

Employee Consent to Use of Personal Data Reliable Under German Law

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The **German Federal Labor Court** (Bundesarbeitsgericht (BAG)) has published the reasons for its two decisions about whether an employee can revoke consent given to his or her employer for public use of the employee's image in photos, videos or other marketing materials (BAG 19 February 2015, [8 AZR 1011/13](#); [BAG 11 December 2014 – 8 AZR 1010/13](#)). The BAG held that (1) an employer can rely on an employee's voluntary consent under German data privacy laws and (2) an employee must take into account the employer's interests when justifying his or her revocation of a valid consent. The BAG's decisions are notable because they are contrary to the widely-held opinion that employee consent given in the context of the employment relationship is not completely voluntary.

German data privacy and copyright laws require an employer to obtain an employee's consent to use the employee's image in photos or videos developed for marketing or similar purposes. The consent must be voluntarily given and not tied to the employee's employment status. Before the BAG's decisions, some German data privacy law commentators argued that an employee's consent is not always freely given because of the employee's subordinate status in the employment relationship.

Now, under the BAG's decisions, the existence of the employer-employee relationship does not cause an employee's individual consent to be per se ineffective. The BAG determined that employees can freely choose whether to consent or not. If an employee believes that he or she is subject to discrimination for withholding consent, remedies are available under other German laws. The BAG emphasised that the consent must be in writing and include certain information to be valid and that whether the consent is subsequently revocable depends on the facts and circumstances.

Key Takeaway:

An employer should obtain individual written consent from an employee to use the employee's image or likeness in marketing materials. To help prevent future revocation, the written consent must state (among other specific requirements) that the employer's rights survive termination of the employment relationship.

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