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Digitalisation and demographic change – how they are transforming employment law for companies

Briefing

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I. Introduction

Advancing digitalisation on the one hand and demographic change on the other are constantly driving change in companies. Apart from structural realignments through transactions, restructuring and outsourcing, this also involves other organisational measures designed to secure entrepreneurial scope for action. For example, a company's cost structure can be optimised with the aid of flexible deployment of employees (including temporary work) or by outsourcing pension commitments. Only companies that are agile will be able to remain competitive in the long term and make use of market opportunities.

Digitalised work environments are making it essential to ensure that employment relationships are structured innovatively and precisely – whether in individual contracts or collective agreements. Data and digital tools are part of everyday corporate life. Artificial intelligence automates tasks, evaluates huge amounts of data in seconds and sometimes even makes autonomous decisions. Digitalisation not only entails the use of new software but is also bringing about fundamental changes in companies: job profiles are changing or vanishing and new ones are emerging. Often, job descriptions and employees' existing qualifications no longer match. The relationship between human labour and machine performance is having to be constantly redefined. In addition, mobile and virtual workplaces and the shift towards cloud-based working environments must be designed to be flexible and at the same time secure when it comes to protecting data and know-how.

Parallel to this, the consequences of demographic change are becoming more apparent. In ageing societies where the baby boomer generation is going into retirement, companies are facing an almost irreplaceable loss of expertise. The call for people to be kept on beyond the standard retirement age is growing louder. At the same time, companies are striving to position themselves as attractive employers in the battle for skilled workers. Efficient employee leadership is becoming a key factor for success: modern working/working time models, appropriate incentive systems for promoting talent and performance as well as training opportunities contribute significantly to the success of a business. Younger employees in particular (those in "generation Z" or younger) no longer see work-life balance as an optional extra but as an integral part of their employment relationship.

Companies have to face up to this transformation. While it may be labour- and cost-intensive, there is no alternative; those who fail to address the challenges will get left behind economically. One of the key success factors of transformation is employment and labour law, especially when it comes to training and flexibility.

II. Employment transformation through training

New business models, technological progress (including artificial intelligence) and a growing shortage of skilled workers are making it necessary to adapt the workforce flexibly to meet changing requirements. Although it is not possible to take every employee along on this transformation process, companies cannot simply "replace" their workforce.

"Traditional" job cutting, whether through redundancies or voluntary schemes, is associated with high costs and businesses lose expertise that could have been retained by retraining their employees within the company. Given this, the aim of the transformation process is not to replace the existing workforce with more qualified specialists; instead, it should be to enable the existing workforce to help shape the process through training.

The simplest measure the company can take is to offer its employees training opportunities. If an employee does not accept such an offer, the company can use legal means by issuing a work-related instruction to unilaterally enforce the training.[1] If the training is unrelated to the work the employees are obliged to perform under their contract, it will be necessary to dismiss them and make them an offer of reemployment on amended terms and conditions.[2] However, the success of compulsory training is likely to be limited.

In companies which have co-determination by employee representatives, the works council has a say in how the training measures are designed (section 96 and following of the German Works Constitution Act (*Betriebsverfassungsgesetz*)). The issue often entails higher-level negotiations on a reconciliation of interests and social plan. This is the case when the transformation process not only leads to the need to train the workforce but is also accompanied by headcount reductions, or when the process itself constitutes a substantial operational change pursuant to section 111 of the German Works Constitution Act (for example if fundamentally new working methods are introduced). In this situation, there is the option of negotiating what is known as a "training social plan" (*Qualifizierungssozialplan*), as a form of workforce transition plan, with the works council. This plan contains four components: assessing training requirements, defining training goals, defining the group of participants and funding. If the transformation process involves headcount reductions, the workforce transition plan offers an additional argument for negotiations with the works council: instead of spending most of the social plan budget on expensive severance payments, it can be used to train the remaining workforce and make the company more competitive (i.e., securing the company's existing workforce through training).

Companies bound by collective agreements may already have collective agreements regarding training in place which may need to be taken into account. Another possibility is to negotiate a tailor-made collective agreement with the trade union. This can be useful in particular if negotiations with a trade union on a company agreement are already underway (to achieve more flexible working hours deviating from an existing collective agreement, for example).

Training can also be held in cooperation between several companies. In industries facing the same challenges, training employees together who share their know-how can save costs and enhance their expertise. However, it is important to bear in mind protection of data and know-how during such cooperative arrangements.

Companies should also check what government funding options are available. The Federal Employment Agency (*Bundesagentur für Arbeit*) offers companies financial support for further training of employees through the "Qualification Opportunities Act" (*Qualifizierungschancengesetz*) scheme (section 82 of Book III of the German Social Code (*Sozialgesetzbuch III*)). Companies can receive subsidies for the costs of further training (course fees) and in some cases a subsidy towards the participants' pay. The level of funding depends on the size of the company.

III. Employment transformation through incresed flexibility

Flexibility constitutes the second pillar of successful transformation – first in the form of flexible workforce size in the sense of a scalable workforce and also in the form of flexible working conditions.

Making the workforce more flexible and scalable helps companies during transformation and likewise prepares them for uncertain economic developments. Using external staff creates flexibility and may potentially avoid redundancies with the involvement of works council committees and possibly trade unions, which often require a reconciliation of interests and a (collective) social plan.

1 See German Federal Employment Court (BAG), 22 June 2011 – 8 AZR 48/10, NZA 2011, 1226, para. 39 and following.

2 See German Federal Employment Court, 17 February 2016 – 2 AZR 613/14, AP *KSchG* ["Employment Law Practice: German Act Against Unfair Dismissal"] 1969, section 2(168), para. 17 and following.

It is essential that the use of external personnel complies with employment-law requirements and is correctly assessed in terms of social security law. The aim of a scalable workforce will not be achieved if temporary staff are hired in breach of the German Temporary Employment Act (*Arbeitnehmerüberlassungsgesetz*), leading to an employment relationship between the temporary worker and the intended hirer.

Similarly, the point of using a freelancer will be thwarted if when the legal relationship is correctly assessed under social security law the freelancer is in fact regarded as an employee for the purposes of section 7 of Book IV of the Social Security Code. This results in employee work and safety rules applying to the freelancer and to a need to pay social security contri-butions on the agreed remuneration. In other words, the employer's and employee's contributions both have to be paid retrospectively for at least the past four years, with virtually no possibility of recourse for the freelancer (section 28e(1), first sentence, section 28g, first to third sentences, section 25(1), first sentence of Book IV of the German Social Code).

The use of external personnel across national borders requires even more careful consideration. In cross-border scenarios, the consequences of such arrangements under social security and tax law have to be considered – such as the risk of permanent establishment for tax purposes. Following fierce criticism, the Federal Employment Agency at least abandoned its briefly held view that the German Temporary Employment Act also applies to cases where an employee works from home abroad but performs his work for a German company.[3]

Apart from making workforce size more flexible, adding flexibility to working conditions is another effective tool during transformation. The areas of application are diverse. Some useful steps are as follows:

- making working hours more flexible, for example by temporary arrangements including short-time work or working-time accounts
- making remuneration more flexible, for example by adjusting variable remuneration components, utilising rights to revoke and determine the voluntary nature of benefits and limiting discretionary benefits
- making the place of work more flexible, for example through WFH or mobile work (including outside the country, subject to residence, social security and tax provisions)
- as a special case, making the transition to retirement more flexible through part-time retirement or a (legally secure) fixed-term extension of the employment beyond retirement age in accordance with section 41 of Book VI of the German Social Security Code to retain experienced skilled workers

When using any of the above tools to increase flexibility, the feasibility of implementing them in individual contracts and the possible rights of works councils to participate should be borne in mind.

Amendments to employment contracts will not be necessary provided that options for flexibility are effectively set down in the contract – for example clauses on short-time working or revocation rights.[4] However, when it comes to changes to key aspects of employment contracts, an agreement with employees will often be unavoidable and should be carefully drafted.

If flexible conditions involving many employees are planned, implementation of these may lead to mandatory co-determination rights of the works council (for example under section 87 of the German Works Constitution Act) and also constitute a substantial operational change requiring a reconciliation of interests and a social plan under section 111 of the Act. In strategic terms, the following applies: the works council can enforce mandatory co-determination rights, possibly in conciliation proceedings. These rights must be observed without fail.

3 Erleichterungen für das IT-Near- und Offshoring – Die Bundesagentur für Arbeit gibt ihre Auffassung zur globalen Anwendung des AÜG wieder auf (in German only), accessed on 04 Dec. 2025

4 See. ErfK/Greiner, 26. Aufl. 2026, § 611a BGB Rn. 749 ff.; ErfK/Preis, 26. Aufl. 2026, § 307 BGB Rn. 26 ff. (in German only).

If measures detrimental to employees are introduced contrary to co-determination requirements, they will be ineffective towards the individual employee under German employment-law doctrine (*Theorie der Wirksamkeitsvoraussetzungen*).[5] The works council cannot force the employer to enter into a reconciliation of interests, which is an agreement regulating whether and how a substantial operational change will take place (for instance different organisational work structures). In contrast, it can force it to implement a social plan, which regulates the compensation of affected employees for the disadvantages resulting from the operational change, within certain limits (sections 112 – 113 of the German Works Constitution Act).[6]

IV. Conclusion

Digitalisation and demographic change pose major challenges for companies. But as we saw above, companies have a wide range of options for successfully shaping employment transformation through training and increased flexibility. As a rule, collective bargaining partners and/or works council bodies must not be left out of all these issues, which calls for experienced and skilful negotiation.

V. Outlook

Besides the topics referred to above, legal reforms and case law, notably from the Federal Employment Court (*Bundesarbeitsgericht*), are constantly creating a need for employment-related adjustments in connection with the topics of digitalisation and demographic change. Examples include the entry into force of the AI Regulation, the planned digitalisation of works constitutions, digital access rights for trade unions, changes to working time legislation, dealing with data protection claims for access to information and compensation, and simplified employment of pensioners:

— AI Regulation: In the AI Regulation, the European Union has created a legal framework for the use of artificial intelligence. The AI Regulation adjusts the classification of AI systems into risk categories and based on this certain restrictions and obligations for companies when using artificial intelligence. For example, certain AI systems may not be used at all in the area of human resources, and there are also extensive testing, organisational, supervisory, documentation, information and training obligations. The regulation is taking effect in stages from 2 February 2025, with the majority of provisions applying from 2 August 2026. In their coalition agreement, the CDU, CSU and SPD coalition expressed its wish to make the implementation of the AI Regulation in Germany innovation-friendly and low on bureaucracy, with the aim of reducing burdens on the economy. The coalition also promises to provide companies with a central service point. Employees are to be trained in the use of artificial intelligence.

— Digitalisation of works constitutions: The coalition agreement promises to develop co-determination against the backdrop of digitalisa-tion and artificial intelligence, for example through online works council meetings, works meetings and works council elections. The German upper house of parliament, the Bundesrat, even adopted a resolution calling for the federal government to fundamentally revise works constitutions with the aim of modernising co-determination in the workplace. Subjects of the proposal include simplifying the formation of works councils in the platform economy and extending co-determination when dealing with employees' data and their training.

— Digital access rights for trade unions: The Federal Employment Court recently ruled that a claimant trade union was not entitled to digital access to the company at least in the case involved. Thus the company was not required to provide the trade union with its employees' work email addresses for the purpose of recruiting members. However, according to the grounds for the judgment, a digital access right for trade unions is not generally ruled out. The coalition would like to expressly regulate digital access rights for trade unions by law.

5 German Federal Employment Court, 25 April 2017 – 1 AZR 427/15, *NZA* ["New Employ-ment Law Journal"] 2017, 1346, para. 16.

6 *SWK ArbR* ["Employment Law Keyword Commentary"]/Schimmelpfennig, 4th edition 2025, *Stichwort Sozialplan* ["Keyword 'Social Plan'"], para. 3.

- Working-time law: In a high-profile decision, the Federal Employment Court imposed additional bureaucratic burdens on companies and employees: companies are obliged to introduce a system that can record the start and end of daily working hours, including overtime. Companies often delegate the obligation to record actual working hours to their employees. The coalition agreement promises more detailed legal rules on electronic recording of working time. The obligation to record working hours is not to apply to trust-based working hours. Transitional rules are planned for small and medium-sized enterprises. In addition, the coalition wants to create the option of weekly maximum working time instead of a daily maximum. This is intended to give employees more flexibility and enable them to balance their family life and career better.

- Rights to access information and claims for damages under data protection law: As digitalisation progresses, data privacy is becoming increasingly important for companies. Numerous recent court rulings have dealt with data privacy issues. Of particular interest under employment and labour law are the conditions and scope of the right to access under Article 15 GDPR. Companies are also increasingly facing claims for damages from employees under Article 82 GDPR for alleged infringement of data protection law. The German government's immediate action plan mentions the introduction of a separate employee data protection act.

- Employment of pensioners: The coalition wants to create more flexibility in the transition from work to retirement and to promote the employment of pensioners. To this end, a new tax incentive system for people who voluntarily work longer when they are retired is to be introduced: the salary of pensioners who continue to work will be tax-free up to an amount of €2,000.00 per month. A draft law is already underway that will make it easier for companies to enter into new fixed-term employment contracts with existing employees who have reached the standard retirement age for statutory retirement insurance without an objective reason.

Authors

Andreas Butz

Lawyer, Partner
Speditionsstraße 1, 40221 Düsseldorf
andreas.butz@noerr.com
T +49 211 49986254

Patrick Mückl

Lawyer, Partner
Speditionsstraße 1, 40221 Düsseldorf
patrick.mueckl@noerr.com
T +49 211 49986256