a cornerstone of German labor and employment law and deeply rooted in the everyday operations of most German employers. In present form, German works councils consult with management regarding:

- the hiring and promotion of employees who are not senior management employees (consultation of the works council is only required to present information beforehand; there are no co-determination rights);

- the termination of employees (consultation and information-sharing with the works council);

- working time (co-determination with the works council is required, and if no agreement is reached between management and works council, then the conciliation board decides); and

- substantial changes in the business organization (only consultation and information-sharing with the works council is necessary, rather than co-determination).

If properly utilized, European works councils can be an effective vehicle for obtaining meaningful employee input and can help with employee morale by allowing workers to feel they have a significant impact on the company's operations. However, care must be taken so as not to allow these councils to ''run amok'' and to negatively impact important managerial decisions. Putting aside the legal issues with implementing such a system in the American workplace under U.S. law (as discussed below), an American based company wishing to voluntarily introduce such a system must carefully weigh the pros and cons of operating a business with this level of employee input.

Challenges of Works Councils Under the NLRA

Works councils do not exist in the U.S. There is no provision in federal labor law that establishes or requires works councils and, in fact, the National Labor Relations Act (NLRA) may prohibit the formation of an EU or German-style works council in a union or non-union environment. This is because the NLRA states that it is an unfair labor practice ''for an employer to dominate or interfere with the formation or administration of any labor organization or to contribute financial or other support to it.'' (29 U.S.C. § 158(a)(2)) Congress' purpose behind the broad statute was to abolish sham ''company-dominated unions'' that existed in the 1930s and interfered with an employee's right to self-organize.

In examining whether works councils might survive a legal challenge, the first question is what constitutes a labor organization. Under the broad statutory definition found in Section 8(a)(2) of the NLRA, a labor organization includes not just a union, but ''any organization of any kind or any agency or employee representation committee or plan'' that:

(1) consists of employee participation;

(2) exists for the purpose of ''dealing with'' the employer; and

(3) concerns grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. 29 U.S.C. § 152(5) (2014).

In the 1980s, many American businesses considered creating employee participation groups in response to the perceived success of worker committees and ''quality circles'' in Japan that helped companies improve quality and efficiency. The National Labor Relations Board stated in *Electromation v. NLRB*, 309 NLRB 990, 142 LRRM 1001 (1992), that if a management-created employee participation group serves as a mouthpiece for its employees, then it is an unlawful company-dominated labor organization. According to the Board, such a determination will be made on a case-by-case basis depending upon the actual facts and circumstances surrounding the creation and duties of such a committee.

What constitutes employee participation? Employee advisory committees easily meet the ''employee participation'' element of the Section 8(a)(2) test, as these committees generally call for employee participation in a group setting to discuss and develop ideas and recommendations for management. No official group is necessarily required. The Board has held that a group of individuals may comprise a labor organization even if the group lacks a constitution, bylaws, elected officials, formal meetings, dues, or other formal structure. *S & W Motor Lines, Inc.*, 236 N.L.R.B. 938, 942, (1978).

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Employer domination or interference suggests unlawful organization. By virtue of how employee teams or advisory committees typically operate, there may be some level of control or interference by the employer to meet this element of the Section 8(a)(2) test. In some decisions, the Board has interpreted this element broadly, finding that if an employer establishes, administrates, or supports an employee committee, determines the structure and function of a committee, or contributes financially in any manner, then there is sufficient employer interference. *Electromation,* at 990. If the employer decides or suggests who should serve as a committee representative, this would also constitute employer ''domination.'' Even if the employer lacks any anti-union animus or has no intent to interfere with employees' rights to organize, the employer may still be viewed as ''dominating'' an organization.

What does 'dealing with' actually mean? Consequently, determining whether an employee team or a works council is an unlawful labor organization under the NLRA will depend on whether the team or group exists for the purpose of ''dealing with'' the employer. The Board has issued many decisions describing when an employee committee ''deals with'' the employer. It is noteworthy that ''dealing with'' is not synonymous with the more limited term of ''bargaining with,'' as in a collective bargaining setting. ''Dealing with'' can involve a broader range of circumstances.

For example, in *Electromation v. NLRB*, 35 F.3d 1148, 147 LRRM 2257 (7th Cir. 1994), the Seventh Circuit upheld the Board's decision that the employer's ''action committees'' were prohibited under Section 8(a)(2). There, the employer had five action committees each consisting of one or two managers and about six employees. Employees volunteered to participate and managers made the ultimate decision regarding who could sit on the action committees.

The committees were designed to discuss and develop proposals for management's consideration on issues regarding the company's policies. Employees were expected to obtain ideas from their coworkers and bring proposals to management.

The Board determined that the action committees were employer-created labor organizations because the committees existed for the purpose of ''dealing with'' the employer regarding work conditions. Further, the committees attempted to act as a representative of employees. This was because the action committees were part of a bilateral mechanism involving proposals from the employee committees concerning the subjects listed in Section 8(a)(2)(5), coupled with real or apparent consideration of those proposals by management.

There was considerable bilateral communication, including ''give and take'' discussions between management and the committees and management would ''sit down and work with'' them. The Board held that these committees ''were dealing with'' the employer and fell squarely within the ambit of an impermissible labor organization.

The Board elaborated on the concept of ''dealing with'' the employer six months later in *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 143 LRRM 1121 (1993). In *E.I. du Pont*, the Board established a ''bilateral mechanism'' test to determine if a committee was ''dealing with'' the employer. A bilateral mechanism ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, and management responds to these proposals by acceptance or rejection through word or deed.

Under those instances, the employee action committee is an unlawful labor organization under Section 8(a)(2). At the same time, the Board declared that an employee group involved in ''brainstorming'' is not engaged in dealing because the group's purpose is to merely develop ideas. If the group only makes proposals, the brainstorming process is not dealing with management. Likewise, use of suggestion boxes where employees make proposals to management is not considered ''dealing with'' management because the employees are acting individually, rather than as a group.

Another example of an organization unlawfully ''dealing with'' an employer was found when an employee-only grievance committee ruled for an employee on a grievance issue and recommended rehire. The employer disagreed and returned the recommendation to the committee for reconsideration. Thereafter, the committee denied the grievance. The Board determined that this grievance committee's practice constituted ''dealing with'' the employer because the parties went ''back and forth explaining themselves until an acceptable result was achieved.'' 317 N.L.R.B. 1110, 1114, 149 LRRM 1257 (1995).

Expansion of participation groups via 'managerial authority' exception. The Board has been clear that it does not intend to forestall all employee participation committees. It is widely accepted that structured employee voice, through an advisory committee or council, offers many benefits in the workplace, such as increased morale, a cooperative climate, and possibly a rise in productivity.

Subsequent Board rulings have determined that some communication mechanisms between the employer and employee groups are not unlawful under the NLRA. The Board has identified an exception to the ''dealing with'' prohibition when the group is considered a ''shared management'' team or is delegated managerial authority.

In *Crown Cork & Seal, Inc.*, 334 N.L.R.B. 699 (2001), 167 LRRM 1257 (143 DLR AA-1, 7/26/01), the Board found that work production teams and smaller committees were not labor organizations and therefore not precluded under Section 8(a)(2). In that case, some members of management and all employees sat on committees in which a number of workplace topics were discussed.

To avoid the appearance of interference or domination, employers should allow employees to volunteer themselves for a works council, rather than nominate or choose the employee participants.

Members of the committee had the power to ''decide and do'' certain actions regarding a host of workplace

issues, including production, quality, training, attendance, safety, maintenance, and discipline, short of suspension or discharge. The committees did not have to wait for management approval before acting, and managerial review was rarely exercised.

In approving these types of employee participation groups, the Board found that the committees exercised authority that was ''unquestionably managerial'' comparable to a front-line supervisor and thus did not ''deal with'' management in a manner that would lead those groups to constitute unlawful labor organizations. This decision signaled the Board's expansive interpretation to allow employee participation committees when the committees act as front-line management in communicating recommendations to higher management, even if higher management has some, if infrequently utilized, veto power.

How Can a U.S. Employer Establish a Lawful Works Council?

Given this legal landscape, what is the future of works councils in the U.S.? Can a type of works council exist in view of the constraints placed by the NLRA? If so, what can it look like and how may it function within the NLRA's parameters?

First, for works councils to operate in the United States that are akin to the works councils prevalent in the EU and Germany, Congress would need to amend the National Labor Relations Act. In the absence of legislative approval, which seems unlikely given the current political climate, employers may reduce the potential of liability under the NLRA by developing a works council program within certain parameters.

1. Limit it to an exchange of ideas, suggestions and information sharing. There are a number of scenarios in which an employee committee or a works council would not be considered to ''deal with'' the employer. As discussed, permissible groups include those engaged in brainstorming or generating ideas to management without specific proposals. Works councils that strictly share or provide information are not considered ''dealing with'' the employer.

Straightforward, one-way suggestion boxes or similar procedures are appropriate and are not considered bilateral communication under *Electromation* and its progeny. There is no bilateral interaction because the groups are only developing ideas and passing along information to management, who may later do what they wish with suggestions. Thus, works councils that merely brainstorm, but do not engage in a ''give and take'' of proposals, will not run afoul of Section 8(a)(2).

2. Avoid certain topics unless there is no employer interference. Works councils in the U.S. should avoid discussing employee grievances, labor disputes, wages, hours, and other conditions of employment. These topics are considered mandatory subjects of bargaining, and an employer must only conduct negotiations about these topics with the employees' representative, such as a union. On the other hand, a works council may freely discuss and provide proposals on issues regarding work productivity, efficiency, quality, or teamwork.

But, if the employer does not dominate, interfere or support the works council in any manner, and exercises no control over the functions and procedures of the council, then, according to some Board decisions, an employer may receive proposals from the council on issues like employees' wages and work schedules.

To avoid the appearance of interference or domination, employers should allow employees to volunteer themselves for a works council, rather than nominate or choose the employee participants. Employees participating in a council should not represent their coworkers, but speak as individuals. Nonsupervisory employees should constitute the majority on any works council, and there should be few members of management. Management may suggest agenda items, but nonsupervisory employees on the council should have the power to decide what to discuss in any meetings.

3. Use committees or works councils that are considered a shared management team. Employee committees that develop specific proposals and recommendations for management to accept or deny and involve a practice of proposal generation, response, and negotiation may be considered an unlawful labor organization. However, a shared management team featuring the following characteristics is permissible based upon *Crown Cork & Seal* and later Board decisions:

- The works council must possess and exercise the same degree and type of supervisory power and authority that a front-line supervisor or manager would have in the company, and be part of the management structure rather than operating as a separate entity;

- The employer should consider the team's decisions in the same way that the employer would treat a front-line supervisor or manager's decisions at the same level; and,

- Management should not constitute a majority on the works council, and any right for management to veto decisions should be used infrequently and be tied to the company's budgetary and financial restraints.

If a works council is so structured, then it will not be ''dealing with'' the employer (and, hence, not an unlawful labor organization), but instead operating as a management structure. The employer should bestow authority to the works council to reach and implement decisions akin to front-line supervisory or managerial decisions.

If managers are on the committee, then they should be in the minority and not possess greater power or authority than the employees. High level management's agreement should not be required in order to move forward with the works council's decisions. Lastly, although managers may serve as facilitators on a works council, they should not have real authority or voting power.

Summary and Conclusions

Works councils are interesting and valuable devices for employees to provide input, share suggestions, and become involved in driving the direction of workplace policies. However, as presently utilized in Germany and the EU, they would likely not withstand a legal challenge if established in the U.S.

A less impactful version of a works council could be adopted in the American workplace so long as the issues above are taken into account. Nevertheless, barring a change in federal labor law allowing for the

  DLR ISSN 0418-2693

implementation of a full-fledged works council, the real challenge for American businesses is whether such a process—whether watered down or not—would provide real benefits to the company and workers or place undue restrictions on management's ability to operate its business productively and profitably.