

DIVERSITY AND DISCRIMINATION

February 2022

Diversity and inclusion require a workplace free of prejudice and discrimination that values all employees equally, notably regardless of nationality, gender, ethnic origin, religion or belief, disability, age and sexual identity. The General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz* - "AGG") sets the legal framework to protect individuals against discrimination in the workplace.

1. Who is covered by the AGG?

The AGG protects all employees. In addition to employees, apprentices, temporary employees and job applicants are protected. Self-employed persons and members of executive bodies, in particular managing directors and board members, are in scope the AGG to the extent the conditions for access to employment or career advancement are concerned.

2. What does discrimination and harassment under the AGG mean?

Discrimination is any unjustified unequal treatment on grounds of the following protected characteristics: race or ethnic origin, religion or belief, gender, disability, age or sexual orientation. Discrimination can occur as direct or indirect discrimination. Direct discrimination occurs if a person experiences less favorable treatment than another person in a comparable situation whereas indirect discrimination takes place when a business imposes apparently neutral provisions, criteria or practices which particularly disadvantage a class of people when compared to others.

Harassment is considered discrimination if unwanted conduct occurs with the purpose of violating an individual's dignity and creating a humiliating or offensive environment. Sexual harassment is discrimination if an unwanted, sexually motivated act is done with the intention to violate a person's dignity, especially when it creates an intimidating and humiliating environment.

3. What if there is a ground for unequal treatment?

Not every difference in treatment is discrimination. A difference in treatment may be justified under certain conditions depending on the ground. Different treatment on account of one of the mentioned characteristics may be justified only if the activity in question cannot be carried out at all or cannot be carried out properly without this characteristic or without the absence of this characteristic. This must always be assessed on the basis of the specific activity to be performed in the individual case.

4. What is affirmative action?

Affirmative action means different treatment to prevent or compensate for existing disadvantages due to one of the protected characteristics: "And in order to treat some persons equally, we must treat them differently". Against this background, the AGG allows employers to take measures to privilege persons that suffer under structural disadvantages. Womens' quota for certain job positions or functions, job advertisements preferring applications of disabled persons or people of color, women etc. are examples for affirmative action.

Nevertheless, affirmative action must also be reviewed under the principle of proportionality and is not possible unconditionally. Affirmative action which unreasonably disadvantages members of the other group is not allowed. For example, it would not be possible to disadvantage a person during the hiring process who is much better qualified just to privilege another person based on affirmative action.

5. What can employees do if discrimination occurs?

Employees have the right to complain to the company's competent department if they feel discriminated by the employer, the management, other employees or third parties in relation to their employment. If the employer does not take any steps to prevent discrimination and harassment, the employee concerned would even be entitled to cease working while still receiving salary, provided this is required for his or her protection.

Employees may also file a claim for compensation and damages because of discrimination. For the claim to damages, the employee must have suffered damage that is measurable and quantifiable in money because of discrimination. The employer would be liable for damages based on intent and negligence. Other than that, the right to claim compensation is not bound to an actual economical damage incurred but it represents payment for damages for pain and suffering because of discrimination.

A discrimination claim must be asserted within two months against the employer in writing. An additional deadline of three months applies within which the claim must be asserted before court. Liability for immaterial damages is limited to appropriate amounts. In general, in comparison to the US, German courts are rather reserved when it comes to awarding damages and compensation based in discriminatory behavior.

While in the US, million-dollar amounts may be awarded to an individual who suffered discrimination, in Germany the amounts are rather low and do not exceed a few thousand euros. In case of discrimination during the hiring process, the affected person has no claim to the establishment of an employment relationship or career advancement. If the affected person would not have been hired even in the case of a non-discriminatory selection, the compensation may not exceed three months' salary.

6. What questions are allowed or not allowed during a job interview?

The employer only has the right to ask questions if the answer to the question is of material importance for the employment relationship, i.e. if it is directly related to the work to be performed. Questions on age, marital status, origin and nationality, religion and belief, party and trade union membership, pregnancy, family planning, sexual identity and disability should be avoided unless the employer has a justified interest. If such a question is asked, in case of a court process, impermissible discrimination would be presumed. The employer must therefore prove that no discrimination has taken place to avoid claims for compensation.

On the other hand, questions about education, qualifications and professional background as well as language skills and the existence of a residence and work permit can of course be asked.

7. What does the employer have to consider when advertising a job?

The job advertisement should generally be formulated as neutrally as possible. Even seemingly unimportant details can be seen as an indication of discrimination. In particular, care should be taken to ensure that the job title is formulated in a gender-neutral manner. Therefore, gender-independent functions designations (for example "Project Management") can be used. A legally secure way to advertise a job is, for example, to add all sexes ("male/female/diverse" or "m/f/d").

In addition, wording that might suggest the applicants' desired age should be avoided. This does not only apply to the obvious cases where the age limit is explicitly stated. Suggestions of discrimination based on racial or ethnic origin may arise from the required language skills, for example "German as a mother language" or "accent-free German". It is safer to draft the requirements in such a way that they can be satisfied by every applicant.

8. What other obligations does the employer have?

The AGG requires employers to take preventive measures to minimize the risk of discrimination. The employer can fulfil this obligation by training its employees in preventing discrimination. The implementation of the training as well as the participation of the employees should be documented for evidence purposes. If employees violate the prohibition of discrimination, this constitutes a breach of duty under the employment contract, to which the employer must respond with case-specific and appropriate measures, such as a warning, reassignment, relocation or dismissal.

In addition, the employer must make the AGG and information on the bodies responsible for handling complaints available to the employees.



YOUR CONTACTS



Dr. André Zimmermann, LL.M.

Düsseldorf / Munich
D: +49 211 36787 260
E: azimmermann@orrick.com



Louisa Kallhoff

Düsseldorf
D: +49 211 36787 156
E: lkallhoff@orrick.com



Marianna Karapetyan

Düsseldorf
D: +49 211 36787 127
E: mkarapetyan@orrick.com

Copyright: Orrick, Herrington & Sutcliffe LLP, 2022. All rights reserved.

The Orrick logo and "Orrick, Herrington & Sutcliffe LLP" are trademarks of Orrick, Herrington & Sutcliffe LLP.

Version: February 2022

Disclaimer: This publication is for general informational purposes only. It is not intended as a substitute for the advice of competent legal, tax or other advisers in connection with any particular matter or issue and should not be used as a substitute. Opinions, interpretations and predictions expressed in this publication are the authors own and do not necessarily represent the views of Orrick, Herrington & Sutcliffe LLP. While the authors have made efforts to be accurate in their statements contained in this publication, neither they nor Orrick, Herrington & Sutcliffe LLP or anyone connected to them make any representation or warranty in this regard.

Attorney Advertising.