

# DATA PROTECTION IN THE BEM PROCEDURE

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## Introduction

If employees are absent due to illness for a period of more than six weeks within a year, employers are obliged under Section 167 (2) (1) SGB IX to clarify, together with the responsible representative body and, if applicable, the representative body for severely disabled employees and with the involvement of the person concerned, what options are available to overcome the incapacity to work, prevent new incapacity to work and maintain the job. To this end, the employer must make the employee an offer to implement a company integration management procedure (Betriebliches Eingliederungsmanagement-Verfahren, BEM). The initiation of the procedure and the implementation of all further individual measures then require the consent of the employee concerned. If consent is refused or revoked, the clarification process in form of the BEM does not apply.

As a large amount of personal data, including health data, is also processed as part of the BEM procedure, the data protection provisions of the General Data Protection Regulation (GDPR) and the Federal Data Protection Act (BDSG) must be observed in addition to the provisions of employment law. It should be noted here that health data is also processed in the course of the BEM procedure, and special requirements apply to the processing of this data.

## Legal basis

As for any other data processing, the principle of prohibition with reservation of permission, which requires the existence of a legal basis, also applies to all data processing procedures in connection with the BEM process, as set out in Art. 6 GDPR. Which legal basis comes into consideration in each case depends on the specific processing activity and the data processed. From a data protection perspective, the BEM procedure can be divided into two sections.

### Identification of the employees concerned, offer to carry out the BEM and documentation of the employee's feedback

Due to the employer's legal obligation under Section 167 (2) (1) SGB IX to offer a BEM in the event of incapacity to work for more than six weeks within a year, the legal basis for the associated contact with the respective employee to offer to carry out the procedure and the prior evaluation of the absences required to determine the employees concerned are the fulfillment of legal obligations under Section 167 (2) SGB IX in conjunction with Art. 6 (1) (1) (c) GDPR and Art. 9 (2) (b) and (h) GDPR with regard to health data as well as the purposes of the employment relationship or the fulfillment of the con-

tract pursuant to Section 26 (1) BDSG in conjunction with Art. 6 (1) (b) GDPR, with regard to health data Section 26 (3) (1) BDSG in conjunction with Art. 9 (2) (b) GDPR. The same applies to the documentation of the offer of a BEM and the filing of the associated documents for the purpose of being able to prove that the employer has fulfilled its legal obligation.

In view of the fact that the employer must involve the responsible representative body and, if applicable, the representative body for severely disabled employees as part of the clarification process, the same applies to informing the works council and, if applicable, the representative body for severely disabled employees of the fact that an employee is being offered the legally prescribed BEM procedure due to their absences.

### Further data processing in connection with the implementation of the BEM

The implementation of the BEM procedure and all other information and individual measures are voluntary for the employee. In principle, the employee concerned can decide for themselves what information they provide and to whom the information is passed on. Subsequently, all further data processing procedures in connection with the implementation of the BEM require the consent of the data subject in accordance with Section 26 (2) BDSG in conjunction with Art. 6 (1) (1) (a), Art. 88 GDPR or – in relation to health data – Section 26 (2), (3) (2) BDSG in conjunction with Art. 9 (2) (a), Art. 88 GDPR. In this respect, it should be noted that a fundamental distinction must be made between consent to the BEM procedure or individual measures themselves and consent to the associated processing of personal data.

As the situation of the person concerned is normally already specifically discussed during the initial meeting and personal data is also processed in this respect, the employee is regularly asked to consent to the data processing procedures that usually take place during the BEM process when the offer is submitted. This also includes, for example, the transmission of further information to those involved in the process, such as the works council, the representative body for severely disabled employees or the company doctor. If the person concerned does not give their consent to the implementation of the BEM and the associated data processing procedures, in principle no further measures may be taken or data processed.

However, the BAG has ruled that the initiation of the BEM procedure in the form of an initial consultation may not be made dependent on the prior granting of consent under data protection law via a preformulated form ([BAG, decision dated 15.12.2022 – Ref. 2 AZR 162/22](#)). The employee's consent to the processing of their data is not a prerequisite for the implementation of the BEM. According to Section 167 (2) (4) SGB IX, there is only a prior obligation to provide information regarding the type and scope of the data collected and used in the course of the BEM. Even without prior consent, it is possible and reasonable to initiate the procedure and initially discuss the possible course of the procedure in general terms during the initial meeting and dispel any reservations. Subsequently, the BEM should not be assessed as rejected without a corresponding procedure and a dismissal should not be based on the alleged rejection.

With regard to the BAG's decision, however, the special circumstance must be taken into account that the employee concerned had already declared her basic willingness to participate in the BEM and only did not want to sign the declaration of consent attached to the offer due to queries. The decision deserves approval to the effect that the employer must first address the employee's reservations and clarify the facts of the case before assessing the BEM procedure as having been rejected by the person concerned. However, contrary to what the BAG's decision suggests, the interview conducted for this purpose is not, strictly speaking, an initial meeting in the traditional sense, but rather an upstream coordination of outstanding issues. It is true that this does not require consent under data protection law as long as no other personal data is processed in this context. In contrast, the actual BEM meeting, in the course of which a specific discussion of the health data and other personal data takes place, may only start once the employee concerned has given their consent. This is also implicitly stated by the BAG in its decision.

If, after the procedure has been initiated, data is to be transmitted to other third parties, e.g. rehabilitation providers, authorities, doctors or other medical personnel, or specific further individual measures are to be taken in the course of which personal data is processed, additional consent must be obtained for each specific case.

### Data protection, retention and deletion periods

Since the BEM also processes health data that is particularly protected by the GDPR within the meaning of Art. 9 (1) GDPR, the infor-

mation obtained in this context must be kept separately from the personnel file, for example in a separate BEM file. The file must be stored in such a way that access by unauthorized persons is prevented. The group of persons involved with the BEM file must be limited to the minimum necessary and disclosed transparently to the person concerned before the BEM is carried out. However, the offer, the employee's reaction to it, as well as the outcome and termination of the BEM may be recorded in the personnel file.

With regard to the specific deletion periods, a distinction must be made between the health data stored in the BEM file and the other data obtained in connection with the BEM. With regard to other data, the general limitation period pursuant to Sections 195 and 199 of the German Civil Code (BGB) can serve as a guide due to any claims for damages by the employee, meaning that data can be stored for three years. Whether health data can also be stored beyond the BEM procedure depends largely on the question of whether the employer may use this data in a potential dismissal process. In one case, the BAG indicated that the use of health data collected in the BEM procedure may be restricted in dismissal proceedings due to the principle of purpose limitation under data protection law ([BAG, decision dated 29.06.2017 – Ref. 2 AZR 47/16](#)). Until this issue has been conclusively clarified, it is advisable to delete the health data after the procedure has ended.

### Conclusion

When determining the correct legal basis for the purpose of data processing in the BEM procedure, a distinction must be made between identifying the employee concerned and the offer to carry out the BEM on the one hand and the implementation itself on the other hand. While in the former case, the employer's legal obligation under Section 167 (2) SGB IX legitimizes data processing, data processing in the BEM procedure requires the consent of the employee concerned under data protection law. Another distinction must be made between consent to the implementation of the BEM and consent to the associated data processing. In particular, the health data collected in the BEM procedure must be kept in a separate file. It is advisable to delete the data from the BEM file after the BEM procedure has ended.

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