

Right to work and access to the labor market

12th Session Open-ended Working Group on Ageing

Submission February 2022

Answers of the German Institute for Human Rights to the guiding questions for the normative framework of the issues examined at the 12th session of the Open-ended Working Group on Ageing:

Right to work and access to the labor market

Definition

1. How is the right to work and access to the labor market for older persons defined in the national legislation in your country? If such a definition is not available, how should it be defined considering relevant existing national, regional and international legal frameworks?

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 GG¹ 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.

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.

¹ Article 12(1): All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law.

Scope of the right

2. What are the key normative elements of the right to work and access to the labor market for older persons? Please provide references to existing standards on elements such as:

- a) Prohibition of all forms of discrimination against older persons on the basis of age, alone or combined with other grounds, in all matters related to employment.
- b) Elimination of all forms of ageism and age discrimination from the workplace and organizational cultures.
- c) Provision of reasonable accommodation to older persons in the workplace.
- d) Affirmative action programs to promote the hiring of older persons.
- e) Access to career development, technical and vocational guidance programs, placements services and vocational and skills development.
- f) Access to flexible or gradual retirement schemes and flexible working practices for older workers.
- g) Promotion of older persons' self-employment and entrepreneurship.
- h) Favorable, fair, and safe working conditions when undertaking formal, informal or unenumerated work.
- i) Access to prompt remedies and redress when older persons' right to work and access to the labor market is denied.

State obligations

3. What are the measures that should be undertaken by the State to respect, protect and fulfil the right to work and access to the labor market for older persons, regarding the normative elements as provided above?

- States should ratify the relevant human rights treaties (CESCR, CRPD, CEDAW, etc.) and advocate for a binding international convention on the rights of older persons, in which the right to work of older persons is defined
- States must guarantee the right of older persons to the opportunity to gain their living by work which they freely choose or accept (Article 6 CESCR)
- States must ensure safe and healthy working conditions for older persons (Article 7(b) CESCR)
- States must ensure non-discriminatory access to the labor market
- States must enact discrimination laws that list age as a ground of discrimination
- States must create the necessary framework conditions so that older persons can exercise their right to work
- States are required to provide a legal framework as well as complaints bodies judicial opportunities to ensure that older persons have full access to the labor market and that they can fully exercise their rights
- States must ensure that discriminatory job postings are prohibited
- States must prohibit the automatic termination of employment contracts upon reaching standard retirement age
- States must ensure that older persons are able to exercise their labor and trade union rights
- States should employ older persons in the public sector

Special considerations

4. What special measures and specific considerations should be considered in developing the normative content of the right of older persons to work and access to labour market, such as protection and regularization of older workers in informal sector, equal remuneration for work of equal value particularly for older women as well as recognition of unpaid work often carried out by older women?

- The provision of reasonable accommodation especially for older persons with disabilities
- In the years leading up to retirement, pre-retirement programs should be implemented with the participation of representatives of employers and employees and other concerned bodies to prepare older workers for their new situation. Such pre-retirement programs should provide older workers with information, in particular, on their rights and obligations as pensioners, but also on opportunities and conditions for continuing a professional activity or taking up voluntary work, means of combating the harmful effects of aging, facilities for adult education and cultural activities, and the management of leisure time.
- Older women must be made more able to participate in paid work without being discriminated against on the basis of their age and gender. They must not be forced to retire early. Both gender pay gap and gender pension gap must be considered and balanced out.

5. How should the responsibilities of non-State parties such as private sector be defined in the context of the right to work and access the labour market for older persons?

- Older workers should be employed in circumstances where their experience and know-how can be optimally utilized.
- States should promote the employment of older persons in the private sector through appropriate policies and measures

Implementation

6. What are the best practices and main challenges faced by your country in the adoption and implementation of the normative framework on the right to work and access to the labor market for older persons?

As a Federal Anti-Discrimination Agency (FADA)² 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

² 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.

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.