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*Challenges in
Economics and
Business in
the Post-COVID
Times*



SUSTAINABILITY AND LABOUR LAW

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Abstract This article explores the question of how sustainability and labour law are interrelated. The modern world of work is characterised by the growing social and environmental responsibility of companies. Especially in the post-COVID era, sustainability also plays an increasingly important role in the corporate context, which is also noticeable in the so-called ‘war for talent’. Achieving personal career goals is no longer enough for employees today. Corporate values and in particular the so-called ESG criteria (Environment, Social, Governance) are thus also becoming increasingly important in the employment relationship and in corporate reporting requirements. In terms of social sustainability, labour law instruments can, for example, promote the creation of a discrimination-free working environment, the introduction of flexible working time models or the protection of whistleblowers. From an ecological perspective, labour regulations are also suitable for implementing ‘green mobility’ and other measures to reduce companies’ ecological footprints. Working from home, which experienced a huge boom during the COVID-19 pandemic, is also sustainable, especially from an ecological point of view. Appropriate consideration of these sustainable work tools in future corporate social responsibility (CSR) strategies not only creates a competitive advantage but can also be beneficial in recruitment.

Keywords:
sustainability,
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1 Introduction

Sustainability and labour law – what do they have in common? What may seem strange at first glance is becoming increasingly important. Sustainability is in vogue and has become part of everyday language. Sustainability, along with CSR (Corporate Social Responsibility) and ESG (Environment, Social and Governance), has long since become part of corporate reality. In 1987, the United Nations World Commission on Environment and Development (‘Brundtland Commission’) defined sustainability as *‘meeting the needs of the present without compromising the ability of future generations to meet their own needs.’* (Brundtland, 1987). Today, sustainability is understood as a three-dimensional concept in the sense of an interweaving of ecological, social and economic requirements. While CSR refers to corporate positioning in terms of sustainability, ESG criteria are primarily concerned with companies’ information and reporting obligations. The special environmental, social and economic responsibility of companies is also reflected in the relationship between employers and employees. Labour law provides the legal framework for operational HR work in companies, thus also supporting the sustainability efforts of HR management. Thus, legal regulations can promote sustainable development but they can also hinder it (Rühmkorf, 2018). The purpose of this paper is first to shed light on the relevance of sustainability for labour law (Part 2.). Subsequently, selected examples will be used to illustrate the link between sustainability and labour law (Part 3.). This is followed by a summary and an outlook with concrete ideas for implementation in companies (Part 4.).

2 Relevance of sustainability for labour law

Due to the CSR Directive (2014/95/EU) adopted at European Union level, large capital market-oriented companies are required to supplement their reporting with non-financial information (Kocher, 2021). The new CSRD draft (Proposal for a Corporate Sustainability Reporting Directive) of 21 April 2021 (European Commission, 2021) will lead to the realignment of sustainability reporting as of the 2023 financial year. The CSRD draft provides for considerable expansion of those companies that will be subject to reporting requirements in the future (it is estimated that this will affect around 50,000 companies in the European Union). The CSRD draft places particular emphasis on the three core elements of sustainability reporting: ‘Environmental’ (climate protection, circular economy, etc.), ‘Social’ (equal opportunities, working conditions, etc.) and ‘Governance’. Thus, in addition

to a large number of other topics (for example, on environmental and climate protection or respect for human rights), the CSRD draft stipulates, among other things, that the companies concerned must also report on working conditions, diversity, equal opportunities (including gender equality), inclusion of people with disabilities, etc. The CSRD draft follows a ‘double materiality’ perspective. This means that in future, the reporting requirements will stipulate that companies must record the effect of sustainability aspects on the company’s economic situation, while at the same time also clarifying the impact of the company’s activities on sustainability aspects.

However, sustainability in labour law is not only relevant in the context of this reporting obligation but also represents a decisive factor in the individual employment relationship. For many employees, sustainability has become a decisive criterion when looking for a job. Achieving personal career goals is no longer enough for the employees of today. Sustainability is also becoming increasingly important when choosing an employer. According to a study conducted by the German online job platform StepStone and the Handelsblatt Research Institute (HRI) in 2021 (StepStone, 2021), in which around 12,000 people were surveyed on the importance of the topic of sustainability at work and when searching for jobs, almost half the respondents (47%) said that they specifically look for sustainable companies when changing jobs. Around a third (34%) said that they would even accept a lower salary for this. For about three quarters (76%) of the employees in Germany, it is important that their employer attaches great importance to the issue of sustainability. In addition, the study shows that sustainability is also an important aspect of the employment relationship for older employees. This shows that sustainability is playing an increasingly important role in the employment relationship, particularly in the post-COVID era, which should not be ignored against the backdrop of the increasingly fierce battle for skilled workers – the ‘war for talent’.

3 Elements of sustainability in labour law

Elements of sustainability can be found in numerous labour regulations, partly regulated in statutes and partly in agreements between employers and employees.

3.1 Equality and diversity

The prevention of discrimination and the creation of a discrimination-free working environment are among the essential components of sustainable business in the sense of the social dimension of sustainability. The legal basis for this within the European Union is provided by the EU anti-discrimination directives (European Union, 2000/2002/2004/2006) and their implementing laws in the member states of the European Union. Internal company processes, for example in the selection of applicants, the context of personnel development, the structuring of remuneration, etc., must be regularly checked to ensure that they are carried out in a non-discriminatory manner. Diverse people also enjoy the protection of the EU anti-discrimination directives and their implementing laws. Diversity is highly valued, especially by the younger generation, and is important when choosing an employer. Diverse people must not be discriminated against on the basis of their gender or sexual orientation. In this context, there are a variety of implications under employment law, ranging from gender-neutral job advertisements to the right to reissue an employer's reference after a gender reassignment. In addition, in the context of inclusion, attention must be paid to the equal treatment of disabled people in working life.

3.2 Flexible working hours

Flexible working time models lead to greater satisfaction among employees, thus increasing sustainability in companies and in employment relationships. During the COVID-19 pandemic in particular, the need for more flexible working conditions, especially flexible working time arrangements, once again became clear. In addition to optimising the work-life balance, however, flexible working time models can also promote the ecological dimension of sustainability. As pointed out by Frey (2019) in relation to the impact of working hours on the environment, people would only have to work nine hours per week instead of forty in order to achieve the current goal of international climate policy, i.e. limiting global warming to less than two degrees Celsius compared to the pre-industrial era. In Germany – similar to other EU member states – the European Working Time Directive for employment relationships has been implemented through the Working Time Act. This law contains clear rules on maximum permissible working hours, breaks, rest periods between the end of work and the beginning of work, etc. However, these rules – the basic concept of which serves to protect employees – are in part too rigid to meet

the desire for a modern work-life balance. Against this background, possibilities are being sought within the framework of labour law to meet the need for more flexibility, for example by introducing trust-based working time, working time accounts or sabbaticals.

3.3 Whistleblower protection

The European Union is currently regulating the legal treatment of whistleblowers, i.e. persons who report irregularities in companies. Uncovering and eliminating internal grievances and protecting whistleblowers from disadvantages under labour law is part of sustainable corporate management. To date, the protection of whistleblowers has regulated very differently within the European Union. The EU Whistleblower Protection Directive 2019/1937 of 23 October 2019 (European Union, 2019) now protects employees who report suspected violations of EU law. The directive stipulates that companies with more than 249 employees (more than 50 employees as of 17 December 2023) must set up a whistleblower system within the company. Currently, when implementing the directive into national law, there is even a tendency for EU member states to expand the scope, so that not only violations of EU law, but also those of national law, are covered.

3.4 Climate protection

Currently, there are few labour laws that require employers to consider climate protection. The most important part in an employer's environmental strategy is likely to be reducing the carbon footprint caused by the company's activities. This can be done, for example, through a focus on 'green mobility'. This not only includes switching from combustion engines to electric motors, but also completely replacing company cars with alternatives such as carpooling or car sharing, offering company bicycles or subsidised/free tickets to use local public transport. A mobility budget can also be an interesting and environmentally friendly alternative to the company car. In this case, the company provides its employees with a budget that can be used flexibly for all means of transportation. In principle, a corresponding provision in the employment contract is sufficient, whereby aspects such as the principle of equal treatment, participation of the works council and data protection must be taken into account. It is also conceivable to think of a change in company policy in relation to business trips and travel expenses (online meetings vs. face-to-face meetings; train instead of flight, etc.) and a related adjustment of travel expense guidelines.

Incentives can also be created via sustainable remuneration models to motivate employees to align their actions more closely with sustainability goals. In the case of managers, for example, this can be done by means of sustainability-oriented target agreements. Employees can also be motivated to be more sustainable through bonus pay agreements (e.g. bonuses for reducing resource consumption). Climate officers or energy scouts, whose task it is to identify energy-saving opportunities in the company, can supplement the environmental strategy (Bohnenberger, 2022).

3.5 Working from home

‘Working from home’ is not a clearly defined term. The terms ‘working from home’, ‘teleworking’ and ‘mobile working’ are often used interchangeably, although they differ in content. In (home-based) ‘telework’ (often also called the ‘home office’), employees work exclusively from home and no longer have a workplace in the company. In so-called ‘mobile work’, employees perform their work using a mobile device (smartphone, tablet, laptop) while on the road or from another location. ‘Working from home’ covers both the types described, although the terminology certainly differs, especially in the international environment. In addition, hybrid systems exist, such as alternating teleworking, in which work is performed alternately in the ‘home office’ and in the workplace. Of course, ‘working from home’ is not a new phenomenon, however, during the COVID-19 crisis in particular, ‘working from home’ was used as an effective lever against the spread of infection, thus it experienced an enormous boom. In Germany, for example, 4% of employees worked from home prior to the COVID-19 pandemic, while during the crisis this figure was between 27% (April 2020) and 24% (January 2021) of employees (Statista Research Department, 2022). It is already apparent that the trend towards ‘remote work’, which was greatly accelerated by the pandemic, is leading to a major change in the world of work, and that ‘working from home’ has become an integral part of labour relations.

So, what about the sustainability of ‘working from home’? According to a 2020 study by Büttner and Breitzkreuz (commissioned by Greenpeace), CO₂ emissions from transport could be reduced by 5.4 million tonnes per year if 40% of employees work permanently from home two days per week (Büttner & Breitzkreuz, 2020). The study also shows that ‘working from home’ can reduce CO₂ emissions in the long term. A 2021 study by the Carbon Trust – based on a statistical analysis of the COVID-related work situation in six countries – also assumes a savings potential of 700kg of

CO² per year per person in the long term (Carbon Trust, 2021). In addition, ‘working from home’ promotes the flexibility of employees and leads to more equality. Lord (2020) notes in his article titled ‘The social perils and promise of remote work’: *‘The need to commute and work from an office at set hours of the day can be inconsistent with the demands of one’s family or childcare responsibilities. As women have historically borne a disproportionate share of child-rearing and household responsibilities, they have often had to say no to higher-paying, higher-level positions and careers.’* Accordingly, ‘working from home’ protects the climate, relieves traffic congestion and promotes equality. However, ‘working from home’ is not completely sustainable. Many employees complain about the lack of social contact with colleagues and the mixing of work and leisure time when working from home. Poor internet connections, lack of space and IT security can also make ‘working from home’ difficult.

The legal aspects of ‘working from home’ are currently regulated very differently in Europe. While ‘working from home’ is already enshrined in statutes in some European countries, there is still no legal regulation on this subject, at least in Germany. Thus, in Germany there is neither a legal obligation to work from home nor a right to work from home. The instruction to work permanently in a home office is also not covered by the employer’s right of direction under labour law. In principle, the employer determines the employee’s place of work at its reasonable discretion, however, the employee’s private home is not part of this. An instruction to ‘work at home’ is therefore only possible if a corresponding agreement has been reached between employer and employee, for example in the employment contract. During the COVID-19 pandemic, however, the German Infection Protection Act and corresponding occupational health and safety ordinances repeatedly mandated a temporary home-office obligation in order to reduce the number of contacts and contain the spread of coronavirus. Employers were required to allow their employees to perform office work or similar activities at home unless there were compelling operational reasons not to do so. The current German government now wants to create a legal right to home office or at least the right of employees to discuss this issue with their employer. Regardless of this, numerous companies have already moved to offer ‘working from home’ in agreement with employees or to enable ‘working from home’ or hybrid working through corresponding company agreements.

Even during ‘working from home’, the respective obligations of the employer and the employee under labour law remain in force. The employer is responsible for compliance with the statutory maximum working hours as well as breaks and rest periods. ‘Working from home’ should not be confused with flexible working hours. In principle, ‘working from home’ must be performed in the same way and at the same times as in the company. If flexible working in the home office is intended, ‘working from home’ must be supplemented by appropriate working time models. Finally, the employer remains obliged to ensure compliance with data protection regulations and, if necessary, to contribute to the additional costs of ‘working from home’.

4 Conclusion and outlook

Employees’ desire for environmental and social sustainability will increasingly shape labour law in the future. Sustainability is one of the most important future trends that no company can escape. Legislators are increasingly enacting regulations that also focus on the sustainability aspect in labour law. This can be seen, for example, in the CSR reporting obligation for certain companies or in anti-discrimination legislation within the European Union. Especially in times of a shortage of skilled workers and the ‘war for talent’, sustainability in labour law is of particular importance. Employees expect their employer to make a clear commitment to sustainability that goes beyond their legal rights as employees. However, in order to be able to invoke sustainability, it is not enough to merely fulfil legal obligations. In addition to complying with legal obligations, employers are in principle free to voluntarily create an even more sustainable working environment and align their CSR strategy accordingly (Wolf, 2015). Some companies already meet this requirement (e.g. in the field of climate protection), thus improving working conditions. In addition to advantages in the recruitment of employees, this also results in an increase in employee satisfaction. Furthermore, this can help to create competitive advantages, which can be particularly essential in the post-COVID era. Those who merely wait for the legislator to impose legal obligations and then implement them will lose out. As part of the respective CSR strategy, a company’s sustainability programme can also be anchored in a code of conduct. In such a code of conduct, companies can set out their commitment to ecologically, socially and economically sustainable action, thus making their sustainable goals more binding. The example of ‘working from home’ in particular shows how COVID-19 has changed our lives and the world of work. The home office will prevail, even when

the pandemic is under control. Even if ‘working from home’ is not completely sustainable, it does have the effect of reducing CO² emissions. However, again, simply allowing the home office is not enough. Anyone who declares the home office as the new working model should also have a corresponding strategy and – providing there is no statutory regulation to this effect – ensure that the agreement is legally secure.

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