New Anti-discrimination Law in Germany

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The new General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz, AGG*) will come into force and effect **on August 1, 2006**. The purpose of the new act is to ensure equal treatment for all in the workplace. As a result, employers are now expressly prohibited from discriminating against job applicants or employees on the basis of gender, race or ethnic origin; religion or belief; age; disability; or sexual orientation. By passing this act, Germany has—at this late stage—implemented four EU directives regarding anti-discrimination, and has further increased the protection of job applicants and employees against potential discrimination. Thus far, German anti-discrimination rules were, with few exceptions, based on the constitutional charter of human rights and case law.

Pursuant to the AGG, a job applicant or an employee who has been discriminated against can claim damages within two months from becoming aware of such discrimination. Damages may also include a claim for non-pecuniary loss, such as pain and suffering. In addition, discriminatory agreements entered into with an employer or discriminatory sanctions imposed by an employer, such as termination on discriminatory grounds, are void. Under the new law, the employer is also obliged to protect employees from discrimination and discriminatory harassment by coworkers or third parties, such as customers.

How Does This New Law Effect Employers?

The AGG covers all employee-related measures to be taken by the employer, from the posting of a job vacancy to rules governing an existing employment relationship. Terms and conditions of employment (such as general pay increases) are included under the AGG, as well as the termination of employment contracts and the terms of social compensation plans.

It is expected that the most important changes in practice will result from the prohibition of discrimination on the basis of age, as other discrimination criteria were already illegal under German law or of no practical relevance for most companies. For example, unlike in the past, a job advertisement seeking a "young employee" or an employee to join a "young and dynamic team" could indicate age discrimination under this new law. Similarly, German employment law has previously allowed distinctions to be made between employees based on their age and/or age group under many circumstances (e.g., in terms of their conditions of employment or selection for

and severance paid on dismissal). Now employers in Germany will have to review numerous longstanding practices and traditions for compliance with the new law since many of these established practices have the potential to discriminate on grounds of age.

The AGG does, however, permit different treatment of employees on grounds of their age, religion or the requirements of a job if certain (strict) criteria are met. However, in practice, a defense based on these new criteria may not be easy to invoke. In such an event, the employer must always show objective reasons to justify different treatment. Greater certainty will only be achieved over time, once we have a body of new case law to serve as a guide to the level of detail German labor courts will expect from employers to justify potentially discriminatory measures.

How Should Employers React to the New Law?

Employers must not discriminate against job applicants and employees on the grounds set out in the AGG. Employers are required to review all planned HR measures and all conditions of employment to ascertain whether these could constitute direct or indirect discrimination towards a job applicant, an employee or a group of employees. Moreover, employers should document their decisions carefully and, in particular, the reasons behind them. This measure could be very important should a job applicant or an employee claim that he/she has been discriminated against and institute legal proceedings. The AGG makes it easier for an employee or an applicant to demonstrate that discrimination has taken place, as the employee merely has to provide *prima facie* evidence ***suggesting*** that discrimination has taken place. In such an event, the employer bears the burden of proof to show that no discrimination has occurred. Therefore, employers—particularly small and medium-sized companies—are well advised to increase their efforts to document HR measures thoroughly in writing.

For more information on this or other labor and employment matters, please contact the author listed above.