



NEWSLETTER

Labor Law

October 2024 | 6th edition



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Dear readers,

Equal treatment in the workplace - a perennial issue!

We start today with our main topic - more to follow - on the General Equal Treatment Act (AGG). This law, which has been in force in Germany since 2006, forms the legal framework for a fair and non-discriminatory working life. We explain the current developments and challenges in practice and explain how the

AGG helps to prevent discrimination in the workplace. The AGG will also be the focus of the regulars' table on employment law in October. However, other employment law topics such as the collective social plan, the training relationship and current BAG decisions etc. will not be neglected.

Best regards from Constance

Your Michael D. Wirlitsch



JOUR FIXE LABOR LAW

Are you interested in discussing labor law topics in a small group? Then our jour fixe is just right for you!

We deal with all kinds of employment law topics or topics you wish to discuss at our jour fixe. The jour fixe takes place every three months at the end of the month.

In addition, we always discuss the latest case law on a wide range of topics.

- ◆ Volunteer program - What is it?
- ◆ No discrimination based on gender, ethnic origin, faith, etc. - What does this mean for employment law?
- ◆ Limits of contractual freedom and discrimination

We look forward to welcoming you to the regulars' table. You are also welcome to pass this invitation on to colleagues.

You will receive all further information on the venue with our separate invitation to the regulars' table or on

TRAININGS LABOR LAW

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18. / 19.12.2024

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You can find the dates in our new
seminar brochure 2025/2026.

All further information on the training
courses can be found at

wirlitsch-arbeitsrecht.de

afb-bodensee.de



General Equal Treatment Act (Part 1)

The topic of equal treatment plays a major role in current social debates - including in employment law.

On the legal side, the principle of equal treatment under employment law derived from the general principle of equality in Article 3 (1) of the German Basic Law, the special prohibitions of discrimination under Article 3 (3) of the German Basic Law and the General Equal Treatment Act (AGG), which came into force on August 13, 2006, are particularly relevant.

According to these regulations, discrimination on the basis of **gender, race, language, homeland and origin, faith** (religion and ideology), **political opinion, disability, age** or **sexual identity** is prohibited unless there is an objective justification. The obligation of the department management and staff council to treat all members of the department equally applies not only to individual personnel measures, but also to collective regulations in service agreements.

To ensure that the requirements of the AGG are not merely program statements, but are actually implemented, the AGG standardizes binding obligations of the employer and the rights of employees. The obligations of the employer contained in Section 12 AGG include, among other things, that the preventive and repressive measures for protection against discrimination on the grounds specified in Section 1 AGG must apply and that the employer must point out the inadmissibility of discrimination and work to ensure that it does not occur.

Should discrimination within the meaning of the AGG nevertheless occur, employees have a right of appeal (§ 13 AGG), a right to refuse performance (§ 14 AGG) and a claim for compensation and damages (§ 15 AGG).

Discrimination grounds:

Gender (Art. 3 para. 2 and 3 GG, § 1 AGG)

The characteristic “gender” concerns the equal treatment and equality of men and women.

Equal rights for both sexes have long been embedded in both EU and German law. Gender is a clear characteristic. However, the prohibition of discrimination also covers people who cannot be clearly assigned to a specific gender (intersexuals) and those who have changed their sexual characteristics through surgery (transsexuals), as well as people who have sexual characteristics that can objectively be assigned to both genders (hermaphrodites). Direct discrimination on the grounds of gender also exists in the case of less favorable treatment of women due to pregnancy or maternity leave.





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Sexual identity (§ 1 AGG)

The term “sexual identity” refers to the preference in the choice of sexual object - in other words, the direction of a person's sexual interests with regard to the desired sexual partner.

The law protects homosexual, heterosexual, bisexual and transsexual people.

Other sexual inclinations or sexual practices are not covered by the AGG. This applies in particular to those that fall within the scope of criminal law. Pedophiles can therefore not invoke the protection of the AGG.

Descent (Art. 3 para. 3 GG)

“Descent” refers to the **biological relationship** of a person to their ancestors.

Race (Art. 3 para. 3 GG, § 1 AGG)

There are no different human races.

Rather, the term “race” is used as a political category. Accordingly, anyone who (incorrectly) assumes that different human races have different values and is hostile to other people because of their characteristics such as skin color, facial structure or hair is acting in a racist manner. The law aims to counteract such tendencies. Nevertheless, the term “race” used in the law is unfortunate.



Collective bargaining social plan

What is a social compensation plan?

It is a collective agreement that does not apply across the board, but is a special case of a company collective agreement that is intended to compensate and/or mitigate the disadvantages resulting from a specific change in operations.

In short: a collective agreement negotiated by the trade union that covers the content of the issues otherwise covered by a social plan. In principle, the works council is responsible for negotiating a social compensation plan in accordance with **§§ 111, 112 BetrVG**.

Advantages of a collective social plan

The company agreement often lacks the enforceability of the demands. Concessions are usually achieved through negotiation and a willingness to compromise. The content of the works agreement therefore depends largely on the negotiating skills of the works council and the availability of leverage. The right to strike, to which trade unions are entitled, is not covered by the scope of the work council's capabilities. Due to their right to strike, the trade unions are able to enforce their conditions more successfully and more easily. Disagreements can only be resolved by the decision of the conciliation committee.



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Unjustified unequal treatment

The question arises as to whether the simultaneous existence of a collective bargaining social plan in addition to the works constitution leads to unjustified unequal treatment **under Art. 3 (3), 9 (3) GG**. Thus, only members of the trade union can enjoy the mandatory and indispensable effect of the collective social plan. It is possible to extend the scope of the social compensation plan to employees who are not bound by collective agreements by mutual agreement. If necessary, however, they will be disadvantaged without an existing employment contract provision.

The negative freedom of association resulting from Art. 9 Para. 3 GG is to be protected. This is impaired if the regulation creates inadmissible pressure for the employee who is not bound to join by the collective agreement.

Whether a social compensation plan is an incentive for collective bargaining is a complex question that depends on various factors.

On the one hand, a social compensation plan can be an incentive for **employers** to commit to collective agreements, as it offers them **legal certainty** and **planning security** when implementing operational changes.

- **Collective social plans** are usually **negotiated** between **trade unions** and **employers' associations**. They contain provisions on severance pay, retraining and further training for employees affected by operational changes.
- **The regulations in collective social plans** are **generally more favorable** for **employees** than the **statutory**

regulations in the Dismissal Protection Act.

- **This can make a social compensation plan attractive for employers**, as it helps them to avoid conflicts with their employees.

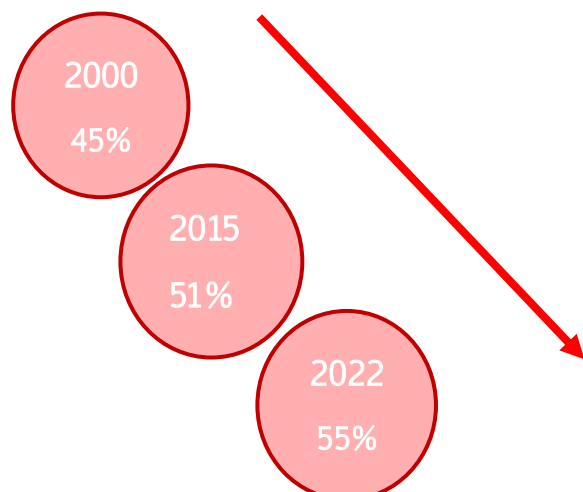
On the other hand, a collectively agreed social plan can be an incentive for **employees** to remain bound by collective agreements, as it offers them **more security** when their **employment is terminated**.

In detail:

The room for maneuver granted by Art. 9 Para. 3 GG due to collective bargaining autonomy makes it possible to differentiate between non-union and union members. Union membership becomes a prerequisite for a better performance.

Violations of granting benefits on the basis of the collective principle of equal treatment can only exist where there is room for maneuver and not in the case of mandatory implementation of collective bargaining agreements.

Employees not covered by collective agreements in the new federal states (2000 to 2022):





Termination of a training contract - What should I bear in mind?

The requirements for the termination of training contracts are regulated by the Vocational Training Act (BBiG).

Before the start of training and during the probationary period, the vocational training relationship can be terminated by either party (training company and trainee) at any time without observing a notice period and without giving reasons (§ 22 Para. 1 BBiG). However, the termination must not be arbitrary, based on unreasonable motives or constitute an unlawful reprimand.

The probationary period must be at least one month and may not exceed four months (§ 20 BBiG).

Termination by the trainee (training company)

After the end of the probationary period, termination without notice is only possible for good cause. The requirements for good cause in training relationships are more stringent than in regular employment relationships.

For example, in view of the educational mandate incumbent on the training company, one or (depending on the degree of breach of duty), several warnings are required to justify a reason for termination before a termination for conduct-related reasons. The training company must have exhausted all possibilities to have an educational effect on the trainee.

In this context, the question is whether the training company can be expected to continue the training until the end of the training. This is only denied in exceptional cases. The more advanced the training, the higher the requirements for reasons of termination. With regard to a formally effective termination, it is important that the written termination is specifically justified. If no reasons are given, the termination is formally invalid. Furthermore, the facts on which the termination is based must not have been known to the trainee for more than two weeks. Here, the trainee's date of reception of the termination notice is decisive.

Termination by trainees

The trainee, on the other hand, has the right to terminate the contract by giving four weeks' notice if he/she gives up the vocational training or changes the direction of training.

They also have the right to terminate the contract without notice for good cause. The aforementioned statements on extraordinary termination apply accordingly.

Exception and special features

The vocational training relationship can generally be terminated by mutual agreement by means of a termination agreement, which must also be in writing.





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Disputes in the training relationship (arbitration)

In the event of problems or disputes in the training relationship, it is always advisable to contact the training advice service of the relevant trade union/chamber early on. Disagreements can often be resolved before they escalate. If a solution cannot be found, the relevant trade union/chamber has the option of calling on the arbitration committee for training disputes (Section 111 (2) ArbGG). A solution acceptable to both parties can usually be found here.

Works constitution law training entitlement - webinar instead of classroom training? (5/24)

According to the Works Constitution Act (BetrVG), work councils are entitled to the following for works council work necessary training courses, the costs of which must be borne by the employer. This may include accommodation and catering costs for an external face-to-face seminar even if the same training provider offers a webinar with the same content.

In the example of airlines a staff representative body (PV) has been established by collective agreement, whose training entitlement is based on the BetrVG. The PV sent two of its members to a basic training course on works constitution law lasting several days in Potsdam at the end of August 2021. The employer paid the seminar fee, but refused to cover the costs of accommodation and meals. The main reason given for this was that the members of the PV had attended a webinar which took place on several days and was offered at the same time and with the same content.

of the same training provider. In the proceedings initiated by PV, it claimed that the employer must also bear the costs of accommodation and meals. The lower courts ordered the employer to do so.

The employer's legal appeal against this was unsuccessful before the Seventh Senate of the Federal Labor Court. Just like a works council, the PA has a certain amount of leeway when assessing which training courses it sends its members to. In principle, this also includes the training format.

Federal Labor Court, decision of February 7, 2024 - 7 ABR 8/23





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Current BAG decision

Works council election - Fewer candidates than works council seats

If fewer employees apply for a works council seat in a works council election than there are members to be elected, a “smaller” works council can be established.

The employer runs a clinic that generally has 170 employees. With a company of that size the accretion of Section 9 of the Works Constitution Act (BetrVG)* provides a works council consisting of seven members. In the works council election initiated in spring 2022, only three female employees stood as candidates and a works council with three members was elected. The employer considered this election to be null and void and sought a corresponding declaration from the labor court. The lower courts did not uphold this and deemed the works council election to be valid.

The employer's legal appeal against this was unsuccessful before the Seventh Senate of the Federal Labor Court. It is not an obstacle to the election of a works council if there are not enough candidates for the works council office. This follows above all from the legislator's intention, expressed in Section 1 (1) sentence 1 BetrVG, that works councils are elected in companies with at least five employees who are permanently entitled to vote, three of which are eligible for election. In the constellation of fewer candidates than works council seats to be filled, the works council size must be reduced to the next lower level (in each case).

of Section 9 BetrVG until the number of applicants is sufficient for the establishment of a body with an odd number of members.

Federal Labor Court, decision of April 24, 2024
- 7 ABR 26/23

Good to know:

§ Section 9 BetrVG (number of works council members) reads in part: The works council in companies with generally

5 to 20 employees entitled to vote consists of one person,

21 to 50 employees entitled to vote: 3 members,

51 to 100 employees entitled to vote: 5 members,

101 to 200 employees with 7 members, ...





New BAG decision:

18.10.2023; 42/23 - Work on call - Duration of weekly working time

With on-call work, employees can be employed flexibly depending on their work requirements. This form of work is particularly common among mini-jobbers in catering, hospitality and retail sectors. It occurs when the employer and employee agree that the employee must perform their work according to the workload.

Legal basis

If the employer and employee agree to work on call, but do not specify the duration of the weekly working time, a working time of 20 hours per week is generally deemed to have been agreed in accordance with Section 12 (1) sentence 3 of the Part-Time and Fixed-Term Employment Act (TzBfG). A deviation from this can only be accepted by way of supplementary interpretation of the contract if the statutory provision is not appropriate and there are objective indications that the parties had unanimously intended a different duration of weekly working hours forming the contract.

Facts of the case

The plaintiff has been employed by the defendant, a company in the printing industry, since 2009 as a “call-off helper insert”. The employment contract she concluded with a legal predecessor of the defendant does not contain any provision on the duration of weekly working hours. The plaintiff was - like the other on-call employees

employees - were called in to work at different times as required. After the extent of the call-off of her work performance decreased from 2020 compared to the immediately preceding years, the plaintiff argued that, according to her calculation, her work performance had been called off by the defendant to an average of 103.2 hours per month in the years 2017 to 2019. She stated that a supplementary interpretation of the contract showed that this was the working time now owed and to be remunerated by the defendant. Insofar as the call-off of her work performance in 2020 and 2021 did not reach this extent, she demanded remuneration due to default of acceptance.

Default of acceptance

Default of acceptance under employment law describes the situation in which the employer does not accept the work offered by the employee. According to Section 293 BGB, the creditor, in this case the employer, is in default. In the employment relationship, the employer is in default of acceptance if there is an employment relationship that can be fulfilled, the employee offers his work performance (pursuant to Sections 294, 295 BGB), the performance is possible (pursuant to Section 297 BGB), but the employer still does not accept the performance (pursuant to Section 293 BGB).





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Based on the statutory provision of Section 12 (1) sentence 3 TzBfG, the Labor Court assumed that the duration of the weekly working hours in the on-call employment relationship between the parties was 20 hours. It therefore upheld the claim for compensation payment for default of acceptance only to a small extent, insofar as the plaintiff's call-off work fell short of 20 hours in individual weeks. The LAG dismissed the plaintiff's appeal. The plaintiff's appeal, in which she maintained her further claims, was unsuccessful before the Fifth Senate of the Federal Labor Court.

If the employer and employee agree that the employee must perform their work according to the workload (work on-call), they must stipulate a specific duration of weekly working hours in the employment contract in accordance with Section 12 (1) sentence 2 TzBfG. If they fail to do so, Section 12 para. 1 sentence 3 TzBfG closes this loophole in that a working week of 20 hours is deemed to have been agreed by law.

A deviation of weekly working hours can only be assumed by way of supplementary interpretation of the contract if the fiction of Section 12 para. 1 sentence 3 TzBfG is not an appropriate provision in the employment relationship in question and there are objective indications that the employer and employee would have agreed a different provision when the

contract was concluded if they had been aware of the loophole. and agreed a higher or lower duration of weekly working hours.

However, the plaintiff has not provided any evidence for such an assumption.

If the initial gap in the employment contract regarding the duration of the weekly working hours at the start of the employment relationship is closed by the statutory fiction of Section 12 (1) sentence 3 TzBfG, the parties may subsequently expressly or impliedly agree on different weekly working hours. However, the employer's call-off behavior in a specific, seemingly arbitrary period long after the start of the employment relationship is not sufficient for this. The employer's call-off behavior alone does not have the value of a legal declaration to the effect that the employer intends to be bound to a higher duration of weekly working hours deviating from Section 12 (1) sentence 3 TzBfG for all future periods. Nor does the employee's willingness to work more than required by Section 12 (1) sentence 3 TzBfG in a certain period of time justify the assumption that the employee wishes to be permanently bound to a longer period of time than provided for by law.

**Federal Labor Court, judgment of October 18, 2023
- 5 AZR 22/23**





This & That

Introduction of the Ukrainian lawyer Ms. Olha Vitenko

I am Olha Vitenko and have been working as a trainee at Wirlitsch law firm, since September of 2024, where I am involved in handling cases.

In 2023 I successfully completed my bachelor's degree in law at the Taras Shevchenko National University in Kyiv (Ukraine). Since October 2023, I have been studying at the University of Konstanz as part of the LL.M. program to obtain a master's degree in law.



It is particularly valuable for me to be able to compare Ukrainian and German law, especially labor law. In order to familiarize you with this topic as well, I have prepared a brief overview. Although Ukraine has inherited a number of laws from the Soviet Union, the basic principles of labor law are in line with those of German law, for example, freedom of occupation, the prohibition of discrimination and the protection of employees. The laws governing working hours, vacation and dismissal are also similar. However, the first major difference between Ukrainian and German labor law is the existence of a uniform labor code, which makes it much easier for students to work and study.

Digitalization and more laws

The current government government wants it to soon be possible to conclude employment contracts by email.

The reduction in bureaucracy is progressing.

Instead of the “written form”, see Section 2 NachweisG, for contractual conditions, the “text form” will be sufficient in future. An employment contract can then also be concluded by e-mail.

More laws at the same time: Federal government statistics show that both the number of federal laws and the number of individual laws increased significantly between 2014 and 2024. While there were 1,671 laws with 44,216 individual standards on January 1, 2014, there were 1,792 laws with a total of 52,155 individual standards at the beginning of this year. Is the reduction in bureaucracy really making progress?

Source:





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We introduce ourselves



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Our specialization is in:

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We have been enforcing your rights in employment law for decades with a sense of proportion and perseverance, even in the face of considerable resistance in and out of court.

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