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# Discrimination Based on Age Recent Case-Law of the CJEU

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## I. Factual basis Demographic change

### 2035: One in three people of retirement age

The ratio of employable people to pension claimants will continue to shift. The statutory pension will reach its limits as early as 2035.



\*) The prediction is based on net immigration of 230,000 people per year on average.

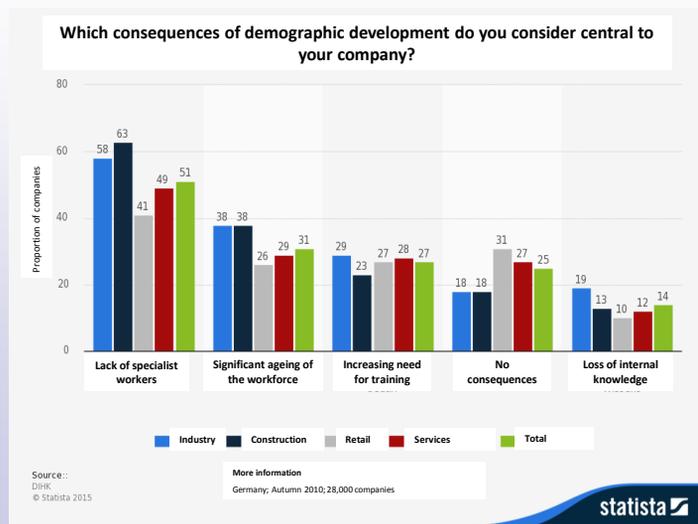
Source: German Federal Statistical Office  
Image: [www.gdv.de](http://www.gdv.de) | German Insurance Association (GDV)



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## Effects of demographic change on companies



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## I. Overview of the case-law of the CJEU

Case C-190/16 „Fries“ (age limits for pilots)

Case C-143/16 „Abercrombie & Fitch“ (on-call employment for persons under 25 years of age)

Case C-441/14 “Rasmussen” (redundancy pay/private law issues)

Case C-432/14 “Bio Philippe” (redundancy at the end of fixed-term contracts)

Case C-501/12 “Landin” (redundancy pay with a pensioner’s right to benefit)

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## **I. Overview of the case-law of the CJEU**

Case C-286/12 “Com v Hungary” (judges)

Case C-152/11 “Odar” (flexible redundancy compensation paid to disabled workers under social plan)

Case C-132/11 “Tyrolean Airways” (cabin crew)

Case C-141/11 “Hörnfeldt” (postal services employee)

Case C-297/10 “Hennings + Mai” (pay groups under collective agreement)

Case C-159 & 160/10 “Fuchs + Köhler” (public prosecutors)

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## **I. Overview of the case-law of the CJEU**

Case C-447/09 “Prigge” (pilot)

Case C-268/09 “Georgiev” (professor)

Case C-341/08 “Petersen” (panel dentist)

Case C-229/08 “Wolf” (fire service)

Case C-555/07 “Kücükdeveci” (notice periods)

Case C-411/05 “Palacios” (manager)

Case C-144/04 “Mangold” (lawyer)

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## II. Legal bases

### EU primary law:

Article 21 CFR - Principle of non-discrimination  
(cf. C-190/16 „Fries“)

Article 6(3) TEU - General principles of EU law  
(cf. C-144/04 “Mangold”)

Article 19 TEU - Legislative competence for  
non-discrimination

### EU secondary law:

Article 2 Dir. 2000/78/EC - Ground of “age”,

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## Primary law effects: Legal test for secondary law (cf. Case C-190/16 „Fries“)

Primacy of EU law: within the framework of its applicability

Direct effect of directives –

vis-à-vis Member States and their institutions

No direct effect –

among individuals; only need to interpret all national  
rules of law in keeping with the provisions laid down  
in EU law

However: national law must **not be applied** also between  
private persons if national law is incompatible with primary law  
(“Mangold” C-555/07, „Kücükdeveci“; C-441/14 „Rasmussen“)

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### Third-party effect of the ban on age discrimination

- The ban on age discrimination is a fundamental principle of EU law
- Directive 2000/78/EC serves solely to reaffirm this principle
- The principle is therefore applicable in Directive form
- Courts fulfil their implementation obligation from the state; primarily by interpreting national law. If an interpretation confirming to the Directive violates the ban on interpretation “contra legem”, the standard that is contrary to primary law remains inapplicable.

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**Caution:** consistent case-law on how national law should be applied, does not elicit the “contra legem” ban; the case-law must be changed.

**Open question:** does this case-law only apply for “general principles” of EU law or for the broad discrimination ban under primary law in Article 21 CFR?

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## III. Application

### Prohibition of age discrimination

#### (1) Direct/indirect discrimination

- Differentiation based directly on age
- Differentiation which is not based on age, but which leads to disproportionate adverse effects on a specific age group

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## III. Application

#### 2. Justification of disadvantage:

Article 2(2)(b) Directive 2000/78/EC – Justification of indirect discrimination, i.e. legitimate aim/appropriate means

Article 2(5) Directive 2000/78/EC – Public security and public order/health protection/protection of rights of others

Article 4(1) Directive 2000/78/EC – Genuine occupational requirements

Article 6 Directive 2000/78/EC – Objectively justified objectives such as employment policy, vocational training etc. if means are appropriate and necessary

- Different requirements in terms of admissible margin of appreciation (State/collective bargaining parties/employers)
- Different requirements with regard to the proportionality test

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## IV. Discrimination test

### 1. Disadvantage:

- Is the cl. treated more unfavourably (in reality or hypothetically) than a comparator?
- Is the comparator in a comparable situation (with regards to all circumstances unrelated to age)?

Example: No precariousness premium on leaving temporary employment for “holiday working” students, case C-432/14 “Bio Philippe”.

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## IV. Discrimination test

### 2. Applicability of exemptions/ justifications

- Article 2(5) Directive 2000/78/EC:  
Legal basis, distinction aimed at public security...etc.
- Article 4(1) Directive 2000/78/EC: differentiation based on age is a significant occupational requirement: legal aim of differentiation objective and proportionate means to achieve this aim (opinions case C-25/15, maximum recruitment age for the police force)

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## IV. Discrimination test

3. Justification of the disadvantage,

Article 6(1)/ Article 2(2)(b) Directive 2000/78/EC:

- Specific, clearly defined aim of differentiation, legitimate (= labour market policy, occupational training)
- Means for achieving the aim are appropriate, necessary and do not encroach more than needed

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## Result of discrimination test

➡ Depends on type of measure which leads to difference in treatment:

- 1) Very wide discretion for all players with regard to standard retirement age. Proportionality of measures has been regularly confirmed.
- 2) In all other cases, margin of discretion has been strictly limited, proportionality has often been criticised, in particular due to:
  - lack of consistency
  - lack of necessity
- 3) Wider margin of discretion for labour market policy of the member states (Case C-143/16, „Abercrombie & Fitch“)

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## Result of discrimination test

### Example: Discrimination on termination of employment

Payment of severance allowance to workers entitled to old age pension  
Case C-499/08 "Andersen"

Termination of employment contract on reaching retirement age  
Case C-45/09 "Rosenblatt"

--- older employees need severance allowance for bridging of a longer job-seeking period

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## Result of discrimination test

Result: on strict scrutiny, the difference in treatment cannot be justified: using the pension entitlement as a basis, instead of the pension actually drawn, is disproportionate because the claimant's interest in remaining employed is worthy of protection

Case C-515/13 "Landin":  
Pension claimants should be excluded if they have reached the statutory pension age on termination

Result: the difference in treatment is justified without having considered the objective of the measure, regardless of the actual economic resources available to an individual: social welfare is sufficient, irrespective of the claimant's interest in remaining employed

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## Findings

Inconsistency in age discrimination cases, depending on whether, or not, general employment policy is affected; this is due to

- fears that this might have (significant) consequences for social welfare systems
- difficulties for all Member States to adapt
- fact that early retirement is seen as a hard-won accomplishment
- lack of acceptance of “Mangold” jurisprudence
- that, since Lisbon, the EU’s strategy has been to increase the employment rate among persons up to 64 years of age and to reduce early retirement

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## Legal consequences of established age discrimination

1. The discriminating difference in treatment is unlawful, and hence ineffective.
2. What will replace the ineffective measure?  
→ A violation of equality rights can always be remedied in a variety of ways:
  - upward harmonisation
  - downward harmonisation
  - re-adjustment(The principle of equal treatment as such does not specify the alternative to be applied)

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## Legal consequences of established age discrimination

3. According to the CJEU's case-law, the alternative will be determined by the Member States' obligation to work towards improving living and working conditions.

Consequently:

Alignment of conditions for discriminated persons with conditions for the privileged group

until

a non-discriminatory rule is applied. This means –

with regard to the past: upward alignment

with regard to the future: at libitum, within the framework of what is legally possible

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## Reasons given for the justification effect

- (1) Article 2(5) Directive 2000/78/EC: strict standard  
Rationale: Exceptions to a general principle need to be strictly interpreted
- (2) Article 4(1) Directive 2000/78/EC: strict standard  
“genuine and determining requirement” for adopting the measure concerned

In both cases: Required consistency calls for stricter scrutiny

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## Result of discrimination test

- (3) Article 6(1) Directive 2000/78/EC: non-exhaustive list of objectives that can provide justification

Must be applied in an appropriate manner

→ flexible Standard, wide discretion for players

Consequence: standard retirement age (laid down in laws/collective agreements/employment contracts) is always accepted because of

- “better distribution of work between the generations”
- “sound structure of age pyramid in companies”
- “generally accepted practice”, approved by social partners
- no statutory exclusion from participation in labour market

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### Example:

#### Amendment of (previously discriminatory) pay groups

- Principle: pay increases based solely on age cannot be justified; they can be justified based on experience (joined cases C-297/10 and C-298/10 “Hennigs” and “Mai”)
- Collective agreements are subject to the ban on discrimination too, when measuring the prerogative for assessment the autonomy of collective bargaining can be taken into account (case C-501/12 “Specht”).
- The desire for public savings does not constitute valid grounds to justify the creation of disadvantaged groups

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### **Example:**

#### **Amendment of (previously discriminatory) pay groups**

- When switching to a grouping system without disadvantage, acquired rights and legitimate expectations should be taken into consideration, even if, in doing so, the previously discriminatory regulation continues (temporarily).  
Case C-530/13 “Schmitzer”; C-20/13 “Unland”;  
if the discriminatory effect is continually perpetuated in some cases, this cannot be justified  
Case C-417/13 “Starjakob”.