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10 pitfalls when dealing with diversity and inclusion under German law

Diversity and inclusion are topics that nowadays play an important role for every company doing business in Germany. A corporate culture of diversity is key for a successful company as it not only demonstrates the company's awareness and acknowledgement of its social structure but can also strengthen the employees' sense of belonging and employee retention. Companies are therefore interested in creating an environment in which their employees can contribute their skills, talents and experience and develop their full potential. As part of HR planning, diversity management measures are taken to promote the social, cultural and ethnic diversity of employees and to use it for the benefit of the company. However, when implementing diversity management strategies and measures, companies must comply with certain rules under German law, especially from an employment and privacy law perspective. The following 10 pitfalls should help to navigate through the relevant areas:

1 Observe the legal framework

Any topic related to diversity and inclusion, may it be during the onboarding process or during the ongoing employment relationship, needs to especially comply with (a) the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz* – "**AGG**") and (b) the Federal Data Protection Act (*Bundesdatenschutzgesetz* – "**BDSG**"), accompanied by the EU General Data Protection Regulation ("**GDPR**"). The AGG is the central statute for protection against discrimination within the workplace. The regulations of BDSG and GDPR aim to protect any person's right to protection of personal data.

In addition to this general legal framework, there are several more specific regulations that must be observed in this area. By way of example, in order to close the gender pay gap, the EU has passed the so-called Pay Transparency Directive, which is intended to help women in particular to better assert their right to equal pay. For German legislators, this means amending the Pay Transparency Act (*Entgelttransparenzgesetz* – „**EntgTranspG**"), which has been in force since 2017. The responsible Federal Ministry is working on a corresponding draft.

As the topic of diversity, equity and inclusion is becoming more and more important, it is to be expected that more legislation in this field will be passed. Observing the most recent developments is therefore crucial.

2 Avoid discrimination under the AGG

Employees, trainees, applicants and former employees are protected from discrimination based on certain characteristics (i) during the application process, (ii) during contract initiation and recruitment, (iii) during the entire employment relationship (iv) as well as upon termination of the employment relationship and beyond. The characteristics protected under the AGG include: race or ethnic origin, gender, religion or belief, disability, age and sexual identity. Due to the potential claims of employees in the event of a

violation (compensation, indemnification, but no right to employment), any kind of direct and indirect discrimination should be avoided.

3 Staff survey on diversity and inclusion yes, but…

… only voluntary and/or completely anonymous to be compliant with data protection regulations. Diversity management measures usually begin with an assessment of the current situation in the company. To this end, companies often conduct surveys that include demographic questions on diversity of genders, ethnicities and identities, equality and inclusion. As personal and sensitive data is collected and processed in this context, the rules of data protection law in particular must be observed. It is advisable to conduct the survey anonymously, if possible, i.e. it must be ensured that the answers cannot be traced back to an individual employee in any way as anonymized data collection does not fall within the scope of the GDPR or BDSG. When avoiding possible trace-back one should not only have the technical but also the factual possibilities in mind. Not seldomly a conclusion about an employee's identity can be drawn from the answers in the survey themselves, e.g. if the survey includes a question on ethnicity and an employee is the only one with Asian background. If it is not possible to conduct the survey anonymously, the employee's prior consent must be obtained as this is the only legal basis for the collection and processing of personal data. In general, the scope of the data and the duration of data storage is permitted only as long as it is necessary and proportionate for the predetermined, explicit and legitimate purpose. Therefore, it is best to keep it limited to the necessary minimum.

4 Be careful when advertising jobs

According to the AGG, job advertisements must not violate the prohibition of discrimination and must not contain any requirements that entail discrimination based on a protected characteristic. Job advertisements must therefore not contain any requirements relating to gender, age or ethnic origin, for example. Above all, they should always be formulated in a gender-neutral manner, either by using the gender designation "m/f/diverse" or by using gender-neutral generic terms ("job in sales"). Unequal treatment can only be justified under strict conditions, e.g. if the protected characteristic constitutes a genuine and determining occupational requirement due to the nature of the activity to be carried out or the conditions under which it is carried out.

5 Employer's right to ask questions in job interviews is limited

As mentioned before, the AGG applies to applicants as well and therefore must be observed when conducting a job interview.

"Simply" questioning employees on a personal level is not recommended as the AGG prohibits discrimination on the grounds of race, ethnicity, gender, religion or ideology, disability, age and sexual identity. The employer should only ask questions the answers to which are of a justified interest to the employer concerning the employment and have a significant factual and close connection with the position of employment. The connection must be so close that the employee's interest in protecting their personal rights and the sanctity of their individual sphere is overruled. Considering these ground rules, German case law has developed a list of questions which should not be asked in a job interview as they are not of justified interest of the employer:

- Pregnancy or family planning
- Disabilities
- Marital status
- Criminal record, unless if relevant for the advertised position, e.g. as employee with fiduciary duties
- Financial situation, SCHUFA (credit check), unless if relevant for the advertised position, e.g. as bookkeeper
- Religion and/or ideology, unless the employer is a religious institution
- Political tendency and/or party membership, unless the employer is a political party or institution

- Whether someone holds public office, honorary or elected
- Trade union membership
- Club, association or organization membership(s)
- Sexual identity and orientation

If a question is not permissible because it does not fall within the justified interests of the employer or breaches a prohibition on discrimination, the candidate may give a false answer without possible charge being made against him or her in the future. This is the so-called "right to lie".

6 Note the narrow limits for background checks

Background checks are permissible only in exceptional cases as the high standard of privacy protection under German and European law sets narrow limits. The employer's legitimate interest in gathering personal data must be so great that the protection of the candidate's data rights is in comparison less important. As a rule, the employer is required to obtain any information relevant to the selection process directly from the candidate. Moreover, inquiries made by the employer are legitimate and permissible only if the information is necessary for the employer to assess whether the candidate is capable of properly performing the duties of the position in question.

7 Protection of vulnerable groups of employees

Certain employee groups that are considered vulnerable under German labor law enjoy special protection. This includes in particular severely disabled employees, pregnant employees and new mothers, new parents as well as employees caring for relatives. Employees within these groups enjoy special protection against dismissal as the prior approval of the respective state authority is required. The individual groups furthermore have different additional entitlements, for example in terms of adaptation of the workplace according to personal circumstances and/or paid time off.

8 Affirmative action measures

German law does not obligate the German employer to take affirmative action, but rather only sets ground rules under which such measures are permissible. This is the case if suitable and appropriate measures are taken to prevent or compensate for existing disadvantages on the grounds listed in sec. 1 AGG. Purpose of this provision is to enable the promotion of disadvantaged groups. Examples of permissible measures include: targets for a mixed workforce composition, plans for the advancement of women, integration agreements for the disabled or programs to promote training for disadvantaged young people.

The general principle on affirmative action measures under this provision is that the promotional measure is only permissible under the following conditions:

(i) current or future existence of a disadvantage i.e. any reduction in opportunities or any increase in burdens that people experience solely because of the protected characteristics, (ii) the positive action measure must have the direct aim of compensating for the unequal treatment; be suitable for achieving this aim; there must be no equal or equally effective measure that is less disadvantageous to the non-promoted group.

According to these principles it is not surprising that one will not find many quotas in German statutory law. In fact, the European Court of Justice ("**CJEU**") has ruled rigid quotas that grant absolute and undifferentiated priority to one group of people as impermissible as they are considered mere measures to achieve equality of results rather than measures to promote equal opportunities.

The only quota is stipulated in sec. 154 of the German Social Security Code Part IX (*Sozialgesetzbuch IX* – "**SGB IX**"). According to this provision, employers with an annual average of at least 20 employees per month must employ at least 5% severely disabled people. If unable, the employer must pay a monthly so-called compensatory contribution (*Ausgleichsabgabe*) per unoccupied position that the employer is obliged to fill in with a severely disabled person. The amount of the contribution ranges from

EUR 140.00-720.00 per unoccupied position depending on how many positions are filled in accordingly and how many the employer is obliged to fill in.

9 Involving the works council

If a works council exists, one should always keep an eye on possible information and co-determination rights when carrying out diversity management measures. A co-determination right can arise particularly regarding "diversity monitoring" measures like employee surveys as such often go hand in hand with technical equipment designed to monitor employees within the meaning of the Works Constitution Act (*Betriesbverfassungsgesetz* – "**BetrVG**"). The works council also has the right to demand measures to promote equal opportunities and diversity management. Works agreements with the employer can include, for example, the integration of people with disabilities or the advancement of women. Strategic cooperation with the works council also makes sense, as involving the works council promotes acceptance of the measures within the workforce.

10 Preventing consequences of a (presumable) discrimination

Besides, of course, the damage to the employer's public image, from a strict legal point of view, a discriminated employee or applicant may claim damages under the AGG, may it be due to an impermissible question asked or other discriminatory measures. Employees even enjoy a facilitation of proof as they only must prove circumstantial evidence that there is causality between a less favorable treatment and one of the characteristics in sec. 1 AGG.

However, they still bear full burden of proof regarding causality between the less favorable treatment and a damage. Hence, they must proof that a non-discriminatory treatment would have resulted in a different outcome which is often difficult. And even if they were able to obtain such proof, the amount of damage compensation is left to the discretion of the courts which are rather reserved. Damage compensation sums in a high five-figure range are rather rare and only awarded in exceptional cases (note: damages claimed by applicants for not being hired due to discrimination are even capped by law to three monthly salaries).

Key is that there is proper documentation of decisions (e.g. promotion, incentives, roles etc.) and an adequate level of covering the business' decision in general exists. This increases as soon as one has the feeling that something is about to go sideways.

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