

# Guiding Questions for Focus Area: Right to Work and Access to the Labour Market National

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Answers of the German Institute for Human Rights

## Legal and Policy Framework

### 1. What are the legal provisions and policy frameworks in your country that recognise the right to work and access to the labour market by older persons?

Germany is a member state to the Covenant on Economic, Social and Cultural Rights. The Covenant is a federal law in Germany and the right to work (articles 6, 7 and 8) covers also older persons (as stated by the Committee on Economic, Social and Cultural Rights in their GC 6 1995 paras 22-25).

In general, the "right to work" is not enshrined in form of a subjective public claim to the provision of a specific job which can be deduced from the German Constitution (Basic Law, Grundgesetz, GG). However Art. 109 II GG in connection with Art. 12 I GG include an objective-legal obligation of the Federal Republic of Germany to ensure an as high as possible standard of employment through an active labor market policy. This provision is standardized in §§ 1, 2 of SGB III. Nor does the otherwise existing constitutional provisions on the "right to work" provide otherwise. The general principle of equal employment law developed by court decisions prohibits the employer from making individual employees worse off than other employees in a similar situation; it also covers age discrimination and aims at distributive justice.<sup>1</sup>

The General Equal Treatment Act (AGG), which has applied in Germany since 2006, was introduced in order to ensure greater equity in society and to help disadvantaged groups to participate to a greater extent. §§ 1, 2 AGG regulate the inadmissibility of a disadvantage due to the age related e.g. on: selection criteria and recruitment conditions, working conditions, access to vocational guidance and vocational training.

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<sup>1</sup> MüKoBGB/Thüsing, 8. Aufl. 2018, AGG § 1 Rn. 5 ([https://beck-online.beck.de/Dokument?vpath=bibdata%2Fkomm%2Fmuekobgb\\_8\\_band1%2Fagg%2Fcont%2Fmuekobgb.agg.p1.glii.g11.htm&pos=3&hwords=on](https://beck-online.beck.de/Dokument?vpath=bibdata%2Fkomm%2Fmuekobgb_8_band1%2Fagg%2Fcont%2Fmuekobgb.agg.p1.glii.g11.htm&pos=3&hwords=on))

Sections 88 to 92 SGB III standardize the so-called integration subsidy (Eingliederungszuschuss). It encourages companies hiring workers aged 50 or over up to 36 months by receiving a subsidy from the employer (amount: up to 50% of the salary, duration: up to 12 months).<sup>2</sup>

## **2. What are the challenges faced by older persons for the realization of their right to work and access to the labour market in your country?**

As a Federal Anti-Discrimination Agency (FADA)<sup>3</sup> survey showed, there is an above-average number of reports of disadvantage due to being "too old" in the search for employment and the application process. These are often cases where, due to prevailing stereotypes, older people are no longer thought to possess particular skills (e. g. in new technologies) because of their age. It is reported that it is especially difficult for older persons to find work, after a break in employment. Cases of age discrimination relating to failed job applications are often cases where the discrimination relates to the gender of the person affected as well as the age (in 46 percent of such cases of age discrimination).

Furthermore people in existing employment relationships report with above-average frequency cases of age discrimination in connection with forms of material disadvantage, such as the comparatively poorer evaluation of performance or discriminatory wage differences. Here, people who are classified as "too old" are perceived as being less competent (especially as regards efficiency, ability to adapt to innovations and dealing with modern technologies), which can in turn affect performance evaluation and salary classification.

## **3. What data, statistics and research are available regarding older persons engaged in informal work, particularly older women, including conditions of their work and economic value?**

Accordingly to the statistical yearbook, the proportion of working pensioners aged 65-69 has increased from 7 to 16 per cent, these figures have been published by the Federal Statistical Office (Destatis). While 20.2 percent of men still work in this age group, only 12.3 percent are women. Particularly common fields of activity are automotive trade and repairs, health and social work and manufacturing.<sup>4</sup>

# **Availability, Accessibility, Acceptability and Quality**

## **4. What steps have been taken to ensure the access of older persons to the labour market including through physical accessibility, access to information about employment opportunities, training and the provision of appropriate work place accommodations?**

To promote the training of workers over 45 years, who are working in a small or medium-sized enterprise, the program "Continuing education of low-skilled and employed older workers in companies" was established.<sup>5</sup>

## **5. What steps have been taken to ensure the availability of specialised services to assist and support older persons to identify and find employment?**

## **6. What good practices are available in terms of ensuring the older persons' enjoyment of their right to work and their access to the labour market?**

<sup>2</sup> [https://www.haufe.de/sozialwesen/leistungen-sozialversicherung/begriffe-der-sozialversicherung-eingliederungszuschuss\\_242\\_415504.html](https://www.haufe.de/sozialwesen/leistungen-sozialversicherung/begriffe-der-sozialversicherung-eingliederungszuschuss_242_415504.html)

<sup>3</sup> The Federal Anti-Discrimination Agency (FADA) is an independent focal point to which persons affected by discrimination may turn. It was established in 2006, after the General Equal Treatment Act (German abbreviation: AGG) had entered into force. The FADA and its tasks have been stipulated in this Act and comply with the EU directives on equal treatment.

<sup>4</sup> [https://www.destatis.de/DE/Themen/Querschnitt/Jahrbuch/\\_inhalt.html](https://www.destatis.de/DE/Themen/Querschnitt/Jahrbuch/_inhalt.html);

<sup>5</sup> <https://www.arbeitsagentur.de/weiterbildung-mit-ueber-50>

**7. What protections are available to ensure older persons enjoy just and favourable conditions of work, including fair wages and equal remuneration for work of equal value, safe working conditions, both in the formal and informal sector?**

§ 622 II BGB regulates graduated notice periods: Longer employees and thus loyal, typically older employees, is granted by extended periods of notice improved protection against dismissal.

In addition, in accordance with § 1 III KSchG the company has to make a social selection, according to which the age of the employee as one of the four key consideration criteria is sufficiently considered.

§ 14 III 1 and 2 TzBfG should also contribute to improving the employment opportunities of older persons by standardizing the possibility for a labour contract for no more than 5 years if the employee has reached the age of 52 and was unemployed for at least 4 months immediately prior to employment. In this context, however, there is also the danger that this regulation will make it more difficult to obtain permanent posts.

§§ 1, 2 Equal Treatment Act (AGG) regulates the inadmissibility of a disadvantage with regard to working conditions including fair wages

## Equality and non-discrimination

**8. In your country, is age one of the prohibited grounds for discrimination in relation to work and access to the labour market, including in older age?**

Under Sect. 7 in conjunction with Sect. 1 of the Equal Treatment Act, unjustified unequal treatment on the basis of age is prohibited. Besides that, Article 3 of the Basic Law (GG) requires all people to be treated equally. This means that discrimination of any type is prohibited generally. Article 3 of the Basic Law does not contain an explicit ban on discrimination on the basis of age; cases of unequal treatment on the basis of age are assessed according to the principle of general equality contained in Article 3 Para. 1 of the Basic Law. Both of these acts affect the employment law directly as they are forming its basis of interpretation.

## Remedies and Redress

**9. What mechanisms are necessary, or already in place, for older persons to lodge complaints and seek redress for denial of their right to work and access to the labour market?**

The findings laid down in answer to question 2 are also consistent with the requests for advice received by the FADA on the subject of age discrimination. This complaints come from persons who have the feeling that they have been disadvantaged in job application processes because of their age. It is extremely difficult to prove that discrimination has occurred. The allegation of discrimination can only be made if there are other indications, such as discriminatory job descriptions or documented statements, for example, which means then that the employer has to prove that this is not the case (Sect. 22 AGG).

There still exist maximum (or minimum) age limits laid down by law, e.g. for ending (or beginning) an employment relationship. Furthermore cases of unequal treatment in civil law can also be justified by a "substantive reason" civil law, associated cases (Sect. 20 AGG). Older persons can claim discrimination against age in the labour market at the FADA.