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BETRIEBSVERFASSUNGSRECHT FÜR ARBEITNEHMER/INNEN

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TOPIC:

**AGE DISCRIMINATION AND
COMPULSORY AGES FOR RETIREMENT**

1 Directives 2000/43/EC, 2000/78/EC, 2002/73/EC

1.1 The six characteristics protected by the directives

Six protected characteristics that may attract discrimination

Race/Ethnic origin
Sex
Religion/Belief
Disability (not just card-bearing status)
Age
Sexual identity

1.2 How these characteristics are protected

<p>Protection from</p> <p>direct discrimination indirect discrimination harassment</p>

1.3 The specifics of anti-discrimination on grounds of age

Framework Directive on Equal Treatment 2000/78/EC of 27/11/2000

Implementation in general by: 2/12/2003

Implementation of age provisions by: 2/12/2006

2. Discrimination on grounds of age as an accepted practice

- 2.1 Public opinion
- 2.2 Everyday discrimination
- 2.3 Applied through legal statutes, collective bargaining agreements, works agreements, individual employment contracts

Example 1: Age limit for job access

Various German states impose an age limit for civil service recruitment: 30, 32, 35 years. The maximum appointment age for judges/ public prosecutors/ public service lawyers, is e.g. 35 years.¹

Active fire-fighting service: Maximum recruitment age 30 years.²

Example 2: Shorter working hours for older workers

In the breweries of Berlin/Brandenburg older workers in former West Berlin work 28 days less upon reaching the age of 60 if they have been with the company for the last 10 years.³

Example 3: Lower pay for younger workers

“Young workers receive 80% until attaining the age of 18, 90% until attaining the age of 19 and 100% upon attaining the age of 19 of the wage scale established in collective bargaining for the occupation which they are exercising.”⁴

¹ Further detail forthcoming in Kühling/Bertelsmann, NZVwR 2009, December issue.

² ECJ C-229/08 (Wolf).

³ § 4 no. 4.1 of the 1994 Framework Agreement for Workers in Breweries, Malthouses and Beer Makers in Berlin/Brandenburg.

⁴ From § 2 of the Collective Bargaining Agreement of 2000 on the Determination of Wages in the Building and Ironwork Preservation Trade in Germany Excepting the Five New States and the State of Berlin.

Example 4: Age-dependent pay scale

The framework agreement for government employees (BAT) that was in force until autumn 2005 provides in § 27 (1) for the pay scale to depend on age: “From the beginning of the month when an employee in pay grades X to III reaches the age of 21 or an employee in pay grades II to I reaches the age of 23, he receives the initial basic pay (Stage 1) for his pay grade. At two-yearly intervals the employee moves on to the next stage of his pay grade until he obtains the final basic pay.”⁵

Example 5: Duration of annual leave

The retail sector in the State of Schleswig-Holstein differentiates between workers from their 18th to 21st birthday (30 days of leave), from age 21 to 25th birthday (32 days), from age 25 to 30th birthday (34 days) and from age 30 onwards (36 days).⁶

Example 6: Participation in training no longer essential

“If an employee who has reached the age of 55 does not consent to a training or re-training scheme, this shall not be regarded as wanton refusal.”⁷

Example 7: Statutory notice of dismissal

§ 622 (1) 1st sentence of the Civil Code (BGB) extends the period of notice for lengthier seniority. § 622 (1) 2nd sentence then provides: “When calculating seniority of service, periods prior to the age of 25 years are not taken into account.”⁸

Example 8: Termination for convenience debarred

Employment may no longer be terminated for convenience if the worker is aged 40 after 15 years in the company⁹ or aged 53 after 3 years in the company¹⁰.

Example 9: Dismissal by age group

Collective dismissals (20% of the work force) are determined by social criteria (seniority, age, maintenance obligations, disability status). Management and works council agree to form age groups: 20 to 30, 31 to 40, 41 to 50, 51 to 60 and older. 20% of each age group are laid off, with the above criteria applying.¹¹

Example 10: Age-dependent severance pay

Various framework agreements provide for severance pay in the event of (even individual) dismissals due to rationalisation – with the amount often based on specific age groups.¹²

⁵ Inadmissible and upward adjustment of pay in rulings: LAG Berlin-Brandenburg on 11/9/2008, NZA-RR 2009, 378; LAG Hessen on 22/4/2009, NZA 2009, 799 ff.

⁶ § 10 of the 1993 Framework Agreement for the Retail Sector in the State of Schleswig-Holstein.

⁷ Recorded note on § 4 (1) 2nd sub-paragraph of the 1987 Agreement on Protection from Rationalisation of Public Service Employees 1987 (2001 version).

⁸ Decisions: LAG Berlin-Brandenburg on 24/7/2007 – 7 Sa 561/07, DB 2007, 2542 f.: Norm must not be applied as in breach of General Equal Treatment Act. LAG Düsseldorf on 21/11/2007 – 12 Sa 1311/07: § 622 II 2 BGB in breach of EU law but reference to ECJ (as C-555/07, Küçükdeveci). LAG Rheinland-Pfalz on 31/7/2008 – 10 Sa 295/08: § 622 II 2 BGB applied although possibly contravening EU law. Cf. also ECJ on 18/6/2009 - Rs. C-88/08 (Hütter).

⁹ E.g. § 53 (3) BAT (from age of 40/15 years seniority).

¹⁰ Framework Agreement for the Metalworking Industry in North Württemberg/North Baden, Waged and Salaried Workers. LAG Baden-Württemberg on 30/7/2007 - 15 Sa 29/07: admissible, at least before General Equal Treatment Act.

¹¹ Federal Labour Court on 6/9/2007 – 2 AZR 387/06; NZA 2008, 405 ff.: dismissal by age group admissible.

¹² § 13 IV 1992 Framework Agreement for the Chemicals Industry (2005 version): higher severance pay based on ages 40, 45, 50, 55 and 60. § 12 of the 1983 Protection From Rationalisation Agree-

Example 11: Severance pay only for older age group

The banking sector only offers severance pay following rationalisation for people aged 40 and over, rail operator Deutsche Bahn from the age of 25, the textiles industry in the State of Baden-Württemberg only from the age of 28.¹³

3. General exceptions permitted for all characteristics, including age**3.1 Exceptions from all grounds: Positive action (§ 5)****Different treatment is also admissible if**

- future disadvantages are to be prevented,
- existing disadvantages are to be compensated for, and
- the measures adopted are proportionate and appropriate.

Very narrow conditions according to ECJ case law, for age: covered by Art. 6 (1) (a).

3.2 Exceptions based on the nature of the activity**Different treatment is admissible when**

- the **objective** is **legitimate**,
 - and the **requirement** is **proportionate**,
 - if the nature of the occupational activity
 - or the context in which it is carried out
- constitutes a **determining occupational requirement**.

ment for the Private Insurance Sector 1983 (status: 2005): severance pay rises at 40, 43, 49, 52, 55 and 58. More details in Bispinck, WSI-Mitt 2005, 586.

¹³ Bispinck, Tarifliche Senioritätsregelungen, in: Informationen zur Tarifpolitik Nr. 59, 2005, 11 f.

Problem: customer expectations (older financial adviser in bank)
 Problem: age limits and generalisation of risks (age limit 60 for pilots)¹⁴

3.3 Exceptions from the specific ground of age

General conditions defined in Art. 6 (1) 2000/78/EC:

- any different treatment must be explained in fair-minded and rational terms (the Directive says: **objectively and reasonably justified**),
- and pursue a **legitimate aim**,
- using **appropriate and necessary** (i.e. proportionate) means.

Particular openings for certain kinds of action (Art. 6 (1)):

- a. the setting of special conditions for all aspects of employment *in order to promote the vocational integration* of young people, older workers and persons with caring responsibilities *or ensure their protection*,
- b. the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or terms of employment
- c. the fixing of a maximum age for recruitment (based on specific training requirements / need for a reasonable period in employment)

4. Terminating employment at a fixed age limit?

4.1 Practice of setting age limits for employment

Statutory law: no provision

Older contracts:

“Employment terminates, without any requirement for notice to be served, upon reaching the age of 65 in the case of men and 60 in the case of women.”

Standard clauses nowadays in framework agreements, works agreements and individual contracts:

“Employment terminates without notice at the end of the month when the worker becomes eligible for the full statutory retirement pension.”¹⁵

¹⁴ BVerfG on 26/1/2007 – 2 BvR 2408/06: age limit of 60 for pilots admissible; BAG on 10/12/2008, DB 2009, 850 ff. – referred to ECJ.

¹⁵ Ruled admissible by BAG on 18/6/2008 – 7 AZR 116/07; NZA 2008, 1302 ff.

4.2 Genesis of the Directive

- 1st proposal from EC Comm. on 25/11/1999: admits age limits “appropriate and necessary to achieving legitimate objectives of labour market policy”.
- 2nd proposal from EC Comm. on 12/10/2000: deletes this passage.
- Wording of Directive: no explicit reference to a maximum age.

4.3 ECJ Judgments on maximum age

ECJ on 16/10/2007, C-411/05 (Palacios de la Villa)

ECJ criteria for the admissibility of an age limit:¹⁶

- The age limit of 65 falls within the scope of the Directive (46)
- The aim behind setting the age limit does not have to be explicitly mentioned in the text (56)
 - However: elements relating to a legitimate aim must be identifiable (employment policy, situation in the labour market) (57)
- If the aim is identifiable: the age limit can be seen in principle as appropriate and necessary (68)
 - The legislator still enjoys broad discretion (68)
- Proportionality principle: not going beyond what is appropriate and necessary (71)
 - The aim must be in the public interest (77)
 - Is the aim “reasonable”? (72) Must not unduly prejudice claims (73)
- The level of financial compensation (retirement pension) cannot be regarded as unreasonably low (73)

¹⁶ The numbers relate to the marginals in the ECJ’s judgment.

ECJ on 5/3/2009, C-388/07 (Age Concern England)

ECJ criteria for the admissibility of an age limit:¹⁷

- The age limit of 65 falls within the scope of the Directive (28)
- Transposition by Member States must be fully effective (41)
 - National choice remains as to methods (41)
- The aim served by the age limit does not have to be set out explicitly (43)
- However: Elements of the legitimate aim must be identifiable from the context (45)
- Social policy objectives must meet the public interest, in particular with regard to employment policy and the labour market (46)
 - Under certain conditions special interests of employers may be valid (46)
 - The legislator still enjoys broad discretion (51)
- Proportionality principle: not going beyond what is appropriate and necessary (52)
- Mere generalisations are not enough – measures must be verifiably and plausibly justified (51)
- Strict distinction drawn between different treatment and discrimination (60)
 - Burden of proof rests with the State (67)
- It is for the national court to decide on the all aspects of the national regulations (49)

4.4 Open questions about compulsory retirement

- Does it depend on the provision of a statutory pension?
- Does it depend on the specific situation of the individual concerned?
- EC policy: to increase the percentage of older workers. What, then, might the legitimate aim be?
- Aim: to replace older workers by younger workers?
- Must the vacancy left be refilled?

4.5 Matter pending before the ECJ: Rosenblatt (C-45/09)

Case: Cleaner working 10 hours a week, now aged 65.
 Gross income prior to pension: € 307.48
 Pension now at 65: € 253.00

- Question: individual situation?
- Problem: employer alone decides whether a person over 65 can carry on working

¹⁷ The numbers relate to the marginals in the ECJ's judgment.

5. Prospects for regulatory policy debate

6. Useful literature¹⁸

Bahnsen, Volker

- Altersgrenzen im Arbeitsrecht, NJW 2008, 407 ff.

Bauer, Jobst-Hubertus

- Altersdiskriminierung – oder: der Gesetzgeber zwischen Skylla und Charybdis, in: Festschrift Adomeit, 2008, 25 ff.

Bertelsmann, Klaus

- Kündigungen nach Altersgruppen und das AGG, AuR 2007, 369 ff.

- Altersgrenze 65, ECJ und AGG, AiB 2007, 689 ff.

Bezani, Thomas/ Wilke, Frank

- Zur Sozialauswahl nach Altersgruppen, EwIR 2007, 609 ff.

Brock, Martin/ Windeln, Norbert

- Zur Vereinbarkeit der Zwangspensionierung mit Europarecht, EwIR 2008, 153 ff.

Colneric, Ninon

- Antidiskriminierung – quo vadis? NZA Beilage 2/2008, 66 ff.

Hase, Detlev

- AGG-konforme Abfindungsberechnung, AiB 2009, 218 ff.

Körner, Marita

- Diskriminierung von älteren Arbeitnehmern – Abhilfe durch das AGG?, NZA 2008, 487 ff.

Krieger, Steffen/ Arnold, Christian

- Rente statt Abfindung: Zulässigkeit des Ausschlusses älterer Arbeitnehmer von Sozialplanleistungen, NZA 2008, 1153 ff.

Linsenmaier, Wolfgang

- Das Verbot der Diskriminierung wegen des Alters, RdA 2003, Beilage Heft 5, 22 ff.

Preis, Ulrich

- Verbot der Altersdiskriminierung als Gemeinschaftsgrundrecht. Der Fall „Mangold“ und die Folgen, NZA 2006, 401 ff.

- Diskriminierungsschutz zwischen ECJ und AGG (Teil I und II), ZESAR 2007, 249 ff. and 308 ff.

Rolfs, Christian

- Altersdiskriminierung: ECJ-Rechtsprechung bleibt konturlos, EuZA 2009, 235 ff.

Schleusener, Aino

- Europarechts- und Grundgesetzwidrigkeit von § 622 II 2 BGB, NZA 2007, 358 ff.

Thüsing, Gregor

- Europarechtswidrigkeit des § 2 Abs. 4 AGG - Altersgruppenbildung, BB 2007, 1506 ff.

Wenckebach, Johanna

- Altersdiskriminierende Kündigung – Altersgruppenbildung, AuR 2008, 70 ff.

¹⁸ In particular with regard to the legal situation in Germany. Attention is also drawn to the Commentaries on the General Equal Treatment Act (AGG), notably:

- Bauer/Göpfert/Krieger, AGG, 2nd ed. 2008
- Däubler/Bertzbach, AGG, 2nd ed. 2008
- Rust/Falke, AGG, 2007