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## Editorial

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### DEAR READER,

We are pleased to send out our summer edition of our „Focus of German Employment Law“. This edition focuses on two topics: Germany looks back to five years of its “Anti-Discrimination Act“. Here we try to answer the question – based on examples from legal practice re. discrimination due to age – whether labour law has changed as significantly as expected when it entered into force. Further we describe some legal issues which may arise when a code of conduct is introduced in Germany. We draw your attention to the fact that limitations for employees from EU member states who joined the EU in 2004 are no longer in force since May 2011.

We hope you find this edition interesting and informative and are available for the questions you may have.

Best regards from Frankfurt,  
**DR. CHRISTIAN BLOTH**



**MANNHEIMER  
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## The “new” Free Movement of Workers

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On 1 May 2011, after a seven year period, restrictions of the free movement of workers have fallen away in Germany.

The restrictions applied for migrant workers from countries which joined the EU in 2004, the “new member states” were instruments for the “older” EU member states to regulate or protect the labour market in their respective areas. Regulations could be made by each member state for a certain maximum period. Some member states, e.g. the UK and Sweden, did not impose any restrictions; others – like Germany – restricted the access to their labour market for the maximum possible period of seven years fearing a flooding of its labour market with cheap workforce from the East.

With the free movement of workers fully entering into force for the 2004 joined EU member states migrant workers from these countries may now work in Germany without the necessity of a working permit. This applies equally to all migrant trainees starting their traineeship in Germany.

The opening of the German labour market for workers of the new EU member states will have an overall positive effect: In an environment of a continuously decreasing number of unemployed people (lowest rates since the re-unification), in some areas such of qualified employers and a (still) growing economy companies are profiting from new qualified and motivated labour force especially in working sectors, where qualified personnel was difficult to find in recent times like engineering, but also nursing and healthcare. On the other side, academics and highly qualified employees profit from possibilities to develop their career in Germany, lower qualified employees from structurally weak regions in their home countries may participate from the booming German export industry.

All restrictions for posted workers from these member states have fallen away making investments in Germany, the EU’s strongest economy located centrally in Europe, even more attractive.

However, some limitations remain. Migrant workers applying for civil services with a high quota of exercising of jurisdiction may require German citizenship, and the restrictions remain to exist for migrant workers from Romania and Bulgaria, which joined the EU in 2007. The complete free movement of workers in relation to these member states will be achieved on 1 January 2014.

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# “Anti-Discrimination Act” – Summary of 5 Years of Experience in Germany

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## I. INTRODUCTION

Germany fulfilled its duty to implement the European Directives against discrimination into national law with the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz – AGG*) on 18 August 2006. Employers and also the legal profession were worried five years ago about the impact of this new act, in particular since age discrimination, religion and sexual preference were not subject to a certain legislation before. Further, differentiation of age played a major role in many parts of German labour law, e.g. in law of termination, including mass dismissals, retirement age and benefits to elderly employers in collective bargaining agreements. Would these differentiations prove legally valid also in future or would essential principles of German labour law practice be history?

However, the impact of the law in Germany has not been as drastic as some expected. The worries (or hopes) of a total change of the “labour law world” have not become reality. Nevertheless substantial consequences have taken place through recent court rulings of the German Federal Labour Court as well as the European Court of Justice.

Out of all protected areas of discrimination, age is the most important one. It is also interesting to note that not only discrimination of old age has been in focus of the judgements but also discrimination of young employees.

## 2. LEADING CASES

Judgements on discrimination of age show a great variety and extend to all areas of employment relations. From the conclusion of employment agreements, to the content of employment agreements, to stipulations in collective bargaining agreements, to the termination of employment contracts all fields were affected. But also rules of social plans or of reconciliations of interests (“*Interessenausgleich*”) were subject of review by the labour courts.

The following judgements, some examples of a variety of judgements of courts of all instances, will illustrate the experience and consequences of the *AGG* in Germany.

### 2.1 CONCLUSION OF EMPLOYMENT AGREEMENT: WORKING IN A “YOUNG TEAM”

In a decision of the higher regional labour court of Hamburg (LAG Hamburg, Urteil vom 23. 6. 2010 - 5 Sa 14/10) the court had to deal with the question if a job advertisement offering the chance to work in a “young team” is discriminating against older applicants. The claimant (applicant for the job) applied to the company with the relevant qualifications the company was looking for. The claimant was 55 years of age when he applied. After applying for the position the claimant was declined after a short period of time. The company consequently employed a younger female with the relevant experience. The main point in this case was the fact that the actual discrimination was not direct but indirect. The company was offering the opportunity to work in a young team, this could also mean that the applicant must not necessarily be young. Also the company was

looking for an experienced employee. The court argued that this was discriminating the claimant as the fact that he had been declined so readily although he had sufficient qualifications to perform the asked tasks was considered enough proof for a discrimination. This was due to the effects of the changed burden of proof in German anti-discrimination law. According to the *AGG* it is sufficient for the claimant to provide evidence of circumstances which indicate a discrimination to change the burden of proof and then the employer has to prove that he did not discriminate against the applicant, which he failed to do in this case.

### 2.2 LESS VACATION FOR YOUNG EMPLOYEES

Another judgement was made by the higher regional labour court in Düsseldorf (LAG Düsseldorf, Urteil vom 18. Januar 2011 - 8 Sa 1274/10). In this judgement the court had to decide on the validity of a stipulation in a collective bargaining agreement providing for different number of vacation days for the employees on the basis of age. The agreement set limits until the age of 20, older than 20 up to 23 and older than 30. The court found this to be discriminating against the younger employees as there was no justification for the differentiation. Especially the argument of the employer that he wanted to respect the balance between family and work was not heard by the court. The agreement did not contain any explanation for the differentiation and it had no legitimate aim as the court held.

### 2.3 AUTOMATIC TERMINATION OF EMPLOYMENT WITH REACHING THE AGE OF 60

Even the European court, EuGH C - 447/09 Prigge, From, Lambach - Lufthansa, had to deal with a German case of discrimination of age. In a case against Lufthansa the European court still has to answer the question if the specialties of aviation traffic could form a justification for the automatic termination of employment of pilots based on the mere fact of turning 60 not at the in Germany higher regular retirement age. A stipulation in a collective bargaining agreement provided for the automatic termination.

The advocate general of the European court is of the opinion that this provision exceeds the right to free collective bargaining as such a stipulation is against the Charter of fundamental rights of the European Union, especially Art. 21, and his legal opinion usually prevails. The advocate general argues that the bringing forward of the age of retirement some years prior to the regular age of retirement cannot be justified by any means as the protection against discrimination of age prevails.

### 2.4 SOCIAL PLAN COMPENSATION AND AGE GROUPS

The German Federal Labour Court (BAG) had to decide the question if the amount of severance payments as provided by social plans can be differentiated on the basis of age of the employees concerned.

The employer in this case awarded different severance payments for different groups of age. 80% of the full compensation up to the age of 29, 90% up to the age of 39 and starting with the age of 40 employees were entitled to a full social plan compensation. One of the younger employees challenged this stipulation before court and failed in all instances.

The BAG explained that according to Sec. 10 Nr. 6 *AGG* the consideration of age when rewarding compensation in a social plan is not discriminating younger employees as older employees usually are less favoured on the job market.

However, the BAG also held that the steps between the age have to be reasonable in order to comply with the AGG.

### 3. PERSPECTIVE

These judgements show and others in the future will also that the discrimination of age will become a basic factor in all labour law questions. Also it should be considered in both ways regarding old and young employees. Although different treatment can be justified in some cases an employer should always consider the aspects of age when differentiations are made – directly or indirectly – on the basis of age.

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# Implementation of Corporate Compliance Guidelines in Germany

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In the recent decade large multinational companies have installed compliance guidelines (also spoken of as a code of ethics) and a compliance structure in order to efficiently fulfil their code of ethics. The aim of installing a compliance structure is primarily to prevent the liability of the company or its organs for breaches of legal obligations or criminal acts of their employees and to act as a “good corporate citizen”. Discrimination, corruption, and other unfair market practices are today in the focus of a good corporate governance all over the Western world. Bad reputation or even severe financial punishments may be the consequence of such practices which can lead to significant disadvantages on the market or at the investors. However, all these principles remain theoretical if there is no efficient control mechanism that rules are followed.

The guidelines have to be put in force as such with a binding effect on the management and employees.

There are different ways to implement compliance guidelines. Questions are how can such guidelines be introduced in existing employment contracts – unilaterally by direction of the employer, by agreement with each employee – and further which role may co-determination play?

### 1. RULES ON WORK PERFORMANCE

A statement by the employer that from now on the compliance guidelines apply also for all employees located in Germany or otherwise falling under German labour jurisdiction is sufficient for regulations which concretise the modalities of the work performance (*‘Arbeitsausführung’*). The directional right (*‘Direktionsrecht’*) of the employer enables him to give as such “directives” in respect of the exercise (*‘Ausführung’*), the place and the time of the work performance to an extent limited by the individual employment contract, works agreements, collective agreements and legal provisions. The directional right of the employer outside the working sphere is limited to behaviour retroacting to the working sphere.

The setup of this kind of regulations in compliance guidelines is within the employer’s right to give instructions and therefore does not need more than a declaration towards the employees.

### 2. DYNAMIC REFERENCE CLAUSES

Apart from declaration by the employer, a code of ethics can be installed by making reference in the employment contract. Most effective is a dynamic reference clause, i.e. a clause in the employment contract referring to the respectively actual code of ethics. In order to achieve an implementation complying with German terms and conditions law two prerequisites have to be met: Firstly the clause in the working contract has to stipulate, that the employer has to inform the employee about the actual version and the changes made in the code of ethics beforehand. Secondly the employee has to be informed about the reasons, why the code of ethics has been changed. This can take place either in the dynamic reference clause or the altered code of ethics itself.

### 3. CO-DETERMINATION

The right of the employer to give instructions can sometimes be restricted for the reasons of codetermination if a works council (*‘Betriebsrat’*) is established. This is possible in enterprises employing regularly more than five employees.

The German Federal Labour Court, BAG, has ruled that certain regulations of compliance guidelines are subject to codetermination and are subject to coordination with the works council. These are in general all clauses regarding the general order in the business, any rules re. the employees’ conducts in particular guidelines on invitation, presents and contracts with externals. This concerns also any provisions on surveillance of the code of ethics, e.g. whistleblowing clauses: Employees could contact a hotline, once they became aware of breaches against the company’s code of ethics. BAG found that due to its impact which goes further than the duty to inform about damages and which concerns the conduct of the employees the whistleblowing clause was subject to codetermination and thus had to be subject of co-determination by the works council.

However, the Federal Court of Labour stated in its leading case that clauses of the code of ethics being subject of co-determination do not lead automatically to co-determination rights re. all other clauses of such code regulating the employee’s work performance. This implies that – even if a code of ethics – has to be regarded as “one set of rules” only a part of it may be subject of co-determination.

### 4. PROTECTION FOR WHISTLEBLOWING

Compliance guidelines are a toothless tiger without proper control and enforcement mechanisms. German legislation has recently made proposals for a provision safeguarding whistleblowers from notices of termination of their employment contracts. In July 2011 the European Court for Human Rights ruled that the publication of grievances at the employer can be protected by the freedom of speech and thus a notice of termination by the employer on these grounds can be unjustified.

Irrespective of the legislative development compliance in its core remains to be business driven. It is the employer’s task to establish a functional structure to get notion of the breaches of the compliance



guidelines, including the provision of a necessary level of secrecy for the “whistleblower” or informant. In many cases an essential part of the structure is a whistleblowing-hotline, often established on a group level located in the mother company’s domicile. With whistleblowers from foreign counties these hotlines often face a language barrier and encounter insecurities with the applicable domestic law. In many cases a cost effective solution solving the aforementioned problems is the “outsourcing” of parts of the compliance structure to legal counsels as it is already practiced even by major enterprises.

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