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Non-regular Employment in Germany and in Japan

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ABSTRACT

In Germany as well as in Japan recent years showed a continuously rising number of non-regular work. As the problems and the solutions are similar in both countries, a comparison seems to be useful. Employment law did not start with the figure of an „employee“, but by different kinds of professions. Only later the abstract figure of an employee was created, and employment law was orientated at this figure. Meanwhile the idea has gained acceptance that non-regular work needs now full attention. First of all there are three types of atypical employees, part-time workers, fixed-term workers and temporary agency workers. There are special rules for their protection. The most important one is the prohibition to discriminate against them in comparison with the corresponding comparable regular employee – with different attitudes in Germany and Japan.

Another type of non-regular employees are those that are typically endangered of being discriminated against. Whereas typical and atypical work refers tot he kind of employment contract, this group - and the next one, too – refers to characteristics of the person. In Germany there are eight items of forbidden grounds; one of them corresponds with Japanese law, equal treatment of men and women.

Finally there is a group of employees that need special protection, like pregnant women, mothers, old age employees, children and youths. Both legal systems provide special rules for their protection.

This paper wants to give a first overview on all kinds of non-regular work in both countries. What is desirable are further studies how these different ways of protection comply with each other and what solutions in one of the two countries give reason to reflections for the legal system of the other country.

ABBREVIATIONS

AGG	Allgemeines Gleichbehandlungsgesetz
AP	Nachschlagewerk des Bundesarbeitsgerichts (Arbeitsrechtliche Praxis)
ASEOE	Act for the Stabilization of the Emploment of Older Employees
Aufl.	Auflage
AuR	Arbeit und Recht (Zeitschrift)
AÜG	Arbeitnehmerüberlassungsgesetz
BAG	Bundesarbeitsgericht
BeckRS	Beck online Rechtsprechung
BEEG	Bundeselterngeld- und Elternzeitgesetz
BetrVG	Betriebsverfassungsgesetz
BGB	Bürgerliches Gesetzbuch
BGBl.	Bundesgesetzblatt
DB	Der Betrieb (Zeitschrift)
DJT	Deutscher Juristentag
ECJ	Court of Justice of the European Union
ErfK	Erfurter Kommentar zum Arbeitsrecht
EU	Europäische Union
EuZA	Europäische Zeitschrift für Arbeitsrecht
EuZW	Europäische Zeitschrift für Wirtschaftsrecht

Forschung & Lehre	(Zeitschrift)
GG	Grundgesetz
Hrsg.	Herausgeber
IAB	Institut für Arbeitsmarkt- und Berufsforschung
JArbSchG	Jugendarbeitsschutzgesetz
JILPT	Japan Institute for Labor Policy and Training
JZ	Juristenzeitung
KSchG	Kündigungsschutzgesetz
LAG	Landesarbeitsgericht
LCA	Labor Contract Act
LSA	Labor Standard Act
Mitbestimmung	Die Mitbestimmung (Zeitschrift)
MittAB	Mitteilungen aus der Arbeitsmarkt- und Berufsforschung
NJW	Neue Juristische Wochenschrift
NJW-Spezial	(Zeitschrift)
NZA	Neue Zeitschrift für Arbeitsrecht
PWA	Part-time Work Act

RdA	Recht der Arbeit
Rn.	Randnummer
S.	Seite
SAE	Sammlung arbeitsrechtlicher Entscheidungen
TAEA	Temporary Agency Employment Act
TFEU	Treaty on the Functioning of the EU
TVG	Tarifvertragsgesetz
TzBfG	Teilzeit- und Befristungsgesetz
WSI	Wirtschaft- und sozialwissenschaftliches Institut des Deutschen Gewerkschaftbundes
ZESAR	Zeitschrift für europäisches Sozial- und Arbeitsrecht
ZfA	Zeitschrift für Arbeitsrecht
ZIAS	Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht

I. Non-regular Employment

At the beginning of the development of an employment law[2] of its own from of the civil law in general it was necessary to abstract from different professions and different legal rules to the terms of employee and employment law. The differences between employees and workers,[3] which still existed in the beginning, were more and more reduced.

As a consequence of the development during the last years there must be more differentiation between regular employment on the one hand and other kinds of employment on the other hand.[4] Employment law is still orientates itself at the regular employment, viz. the worker who is engaged for his whole life in the same enterprise and works fulltime. In Japan, this model has in the past been more vivid, as the model of lifelong employment.[5]

To make differences inside of employment law became necessary from several reasons. Enterprises tend more than before to use their work craft more flexible.[6] One possible way is to make redundancy dismissals easier.[7] In the United States of America still exists - adopted from British law - the principle of "employment at will" or of "hire and fire". A reason for dismissal is as unnecessary as to keep long termination periods.[8] Another way would be to protect the maintenance of the employment relationship, but to admit changes in the conditions of the employment contract.[9] If that leads to major changes it opposes the principle of "pacta sunt servanda". Finally the legal system may allow new kinds of employment relationships.

This is especially the case with "atypical employment". It is to be found EU-wide namely concerning the following kinds of employees: Women, youths - especially pupils, students and apprentices -, older employees, members of minorities and disabled persons.[10] Employees no longer stay their whole life in the same enterprise, but change the employer, often several times.[11] The biography of working life, especially with women, is often composed of fulltime work for a non-definite period, interruption of employment, part-time and fulltime work for a

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[2] In this paper, as in American law, „employment law" means the law of the relationship between employer and employee," labour law" means the law of the collective relationship between the organisations of trade unions and employers´associations and that of works councils.

[3] In English law, the term „worker" has three meanings: *first*, the opposite of an employee, meaning blue collar worker opposite to white collar worker; *second*, meaning an employee in general; *third*, meaning an economically dependent self-employed. In the following text „worker" is synonym to „employee".

[4] For Europe *Behrens/Richter*, NZA 2002, 138.

[5] *Araki*, Labor Law and Employment Law in Japan, p. 18; *J. Junker*, Arbeitnehmerüberlassung, S. 45 ff.; *Labor Situation 2013/2014*, p. 77.

[6] *Davies*, EU Labour Law, p. 178.

[7] *Wank*, Nihon Rodo Kenkyu Zasshi 2001, 1.

[8] *Kittner/Kohler*, BB 2000, Beilage 4, S. 1.

[9] A comparison between Germany and Japan at *Wank*, RdA 2005, 271.

[10] *Workinglives*, p. 438; regarding Germany p. 72.

[11] *Rhein/Stöber*, IAB-Kurzbericht 3/2014.

non-definite period again.[12] This can happen voluntarily, to achieve better working conditions, or because of a change of the residence or from other personal reasons. It may also be caused by the fact that only part-time work is offered. This is acceptable as long as it complies with a special demand of the enterprise, but not if it characterizes the labour market in general.

Part-time work corresponds to entrepreneurial flexibility, and to a great extend it is also demanded by employees, especially by women.

Temporary agency work finally is also used to cover a peremptory demand of an enterprise - here again it becomes doubtful when it is used as a permanent instrument to replace the core employees, to reduce costs.

In Germany as well as in Japan the legal system has reacted by gradually creating an own regime for atypical work. Topics are antidiscrimination law, the restriction of the use of atypical work for certain demands and the promotion of the integration of atypically employed in the staff.

Another reason for different rules for atypically employed arises from antidiscrimination law. The movement started in America, dealing at first with race discrimination. Later other kinds of discrimination were also banned, followed by special laws for each. A similar fragmentation of law is also to be found in some countries of the EU, like Great Britain.[13] In Germany the most important cases have been compiled in one statute, the Allgemeines Gleichbehandlungsgesetz, AGG. In Japan the prohibition of discrimination is spread over different statutes. The most important topic is the prohibition of discrimination. But this is often not sufficient and must be accompanied by special statutes for special groups of employees, especially women, older employees and youths. For these groups there are parallel rulings in Germany and Japan.

II. Standard Employment Relationship and Atypical Employment

This study compares – for a certain part of employment law – the legal situation of non-regular work in Germany and Japan.[14] In both countries there is a great and actual interest in politics and in jurisprudence in the research of the legal situation and in possible reforms. One reason is that atypical employment is regarded as disadvantageous for labour conditions, especially as regards the amount of salary and the security of the workplace. In both countries the share of atypically employed in the whole number of the workforce amounts to more than

[12] *Waltermann*, Gutachten B zum 68. DJT, S. 12.

[13] *Howes/Wank*, International Journal of Comparative Law and Industrial Relations 21 (2005), p. 571.

[14] The legitimacy of such a comparison is justified by *Seifert*, Atypical employment, JILPT Research Reports, Reports by Visiting Researchers, 2010, p. 1.

one third.[15] The increase is due to a tendency of enterprises to become more flexible and to a trend towards service-based industries.[16]

In both countries the share of women among atypical work is very high.[17] This should not lead to the hasty conclusion that atypical employment is generally work done by women procuring a disadvantage of women compared with men. Among fixed-term work and among temporary agency work the share of men and women does not differ significantly; but it is remarkable as regards part-time work. On the other hand part-time work often complies with the interest of women and is demanded by them.

1. Atypical Employment in a Strict Sense

The topic of employment law is how to improve the situation of employees by taking into account the legitimate interests of employers. For a long period in Japan as well as in Germany the so called regular employment relationship (= Normalarbeitsverhältnis) was in the focus.[18] It is characterized by three items:

- The employment relationship is not terminated.

- It is a fulltime employment relationship.[19]

- The employee works for the enterprise that has concluded the employment contract.

In Japan, too, as in EU law,[20] this is the opposite term to the three kinds of atypical work named before.[21]

Some authors include further criteria, like if the person is protected by the social security system, or if all rules of employment law and social security law are to be applied on these people, or if they have regular working time or if they are monthly paid.[22] Even new articles do not only refer to the three criteria named above for atypical work, but also to the protection by the social security system. [23]

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[15] *JILPT Research Report No.* 132, p. 4: part-time 15 %, fixed-term 15 %, entrusted workers 2 %, temporary agency work 3 %; *Labor Situation 2013/2014,* p. 29: part-time 14 %, temporary agency work 1.4 %, fixed-term, contract employees and entrusted workers: 11.3 %; *Seifert*, Atypical employment, p. 12 : Germany 2008: 37 %, Japan 200: 34 % (diagrams 1 and 2); similar figures in other countries, *Waltermann*, Gutachten B zum 68. DJT, S. 9.

[16] *Labor Situation 2013/2014*, p. 27, 37.

[17] *Neal*, RdA 1992, 115, 116; *Seifert*, Atypical employment, p. 17 (diagram 3).

[18] The „farewell to regular employment relationship" was subject of the 68. Deutscher Juristentag 2010 in Berlin; see Gutachten B by *Waltermann*; *Waltermann*, NJW-Beilage 210, 1 ff.; *Joussen*, JZ 2010, 812 ff.; *Wank*, RdA 2010, 193 ff.; before: *Zachert,* AuR 1988, 132.

[19] Some authors include a part-time employment relationship with at least half of the usual working time; see e.g. *Waltermann*, Gutachten B zum 68. DJT, S. 11; contrary: § 2 TzBfG.

[20] *Davies*, EU Labour Law, p. 173, 178.

[21] *Wada*, Nagoya University Journal of Law and Politics, No. 251, p. 553-557; *Araki*, New Labour Policies.

[22] *Mückenberger*, Zeitschrift für Sozialreform 31 (1985), 415 ff., 457.

[23] *Seifert*, Atypical employment, p. 6; *Waltermann*, Gutachten B zum 68. DJT, S. 11.

As far as a big number of criteria is named these criteria are neither characteristic nor of information in law.[24] They may be appropriate for a sociological study, but in law it is preferable to concentrate on certain legal aspects. E. g. seasonal work is simply a kind of fixed-term work, which is also the case for work on demand; homework is a kind of employee-like employment.[25] The green book of the commission[26] names no-hours-contracts and contracts of freelancers which do also not belong in this context. It is the same with "small own contractors". The inclusion in the social security system should not be mixed with categories of employment law, although for an overall view – with separate approach, but combining view – they should be seen together (see below III 4). Therefore it is preferable to keep to the common mostly used definition.[27] It can be understood with reference to the following opposite terms[28] characterizing atypical work:[29]

- fixed-term employment
- part-time employment
- temporary agency work.

As regards the word typical it does not refer to a statistic relationship of regular employment and atypical employment. The question, if the typical employment relationship is not only a fact but denotes also an "average standard", must be answered differently for different kinds of employment.[30]

In Japanese law, too, there exists the "regular employee" (seishain). The official statistics concerning atypical employment are to be used with caution; there is not one statistic encompassing all three groups, but there are separate statistics for the group fulltime/part-time and non-fixed term /fixed term, and for temporary agency work.[31] Besides, employees are asked to name the qualification of their contract, which may not correspond with the legal category.

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[24] Critique by *Wada*, Nagoya University Journal of Law and Politics No. 251.

[25] Different opinion at *Waltermann*, Gutachten B zum 68. DJT, S. 12.

[26] COM (2006) 708 final, p. 8.

[27] E.g. *Davies*, EU Labour Law, p. 178; *Thüsing*, Europäisches Arbeitsrecht, S. 142 ff.; *Waltermann*, NJW-Beilage 2010, 81, 82 ff.

[28] On opposite terms see *Wank*, Die juristische Begriffsbildung, 1985, S. 39 ff.

[29] *Thüsing*, Europäisches Arbeitsrecht, S. 44; *Wank*, RdA 2010, 193, 197 f.; Statisches Bundesamt (Hrsg.), *Sachverständigenrat* zur Begutachtung der gesamtwirtschaftlichen Entwicklung, Jahresgutachten 2007/2008, 2007, S. 192 ff.

[30] *Pfarr*, WSI-Mitteilungen 2000, 279; *Zachert*, AuR 1988, 129.

[31] *Kambayashi*, Japan Labor Review Vol. 10 (2013), No. 4, p. 55.

From a labour law point of view, within employment law because of some specialties some kinds of employment might be called atypical employment,[32] like telework[33] or homework. But as said before, they can be understood by the standard categories.

As long as the focus is on the regular employment relationship, atypical employment seems to be a second class employment. At first glance it seems as if it is allowed with these to conclude working conditions that are worse than with regular employment. In fact, this has been the case in Germany, and in Japan this point of view is still more vivid. It was only when atypically employed were regarded as in need of protection, their situation was adapted to that of regular employment, especially by the prohibition of discrimination.

2. The System of Non-regular Employment

Things would be easy if there was only the difference between a typical employee in a typical employment relationship (Japanese: seishain) and the atypical employee (hiseishain). In fact, not only the German and the Japanese legal system, but also that of other countries oppose to the "typical employee" not only the atypical employee, but also other groups of employees that enjoy a special protection in labour law out of other reasons.

To these groups belong:

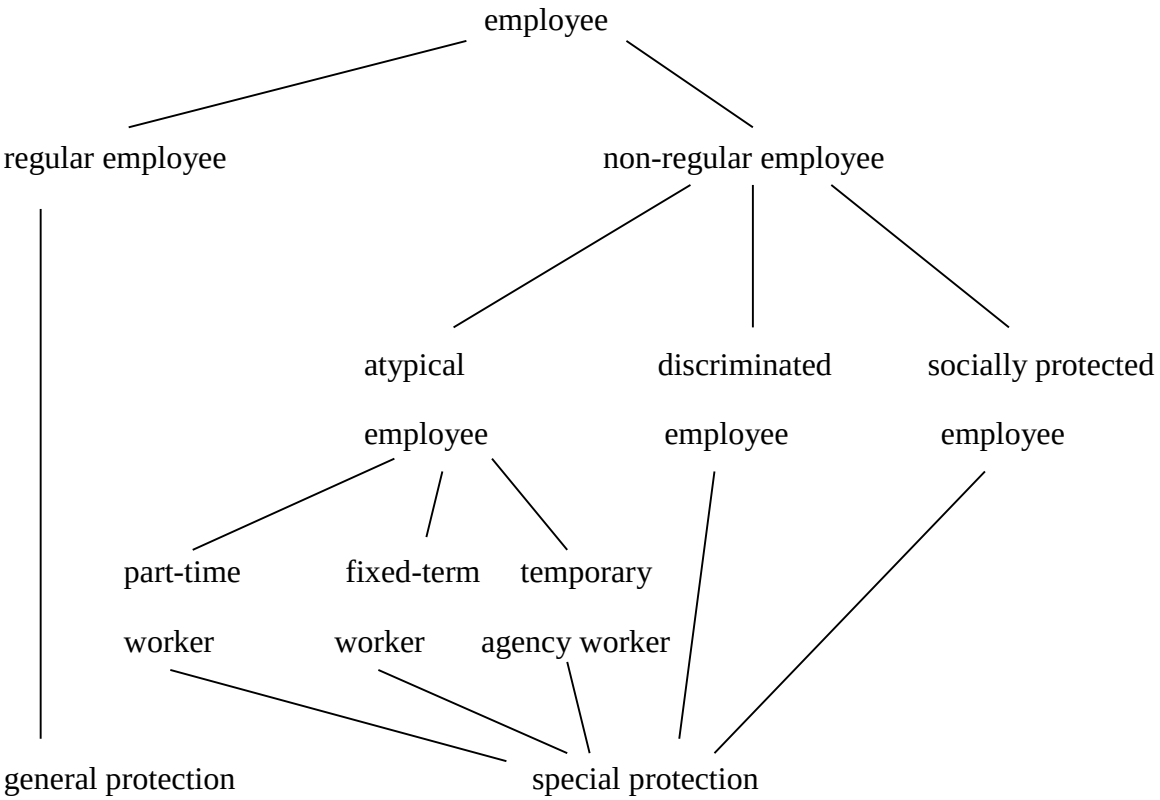
- employees endangered of discrimination

- especially protected employees (in Germany "sozialer Arbeitsschutz", employees protected from social reasons)

- employees with special official tasks (office bearers)

The last group, to which belong e. g. representatives of a works council, are not dealt with here, because their protection is not connected with their person or their job, but with a special position in the enterprise. Then the following system can be stated: [34]

[32] *Davies*, EU Labour Law, p. 178; *Neal*, RdA 1992, 115; *Riesenhuber*, Europäisches Arbeitsrecht, S. 298 f.
[33] *Barnard*, EU Employment Law, p. 450; *Wank*, Telearbeit, 1997; there is an EU framework agreement, published in RdA 2003, 55.
[34] See also *Thüsing*, Europäisches Arbeitsrecht, S. 142 ff.



The following is characteristic for the whole area of non-regular work: Employment law is basically a special part of civil law with the special aim of protecting employees.[35] For the three areas named above there are further reasons for protection: for atypically employed because of the special kind of their employment contract, for others because there is a higher danger for them to be discriminated against, for a third group because they deserve special protection because of their personal status; these three reasons and three areas can overlap. In the group of discrimination it is possible that several kinds of discrimination are combined to the disadvantage of one person.[36]

All these groups shall be analyzed in the following study.

a) Atypical Employees

As regards atypical employees the starting-point is not in their person, but in a specialty of the performance of their job.

[35] *Düwell/Löwisch/Waltermann/Wank (Hrsg.),* Das Verhältnis von Arbeitsrecht und Zivilrecht in Japan und Deutschland, 2013; *Wank*, Auslegung und Rechtsfortbildung im Arbeitsrecht, 2013, S. 31 ff.

[36] *S. Philipp*, Intersektionelle Benachteiligung und Diskriminierung, 2014.

b) Employees Endangered of Discrimination

There is no special term for this group, neither in Germany nor in Japan. Reference is only made to the criteria, not to the persons. In Germany they are called "forbidden criteria" which means it is forbidden to use this criteria for different treatment. In German employment law those are the employees in § 6 complying with one of the forbidden criteria in § 1 Allgemeines Gleichbehandlungsgesetz (AGG). It would be incorrect to call them "discriminated employees", because they are only employees for whom there is a higher probability that they are discriminated against. In the following text they are called employees in danger of discrimination. The law refers to a special quality that causes the fear that these persons will be discriminated against in working life.

A protection may be realized by two ways, either by antidiscrimination law or by special varieties of the general principle of equal treatment.[37]

c) Specially Protected Groups of Persons ("Sozialer Arbeitsschutz")[38]

In employment law some groups of persons enjoy a special protection. Whereas atypical work in a strict sense is characterized by the kind of employment relationship, these groups are characterized by special criteria making them more in need of protection. Thos groups are:

- women in general
- pregnant women
- mothers
- parents
- children and youths
- older employees
- disabled persons.

[37] As regards the difference see *Wiedemann*, Die Gleichbehandlungsgebote im Arbeitsrecht, 2001, S. 59; *Thüsing*, Europäisches Arbeitsrecht, S. 145 f.

[38] Details in *Schaub*, Arbeitsrechts-Handbuch, §§ 37 ff., 43, 120; *Münchener Handbuch* zum Arbeitsrecht, §§ 45 f., 95, 317 ff.

As regards these groups there are two ways to give them a special protection. One is by antidiscrimination law, i.e. that these persons may not be disadvantaged compared with "typical employees" (see above 2 b).

Another way is to create a complete legal regime of its own with different rules from normal employment law, generally meaning a better treatment or higher duties of the employer.

All in all our subject of non-regular work has three aspects, [39] namely

- special rules for atypically employed in a strict sense,
- special rules concerning antidiscrimination
- special rules for especially protected groups,
    - using prohibition of discrimination or
    - special law regimes

In a broader sense especially solo-self-employed ("Einmannbetriebe")[40] and employee-likes[41] also belong to our subject. On the one hand these are either employees or self-employed; if the latter, they are not included in the category of employees. But on the other hand they are economically dependent, so that some rules for employees are applicable on them.

III. Interests

The subject of non-regular employment encourages to provide first a view over the legal facts, to draw the correct interpretation of rules and to find the right legal consequences.[42] This must be combined with the idea of the legislator of the legal facts and with the aims of the legislator, following from this idea. Regarding the separate kinds of atypical work reveals great differences among them.

[39] See also *Günther*, Arbeitsrechtlicher Diskriminierungsschutz und Diversity Management, 2013.
[40] *Waltermann*, Gutachten B zum 68. DJT; *Leighton/Brown*, Future Working, The rise of Europe´s independent performers (iPros), 2014.
[41] *Wank*, Arbeitnehmer und Selbständige, 1988, S. 235 ff.; *Wank*, in Wiedemann, TVG, § 12 a Rn. 71.
[42] Gutachten *Waltermann*, 68. DJT.

1. Employer

a) Atypical Employment

aa) For **Employers** it may be of advantage to engage atypical employees in a strict sense. These advantages encompass:[43]

- flexibility
- the organization of work
- less protection for employees
- costs.

In the regular employment relationship there may be unproductiveness at work. The employee is engaged for the whole period of a day, a week or a month and is paid for this time, §§ 611, 615 BGB. That the employer bears the risk of paying without corresponding work is a characteristic of the employment relationship. The employee offers his being prepared to work and the employer pays him for this presence. In department stores e. g. there is a run of customers only at certain times; in an enterprise of production there may be unproductiveness because at the moment there are no orders. Atypical employment relationships allow the employer to bring in employees at the time when they are needed; he achieves more **flexibility**.[44]

In times of a crisis employers tend to use atypically employed as buffer: Fixed-term contracts or contracts with temporary agencies are not prolonged.[45]

bb) The employment relationship requires from the employer a lot of **organizational duties**. They start with the recruitment of personnel, with advertisements for the job, presentations of the applicants, information of the works council, and conclusion of employment contracts. They continue with payroll accounting and plans of the organization. By engaging atypical employees the employer can free himself from some of these duties.[46]

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[43] *Hohendanner /Walwei*, WSI-Mitteilungen 2013, 239, 242; JILPT Research Report No. 132, p. 10; *Nienhüser* in Keller/Seifert, Atypische Beschäftigung, 2007, S. 51, 55 ff.; *Seifert*, Atypical employment, p. 9, 14; *Takeuchi-Okuno*, in JILPT, Labor Policy, p. 69, 73.

[44] *Laux*/Schlachter, TzBfG, Einführung Rn. 19, 21.

[45] *Araki*, Labor and Employment Law in Japan, p. 34: „shock absorbers".

[46] *Laux*/Schlachter, TzBfG, Einführung Rn. 19, 21.

cc) The typical employee gets sickness pay, mother protection law, leave and protection regarding dismissals, to name only a few **rights of employees**. Meanwhile, in Germany the engagement of part-time employees or of fixed-term employees is no longer of much advantage in these respects, ad by changed law they are in an equal position as typical employees.

It is still different with temporary agency work. In German law the agent is responsible for the protection in employment law as he is his employer, the user company is free from observing most of this protective law – as long as it does not concern health and safety law.

dd) From these reasons there may be a **reduction of costs**, e. g. by using well-directed part-time employees or fixed-term employees payment without corresponding work may be avoided, or by taking advantage of temporary agency work the costs of organization and the costs e. g. of continued payment of wages are transferred to the temp agency.[47]

b) Employees Endangered of Discrimination

With regard to discrimination in employment there is often a moralistic view. The employer who among the applicants tends not to engage women or disabled, is morally criticized. But for an employer employees are not only persons, but also factors of cost. If women or disabled persons stay more often away from work than others, then the employer acts economically rational if he prefers other applicants. It is therefore a duty of politic to make their engagement easier; otherwise the assumed protection creates contrary results.[48] There could be nudges like subsidies by the state or by the social security system; but often law makes the engagement unnecessarily complicated: in Germany e.g. before a disabled person can be dismissed, the employer must not only ask the works council but also the integration office, and the employee may sue him before labour courts and simultaneously before administrative courts.

A legal system should rather not be based on moral but on practicable and performable mandatory law, and besides provide nudges[49] for activities complying with ethics. If e.g. the aim is to introduce more women in leading positions, it may be helpful to demonstrate the advantages of a change.

c) Especially Protected Groups of Employees

As regards the engagement of persons under special employment law protection the interests of employers are similar as with persons in danger of discrimination. Whereas employers engage atypically employed foremost from their own interest, they are less interested in

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[47] *Laux*/Schlachter, TzBfG, Einführung Rn. 19, 21.

[48] On contrary results see *Wank*, Das Recht auf Arbeit, 1980, S. 82 ff.

[49] *Richard H. Thaler/Cass R. Sunstein*, Nudge, 3. Aufl. 2009.

engaging persons with a discrimination criterion or who are members of the specially protected groups. There are two reasons for this: First, employers fear that these persons may produce a lesser amount of work, second, special protective law produces additional costs, like with maternity leave or with additional leave for disabled.

Besides, in some cases it is necessary to call in authorities for employments or measures of the employer for which no authority is needed for regular employees.

So here again the existence of special protective law may lead to contrary results: Just because special groups of employees enjoy a higher protection, they are not engaged at all or are not promoted.

2. Employees

a) Atypical Employment

To reach an appropriate interpretation of labour law in atypical employment scrutinized differences are required as regards the interests of employees.[50]

Maybe just the atypical employment comes up to the interest of an employee, as may be the case with part-time work, partially also with temporary agency work.[51] On the other hand, sometimes an atypical employment is imposed to employees who would prefer a regular job.

For Japan can be stated that atypical employment was originally taken mostly by pupils and housewives in their second job. As the number of jobs in typical employment has become reduced and as enterprises do no longer offer, as in former times, all workplaces with the promise of lifelong engagement, atypical employment is today also chosen by those who would prefer a regular employment.[52]

As regards working time, a prominent aim of employees is the harmonization of work and family, which results in the possibility to work less and in different times from regular employees.[53] A typical situation looks like this: The husband has a fulltime job. The wife reduces her working time to work in the morning as a result of childcare, and is at home when the children are back from Kindergarten or school.

When looking at the protection of employees in atypical employment, it is necessary to differ according to the need of protection. This is often not done, leading to distorted attitude and

[50] *Kronauer/Linne*, in Kronauer/Linne, Flexicurity, 2005, S. 9, 15.
[51] *Waltermann*, Gutachten B zum 68. DJT, S. 13.
[52] *Araki*, New labour policies, sub 6.
[53] *Barnard*, EU Employment Law, p. 426 regards this – doubtfully – as the main criterion for atypical work.

legal judgment. Atypical employment is then – especially by trade unions – generally looked at as suspicious and named as "precarious", which is not correct.[54]

On the other hand there are employees whose income is secured by other means, like by a main occupation or by old age pension. In these cases it may be asked, if these employees need exactly the same protection as those who rely on the job as their only income. Perhaps in such a case a minor job ("geringfügige Beschäftigung" = small amount job) means a reasonable addition to the main job and its income.

Atypical work shall also serve the aim to be a springboard for regular employment.[55] Unemployment is avoided, qualities can be maintained and an involvement in society remains possible.

To avoid a general disqualification of atypical employment, negative connotations like "precarious jobs" [56] should not be used.

As critique there can be stated that atypical employment leads – compared with regular employment – to

- lower salaries[57]

- insecurity as regards the maintenance of the job.[58]

The result may be that the employee cannot leave the status of atypical employment and that necessary training is not taken care of.[59]

b) Employees Endangered of Discrimination

Employees with certain characteristics in their person often are disadvantaged in the labour world. The cause may be prejudices of the employer or of the colleagues or of customers, but also, as stated above, economical reasons. It is necessary that these persons get an easier way to prove the connection between their characteristic and a disadvantageous treatment and that those discriminations are forbidden.

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[54] *Waltermann*, Gutachten B zum 68. DJT, S. 13.

[55] *Hohendanner/Walwei*, WSI-Mitteilungen 2003, 239, 240; JILPT Research Report No. 132, p. 5; *Riesenhuber*, Europäisches Arbeitsrecht, S. 299.

[56] E. g. *Thüsing*, Europäisches Arbeitsrecht, § 4.

[57] *Araki*, New labour policies, sub 7; *Waltermann*, NJW-Beilage 2010, 81; *Waltermann*, Gutachten B zum 68. DJT, S. 18 f.

[58] *Brehmer/Seifert*, Zeitschrift für Arbeitsmarktforschung 2008, 501 ff.; *Dörre* in Kronauer/Linne, Flexicurity, 2005, S. 9; *Hanami/Komiya*, Labour Law in Japan, p. 7.

[59] JILPT Research Report No. 132, p. 5.

c) Especially Protected Groups of Employees

For members of these groups there is also the danger that because of belonging to this group they are not engaged or are disadvantaged during their employment relationship or do not receive the kinds of protection that is necessary for them.

As important as prohibition of discrimination are here duties to support and consideration. E. g. there is especially with disabled persons a duty of the employer to provide special conditions at the working place, like entrances without barriers or special devices to operate a machine.

As regards mothers it is necessary to enable them to manage the working time in a flexible way to make sure they can combine job and family.[60]

3. Public Interests

The state is not only interested in the fair balancing between employers and employees, but also in the labour market, the employment policy. For this reason sometimes the legal positions of employees are reduced to promote more employment;[61] this happens significantly in times of an economic crisis.[62] A high degree of protection of employees is of disadvantage for a national economy in global competition.[63]

The working conditions of employees do not only meet with the interest of employers and employees, but also with that of the state which is due to create *social justice* and a fair compromise of interests. The state must avoid the creation of a second class employment law, but must develop the appropriate law and regard employment law, social security law and tax law as a unity with regard of employment. Therefore the state must care for a special protection of those groups of the labour market that have special difficulties. The state must also take care that employees do not choose present advantages that lead to a lack of protection in old age and a burden for society.

By promoting atypical employment the state wants to improve the labour market. The idea is that by allowing employers more flexible conditions they will sooner be ready to engage more workforce.[64]

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[60] For Germany see *Wank* in Klammer/Motz (Hrsg.), Neue Wege - gleiche Chancen, 2011, S. 125 ff.; for Japan see *Kawada* in Gedächtnisschrift für Zachert, S. 412, 418 Fn. 14.

[61] *Waltermann*, Gutachten B zum 68. DJT, S. 14 referring to the Agenda 2010 of the Federal Government.

[62] As regards Greece in times of the economic crisis see *Wank*, RdA 2013, 383.

[63] *Waltermann*, Gutachten B zum 68. DJT, S. 15.

[64] *Waltermann*, Gutachten B zum 68. DJT, S. 14; Begründung zum Gesetzentwurf des TzBfG, Bundestags-Drucksache 14/4374, S. 1; Boecken/*Joussen*, § 1 TzBfG Rn. 7 f.; Meinel/Heyn/*Herms*, § 1 TzBfG Rn. 11.

A special aspect is the labour market in times of an *economical crisis*. In Germany as well as in Japan atypically employed - especially temporary agency workers – serve as a buffer, to comply with a reduction of demand for workforce.[65]

What cannot be found out so far is whether atypical employment causes substitution effects, i.e. if they repress regular employees from the labour market or whether they create additional jobs.[66]

4. Employment Law, Social Security Law and Tax Law

In statements about non-regular work there is typically a division inasmuch as labour law scholars deal with the labour law aspect and scholars of social security law and of tax law with their special aspects. Seen from the view of an employee all three areas must be looked at together. If e. g. the question is how much an atypically employed earns from his job, what interests him is the net income, meaning the gross income minus social security premium and tax. Regarding employment law under the aspect of securing the existence of an employee, this question cannot be blended out. Especially with so called "geringfügige Beschäftigung" in Germany this connection is evident.[67]

There is also a connection as the exemption from social security premiums on the one hand leads to more jobs, but on the other hand it leads to a greater burden of the social security system. Furthermore times of small income jobs cause low old age pensions.[68]

The connection between employment law and social security law also becomes apparent regarding the question where pregnant women get their income from. As there is no inner connection with the employment relationship, this should logically be paid by the social security system, i. e. by the health insurance. Instead the state has in Germany transferred this mainly on the employers and has cynically called this a "subsidy" to the payments of the health insurance. [69] So the state has a share of the responsibility to the result that employers try to avoid the engagement of pregnant women.

As regards the treatment of atypically employed the state does not give a good example. Fixed-term employments are to be found with the state as employer to the same amount as in free economy.[70] Last year school authorities were blamed because they engage new teachers only on fixed-term jobs and newly engage the teachers they prefer at the end of the summer vacations, although there is a permanent demand for more teachers.

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[65] *Seifert*, Atypical Employment, p. 15.
[66] *Hohendanner/Walwei*, WSI-Mitteilungen 2013, 239, 243.
[67] *Waltermann*, Gutachten B zum 68. DJT and V 1 a cc.
[68] *Waltermann*, Gutachten B zum 68. DJT, S. 10 f.
[69] *Wank*, Arbeitnehmer und Selbständige, 1988, S. 89 f.
[70] It is a general fact that the state does itself not comply with duties that it imposes on employers; *Wank*, Forschung & Lehre 2013, 738.

There is another connection between employment law and social security law inasmuch, as the regular age limit is only legitimate referring to the time when the employee is secured by a social security old age pension.[71]

The EU directives on atypical work blend out social security; the German law follows this.[72]

5. Weighing of Interests and Flexicurity

The directives on atypical employment try to harmonize the two aims, protection of employees and flexibility of enterprises[73], so called flexicurity.[74] In antidiscrimination law, however, the ECJ sometimes forgets the fact that these are rules for an economic entity; e. g. it thinks to be just that an employer must pay the substitute for a substitute for an absent pregnant employee without getting any work in return for months.[75] Different from this in the law of especially protected persons there is a weighing of interests inasmuch as the employer can order an employee that is prevented by pregnancy to fulfill her regular job to do other, but appropriate work.[76] This is also valid for pregnant part-time workers.

IV. Legal Basis

It is characteristic for Germany and Japan as well as for other countries that the three systematic aspects of non-regular employment are without order spread over different laws and that these rules sometimes complete each other, sometimes they overlap and sometimes they are contrary. Rules concerning mothers working in part-time e.g. are to be found in German law in

- atypical employment (TzBfG)
- antidiscrimination law (AGG) and
- law for the protection of mothers (Mutterschutzgesetz).[77]

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[71] ECJ 16.10.2007 case C-411/05 – Palacios de la Villa, Slg. 2007 I-08531; 12.10.2010 case C-45/09 –Rosenbladt, NZA 2010, 1167; see *Wank*, Festschrift Bepler, S. 585, 596.

[72] It was different in the first drafts of directives; see *Wank*, RdA 1992, 103, 106 f.

[73] Historical view by *Stöhr*, to be published in RdA 2014.

[74] *Davies*, EU Labour Law, p. 180; *Bitburger Gespräche*, Unternehmerische Entscheidungsfreiheit, 2014.

[75] Critique by *Wank*, Festschrift Richardi, 2007, S. 441, 454 ff.

[76] *Buchner/Becker*, Mutterschutzgesetz, 8. Aufl. 2008, vor §§ 23 – 8 Rn. 27 ff.

[77] See also VI 1 a.

1. Germany

a) Atypical Employment

In Germany the law of atypical employment is to a great extend based on the law of the EU.[78] So this report on German law is at the same time a report on EU law.

In the beginning the EU (at that time EEC = European Economic Community, later EC) planned three separate directives for the three kinds of atypical employment. Consultations with the member states showed that an agreement could not be reached. Therefore the EC transferred the task to create a legal basis on the social partners on EC level. They concluded a framework agreement on fixed-term work and on part-time work. These agreements became the contents of corresponding directives, so that fixed-term employment is today ruled in the directive on fixed-term employment, directive 99/70/EC, and part-time in the directive on part-time employment, directive 97/81/EC.

There was a separate way for temporary agency work. Already a long time ago there was a special directive for a certain aspect of this work, health and safety at work, the directive on health and safety of temporary agency workers. But it was impossible to reach an agreement of the social partners on temporary agency work in general. Meanwhile the commission has created the directive 2008/104/EC on this subject.[79]

All four directives have meanwhile been transformed into German law. The law of part-time work and that of fixed-term work were combined in one statute, the act on part-time and fixed-term work, Teilzeit- und Befristungsgesetz, TzBfG. The law of temporary agency work is ruled in the Arbeitnehmerüberlassungsgesetz, AÜG.[80] In its newest version the directive on health and safety as well as the general directive have been adopted.

b) Antidiscrimination Law

Antidiscrimination is ruled in Germany in a special act, the Allgemeines Gleichbehandlungsgesetz, AGG.[81] It encompasses three different areas,

- employment law, §§ 1-18,
- civil law, §§ 19 - 21,
- law of civil servants, § 24 in connection with §§ 6 – 18.

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[78] The development is shown in *Michael Schmidt*, Die Richtlinienvorschläge; *Thüsing*, Europäisches Arbeitsrecht, S. 145 f.; *Wank*, RdA 1992, 303.

[79] ErfK-*Wank*, AÜG, Einleitung Rn. 3.

[80] *Boemke/Lembke* (Hrsg.), AÜG, 3. Aufl. 2013; ErfK-*Wank*, AÜG, 14. Aufl. 2014; *Schüren/Hamann*, AÜG, 4. Aufl. 2010; *Thüsing*, AÜG, 3. Aufl. 2012; *Ulb*er, AÜG, 4. Aufl. 2011.

[81] Commentaries: *Adomeit/Mohr*, 2. Aufl. 2011; *Bauer/Göpfert/Krieger*, 3. Aufl. 2011; *Däubler/Bertzbach*, 2. Aufl. 2008; *Wendeling-Schröder/Stein*, 2008.

Some criteria are only to be found here, others as well here as in the law for especially protected groups. E. g. employees that are discriminated from religious reasons are only protected here; there is no special law on the protection of religion.

Disabled persons, however, are as well protected by the AGG as by Sozialgesetzbuch IX (SGB IX, former Schwerbehindertengesetz), women as well by the AGG as by Mutterschutzgesetz and BEEG.[82]

Antidiscrimination law in the AGG only deals with the eight criteria named there. As regards other criteria the employer is bound by the allgemeiner arbeitsrechtlicher Gleichbehandlungsgrundsatz (general principle of equal treatment in employment law).[83] It is not written law, but generally accepted. It transforms the principle laid down in Article 3 of the constitution into employment law. As justification, any plausible reason is sufficient.

c) Especially Protected Groups of Employees

For the different groups named here there are special laws, mostly based on EU law.

The dual way of antidiscrimination law and social protection like in Germany is also characteristic for EU law. On the one hand there are prohibitions of discrimination for the especially protected. The three central directives of the EU do not refer to atypical work, but to employees in general, directive 2000/42/EC, directive 2000/78/EC and directive 2006/54/EC. It is forbidden to choose sexual orientation, sex, race or ethnic origin, religion or belief, disablement or age as criteria in any measures in employment law. These aspects are not dealt with in the following study.

As regards women in general in relation to men, or mothers or parents or young employees or old employees or disabled persons, there are as well prohibitions of discrimination as general rules of protection. Due to this dual way there are sometimes fractures in German law. So a special rule obliging employers to provide special working conditions for disabled persons is ruled in antidiscrimination law and not in the law of disabled persons. On the other hand a special rule about applications of disabled persons, different from the AGG, is ruled in the law of disabled persons and not in the AGG.

2. Japan

a) Atypical Employment

In Japan there is no combination of the law of atypical employment. The general principle of equal treatment is stated in Art. 3 Labour Standard Act (LSA); but no consequences for the

[82] See VI 1 a.

[83] *Thüsing*, Europäisches Arbeitsrecht, S. 147.

law of atypical employment is deducted from this. By systematic interpretation rules like Art. 8 of the Part-Time Act (PTA) are special in comparison with the general principle.

Part-time employment is ruled in the Act for the Improvement of the Management of Employment of Part-time Employees.[84]

For **fixed-term employment**[85] there is in sec. 14 paragraph 1 LSA a time limit of three years. For highly qualified employees or for employees older than 60 years it may be prolonged up to five years. Besides, prolongations are allowed without limit**.**

Based on Art. 14 paragraph 2 LSA the minister of labour and social affairs has in 2003 ruled that an employer must declare, when concluding an employment contract, if after the end of the period a prolongation is planned.

In August 2012 there were important changes in the law of fixed-term employees. They refer to

- the transformation by law from a fixed-term contract to a non-fixed term contract, Art. 18 LSA,

- the end of a fixed-term employment contract, Art. 19 LSA,

- the prohibition to create too great a difference between the employment conditions of employees without fixed term and fixed-term employees, Art. 20 LSA.

As well as in Germany and other countries, the law of dismissal and the law of fixed-term employment must be seen in connection. Employers tend to avoid restrictions of the law of dismissals by concluding fixed-term contracts. They need not give notice, but the contract ends by itself. In Japan for a long time, like still in the US, the principle of "employment at will" was valid, meaning that the employer could dismiss his employees at any time without reason. De facto the Japanese courts have controlled dismissals, and they ruled dismissals without a reasonable cause as abuse of rights. Meanwhile the requirement of a reasonable cause for ordinary dismissals has been adopted in written law, at first in Art. 23 LSA and now in Art. 16 Labour Contract Act (LCA).[86]

In Japan as in Germany it is more profitable for employers to engage applicants - in times when the future economy is uncertain - for a fixed term. They serve as buffer for economic swaying.

Japanese law of **temporary agency work** is based on German law.[87] It is ruled in the Act for the Protection of Appropriate Performance of Temporary Agency Business and for the

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[84] Act No. 76 of 1933, amended by Act No. 72 of 2007 (here as PWA); before there was the act of 1988; see *Kawada*, Gedächtnisschrift Zachert, 2010, S. 412.

[85] *Hashimoto*, Bulletin der Japanisch-deutschen Gesellschaft für Arbeitsrecht No. 12 (2011), S. 61.

[86] A comparison of German and Japanese law of dismissals at *Wank*, Nagoya University Journal of Law and Politics No. 248, March 2013, p. 204.

[87] *Nishitani*, Vergleichende Einführung in das japanische Arbeitsrecht, 2003, S. 305 f.

Protection of Temporary Agency Employees.[88] The last change of this act was in 2012.[89] At the moment no translation in English exists.[90]

The understanding of English texts on the Japanese temporary agency law is difficult by the fact that they name the employee "dispatched worker". But this is due to the "entsandter Arbeitnehmer" in the German Arbeitnehmerentsendegesetz (AEntG)[91], based on the directive on dispatched workers, meaning employees sent into a country from an employer with residence abroad.

b) Antidiscrimination Law

Although the general principle of equal treatment is part of the Japanese constitution in Art. 14, in Japanese employment law there is no general transformation of this principle into a special antidiscrimination law.

c) Especially Protected Groups of Employees

In Japan, too, there are special acts for especially protected groups, for women in Art. 4 LSA and in Art. 64 LSA, for children and youths in Art. 56 LSA, for older employees in the Act for the Stabilization of the Employment of Older Employees.[92]

V. Rules for Atypical Employment in Detail

Following this overview about the legal basis the rules shall now be analyzed in detail. In the beginning the study refers to atypically employed in a strict sense.

1. Germany

The German law concerning part-time and fixed-term work (TzBfG) as well as that on temporary agency work is based on EU law.[93] They are the part-time directive 97/81/EC, the

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[88] Act of 28.3.2012; in the following text as Temporary Agency Employment Act, TAEA; see *J. Junker*, Arbeitnehmerüberlassung, S. 96 ff.; *Wank*, Arbeitnehmerüberlassung in Deutschland und Japan, to be published in Gakushuin Daigaku Law Journal 2014.

[89] The version of the act before this change ist to be found in internet in English under www.cas.go-jp/jp/seisaku/horei/data/aspo.pdf. As regards the actual version in English, there is only a brochure of the Ministry of health, work and social affairs (see the following note).

[90] There are explanations by the Ministry of work under www.mhlw.go.jp/english/policy/employ-labour/employment-security/dl/act121113e. pdf.

[91] *Wank* in Wiedemann, TVG, 7. Aufl., Arbeitnehmerentsendegesetz.

[92] Act No. 68 of May 25, 1971 (in the following text ASEOE).

[93] *Waltermann*, Gutachten B zum 68. DJT, S. 20.

directive on fixed-term employment 1999/70/EC and the directive on temporary agency work 2008/104/EC. The EU has a positive attitude to atypical employment, but wants it in connection with the principle of equal treatment.

a) Part-time Work

Based on a framework agreement of the European social partners, the directive 97/81/EC was promulgated. A central item is the prohibition of discrimination in Art. 1 of the directive in connection with sec. 4 of the framework agreement.[94] The German law exceeds in several regards the requirements of the directive by more rights for employees.

aa) Legal Facts

Part-time employees represent one fourth of the whole number of employees.[95] Every fifth worki place newly installed in 2012 was a part-time job. In the whole of the EU the number of part-timers steadily increases.[96] Of women working, more than half work in part-time.[97]

bb) Interests

As far as the interests are concerned,[98] the interests of employers and of employees are for a great deal the same.[99]

In all statements concerning the different kinds of atypical employment it must be taken into account that it is not the single income from this job, but the income of the family that counts. That means that a fulltime job of one person and an atypical employment of the other may result in an appropriate income. [100]

By part-time work an *employer* has the chance as well regarding the working hours as well as regarding the amount of work to adopt the employment contracts to his demands.[101] Another advantage is the higher motivation of part-timers, leading to a higher productivity.[102]

Of disadvantage may be higher costs for personnel and organization. The costs for benefits often are bound to a person and not to a fulltime workplace and is therefore higher. [103]

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94 *Waltermann*, Gutachten B zum 68. DJT, S. 24.

95 *Seifert*, Atypical employment, p. 13 with diagram 2; *Waltermann*, Gutachten B zum 68. DJT, S. 23.

96 *Workinglives*, p. 22.

97 *Waltermann*, Gutachten B zum 68. DJT, S. 24.

98 Bundestags-Drucksache 14/4374, S. 11; *Waltermann*, Gutachten B zum 68. DJT, S. 25; *Wank* in Blanke u.a., Handbuch Neue Beschäftigungsformen, 2. Teil Rn. 39 f.; see above III 1, 2.

99 *Joussen*, JZ 2010, 812, 815; *Waltermann*, Gutachten B zum 68. DJT, S. 26.

100 *Waltermann*, Gutachten B zum 68, DJT, S. 26.

101 *Seifert*, Atypical employment, p. 14.

102 *Bertelsmann/Rust*, RdA 1985, 146; *Laux*/Schlachter, TzBfG, Einführung Rn. 21 ff.; *Waltermann*, Gutachten B zum 68. DJT, S. 25.

103 *Laux*/Schlachter, TzBfG, Einführung Rn. 18.

Among the part-timers it is necessary to distinguish.[104] There are male and female employees that would prefer a fulltime job but get only offered a part-time job.[105] If the offer of a part-time job complies in general with the interests of the employee,[106] the question is if the position of working time and the amount of hours also comply. Some part-timers would like to reduce the amount of their working hours, part-time employed men by five hours, women by 2, 5 hours.[107]

In other cases part-time work specially corresponds with the wishes of the employee.[108] This is especially true for mothers who need time for childcare. Following a study by the SOKO-Institut für Sozialforschung in 2000, the motives for part-time work were as follows:

- 41, 3 % more sovereignty in time

- 22, 5 % more free time

- 43, 7 % more free time activities

- 9, 1 % professional training.

In politics there is the question if an employer may at will offer only part-time jobs or if he needs – like with fixed-term work – a reasonable cause. If this requirement should be introduced it is important that necessary decisions about the organization of work are not obstructed.

cc) Definition

(1)The law about part-time work, the Teilzeit- und Befristungsgesetz, provides a definition in § 2 TzBfG.[109] As in the whole area of atypical employment, of antidiscrimination law and of socially protected groups there is always the problem to find the "**comparable employee**",

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[104] *Altendorf*, Hindernisse, S. 221 ff.; *Hohendanner/Walwei,* WSI-Mitteilungen 2013, 239, 242; *Wank*, RdA 2010, 193, 197 f.

[105] *Kawada*, Gedächtnisschrift Zachert, S. 412, 429 Fn. 15; *Seifert*, Atypical Employment, p. 15; *Workinglives*, p. 25.

[106] Only a minority of employees in the EU regards part-time as something precarious, *Workinglives*, p. 22, 23.

[107] Kölner Stadt-Anzeiger, 4. Februar 2014, S. 9.

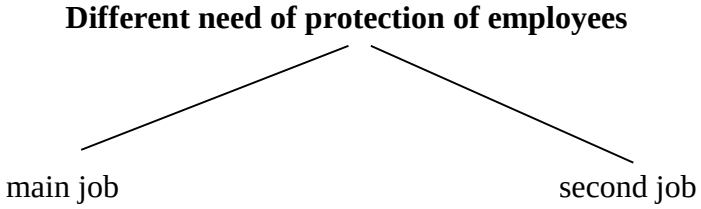
[108] *Waltermann*, Gutachten B zum 68. DJT, S. 25.

[109] As regards the definition in the directive, see *Thüsing*, Europäisches Arbeitsrecht, S. 131.

with whom the employee in question can be compared; this problem should be solved for all cases in an equal or similar way. There might be a general definition of the "comparable employee". But this is neither the case in EU law nor in German law. Instead, the problem must be solved anew for each single act and for each single group of employees. [110] There is even the opinion, the comparable fulltime employee in § 2 TzBfG and that in § 4 TzBfG need not be the same.[111]

The opposite term of a part-timer is the fulltime employee. So part-time employee is each employee that works less than a fulltime employee, § 2 Abs. 1 Satz 1 TzBfG. He who works 35 hours instead of the usual 36 hours is a part-timer. So - without regarding the different situation and different interests – the fulltime employee with slightly less hours is legally regarded as in the same situation as an employee who works two hours a week in his second job. Neither the part-time act nor the courts differ whether the part-time job is the main job or a second job or if it is due to grant the family income or is just an additional income.[112]

The comparable employee must be a fulltime employee. He must perform an equal or a similar activity. § 2 Abs. 1 TzBfG provides several steps to determine this: a fulltime job in the same enterprise; otherwise according to the collective bargaining agreement; otherwise referring to such a job in the same industrial area.[113]



(2)In employment law – different from social security law – there is no distinction between a part-time job in general and a **geringfügige Beschäftigung (**Minijob = small income job).[114] As of March 2013 4.5 million women had a "Minijob" and 2.7 million men. For 3 million women the Minijob was their only employment, for the others it was their second job.[115]

The difference which is also important for employment law, as the decision for a job for employers as well as for employees depends on whether it is a normal part-time job or a Minijob, is only named in social security law, § 8 Abs. 1 Nr. 1 Sozialgesetzbuch IV (SGB IV); there is only a clarification in § 2 Abs. 2 TzBfG. With the model of a small income job the law has created nudges to take a job with work only to a certain amount. The privilege is

[110] See *Lubisch*, Der vergleichbare Arbeitnehmer, Dissertation Bochum, to be published in 2014.
[111] Meinel/Heyn/*Herms*, § 2 TzBfG Rn. 3; opposite (and right) opinion by Boecken/*Joussen*, § 2 TzBfG Rn. 35.
[112] Distinguishing: *Wank*, Arbeitnehmer und Selbständige, 1988, S. 225 ff.
[113] Boecken/*Joussen*, § 2 TzBfG Rn. 20 ff.
[114] *Waltermann*, Gutachten B zum 68. DJT, S. 27.
[115] Frankfurter Allgemeine Zeitung Nr. 12, 15.1.2014, S. 9.

that employees partly do not need to pay social security premiums. There are two kinds of small income jobs, one referring to the amount of salary and one referring to the amount of working time.

An "Entgeltgeringfügigkeit" (small income referring to salary) means that the salary out of regular employment does not exceed 450 Euro. § 14 SGB IV says that salary encompasses all kinds of income, including a one-off payment.

"Zeitgeringfügig" employed (small income referring to working time) are employees that are engaged within one calendar year only for two months or on 50 work days.

Small income employed need not pay social security premiums, § 7 Abs. 1 Satz 1 SGB V, § 5 Abs. 2 Nr. 1 SGB VI, § 20 Abs. 1 Satz 1 SGB IX in connection with § 7 SGB V, § 27 Abs. 2 SGB III. The employers must pay flat rate premiums for sickness insurance and for old age insurance, § 249 b SGB V, § 172 Abs. 3 SGB VI.

On the one hand it is advantageous for employees that they do not have to pay social security premiums. On the other hand that excludes them from claims against the social security system. This is doubtful in cases where the small income job is due to provide the existence of the employee. But it should be taken into account that 42 % of the Minijob employees are pupils, students or retired persons.[116]

Politically the institute of small income jobs is much criticized. One argument is that without this nudge a lot of these working places would not be offered at all[117] or they would be performed in illicit work – a result that is generally disregarded by critics.[118] Others criticize that the privilege for Minijobs causes repressing effects against regular jobs[119] and that these persons later lack sufficient protection by old age pensions or that the state must take care of them. It is criticized that the intended function of a bridge to a regular job does not exist;[120] the problem of sufficient old age pension is transferred to the next generation.[121] Besides, the limits for income cause that the salary per hour stays below the general development in the labour market.[122]

There is a lot of proposals for a change of the legal situation.[123] Some authors suggest that the exemption from social security premiums should be abolished,[124] as this is declared to be a singularity of German law. Perhaps it would be helpful to differ between main job and second job and to find out the wishes of the Minijob employees themselves: Under what conditions would they work and under what conditions the work is no longer worthwhile for them?

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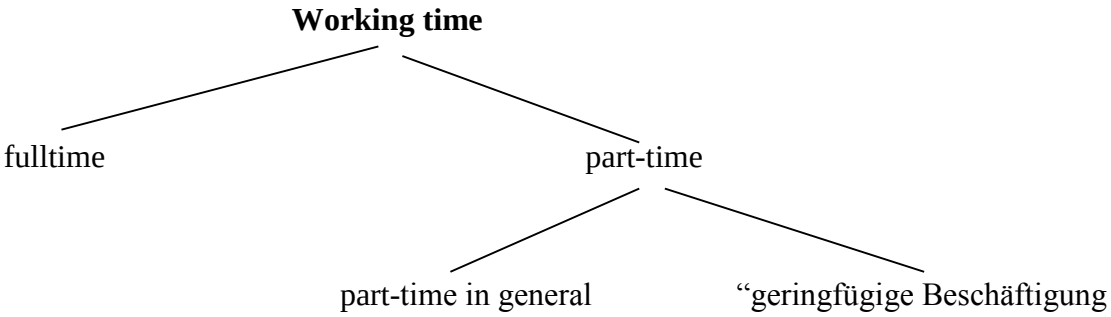
116 *Deinert*, RdA 2014, 65, 67; *Hohendanner/Walwei*, WSI-Mitteilungen 2013, 239, 241.
117 *Hartz u. a.,* Moderne Dienstleistungen am Arbeitsmarkt, S. 170; *Rolfs*, NZA 2003, 65, 66.
118 *Wank*, Festschrift Buchner, 2009, S. 898.
119 *Waltermann*, Gutachten B zum 68. DJT, S. 36.
120 *Waltermann*, Gutachten B zum 68. DJT, SD. 35.
121 *Deinert*, RdA 2014,65, 66; *Waltermann*, Gutachten B zum 68. DJT, S. 37.
122 *Griese/Preis/Kruchen*, NZA 2013, 113, 120.
123 The latest one by *Griese/Preis/Kruchen*, NZA 2013, 113 ff.
124 *Waltermann*, Gutachten B zum 68. DJT, S. 40.



Contrary to a lot of political criticism the acceptance of a Minijob is no proof of precariousness.[125] In view of the privileges it is of more advantage for many employees, to accept a Minijob besides the main job than to add overtime in their main job.

dd) Prohibition of Discrimination

(1) The central rule in the Teilzeit- und Befristungsgesetz is § 4 Abs. 1 TzBfG, the prohibition of discrimination.[126] Already before the coming into force of the directive there was such a prohibition by the jurisdiction of ECJ and Bundesarbeitsgericht. As part-time work is mostly done by women, to discriminate a part-time employee was an indirect discrimination of women. Therefore these cases were at that time ruled by antidiscrimination law (today in Germany by the Allgemeines Gleichbehandlungsgesetz, AGG), and not by the law of atypical employment.[127]

When comparing the normal salary and additional payments one must distinguish. There always needs to be a just cause for different treatment in comparison with fulltime employees. Compared is same or similar work, but not: work of equal value, like in gender discrimination.[128]

The principle of equal treatment can be applied in relation of fulltime work and part-time work; it is not valid among different groups of part-time employees.[129] E. g. the employees working on Mondays or Thursdays have more often a holiday than those working on Tuesday, because most of the holidays during the week are on these two days; this problem cannot be solved by § 4 TzBfG, but by the general principle of equal treatment.

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[125] *Hohendanner /Walwei*, WSI-Mitteilungen 2013, 239, 241.

[126] As regards the German rule see *Kawada*, Chuo-Gakuin University Review of Faculty of Law Vol. 15, No. 1 / 2 (2002), p. 186.

[127] Annuß/*Thüsing*, § 4 TzBfG Rn. 5 ff.; *Davies*, EU Labour Law, p. 183; *Wank* in Hanau/Steinmeyer/Wank, Handbuch des Europäischen Arbeits- und Sozialrechts, S. 552 ff.

[128] Annuß/*Thüsing*, § 4 TzBfG Rn. 25; *Thüsing*, Europäisches Arbeitsrecht, S. 150.

[129] BAG 6.12.1990 AP BeschFG 1985 § 2 Nr. 12; Annuß/*Thüsing*, § 4 TzBfG Rn. 24; Boecken /*Joussen*, § 4 TzBfG Rn. 24 ff.; *Laux*/Schlachter, § 4 TzBfG Rn. 17.

Forbidden is not only direct discrimination, but also indirect discrimination. [130] If the disadvantage in one respect is balanced by a privilege in another respect, then in the end there is no disadvantage.[131]

The principle of equal treatment refers to all kinds of working conditions. But it is necessary to distinguish between money and a benefit worth money on the one hand and other conditions of work on the other hand, and also between benefits that can be divided and others. Regarding salary and benefits that can be divided the pro-rata-temporis principle is applicable.[132] As regards indivisible benefits part-time employees generally have a claim to the whole benefit, but there can be a reasonable ground to exempt them.[133]

Generally disadvantages are justified if there is a reasonable cause. Judged by the wording of § 4 Abs. 1 TzBfG there seems to be no reasonable cause for differences concerning money, and some authors think so. The prevailing opinion, however, is - with good reason - opposite.[134] Reasonable causes are: occupational training, qualification, and experience in the job or requirements to the performance of the job.[135]

If there is less work to be done, the employer may perform the adaption by primarily dismissing of part-time workers. [136]

Of special interest are the rules serving the integration of part-timers (§§ 7 and 10 TzBfG) and the rules concerning the change from part-time to fulltime and vice versa (§§ 8 and 9 TzBfG).

Although the law demands equal treatment, part-timers often do not make use of their rights.[137]

(2) As part-timers only spend a part of the operating time of the enterprise, they may be excluded from information, and the employer may regard their work as less profitable and exclude them from further training measures. Therefore §§ 7 and 10 serve the **integration of part-time employees** in the staff and complete the principle of equal treatment by the duty of certain measures.

(3) (a) The German employment law enables an employee to keep his job and **change from a fulltime status** to a part-time status**, § 8 TzBfG**.[138] Similar rules exist in § 15 BEEG, § 21 SGB IX and in § 63 Pflegezeitgesetz.[139] The requirements are:

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[130] *Laux*/Schlachter, § 4 TzBfG Rn. 31.
[131] *Laux*/Schlachter, § 4 TzBfG Rn. 32.
[132] *Laux*/Schlachter, § 4 TzBfG Rn. 47.
[133] *Laux*/Schlachter, § 4 TzBfG Rn. 48 f.
[134] *Laux*/Schlachter, § 4 TzBfG Rn. 55; *Wank* in Blanke u.a., Neue Beschäftigungsformen, Teil 2 Rn. 172.
[135] *Laux*/Schlachter, § 4 TzBfG Rn. 62; *Wank* in Blanke u. a., Neue Beschäftigungsformen, Teil 2 Rn. 172.
[136] Annuß*/Thüsing*, § 4 TzBfG Rn. 667 ff.
[137] *Griese/Preis/Kruchen*, NZA 2013, 113 ff.
[138] On EU law *Thüsing*, Europäisches Arbeitsrecht, S. 155.
[139] *Boecken*/Joussen, § 8 TzBfG Rn. 197 ff.; *Latzel*, in Vielfalt oder Chaos, Hrsg. Uffmann/Dahm, 2013, S. 77, 87 ff.; Meinel/*Heyn*/Herms, § 8 TzBfG Rn. 3 ff.

- The employment relationship has existed longer than six months.[140]

- The employer must inform the employer of his wish to reduce his working time and to arrange another distribution of his working time at least three months before the planned change.[141]

- The employer has engaged in his enterprise regularly more than 15 employees.[142]

- If the employer has consented to a reduction of working time or has refused it with justification, a new reduction of working time can be demanded no sooner than after two years.[143]

The employer is obliged to discuss with the employee his or her wish of reduction of working time. He may only refuse this wish, if *entrepreneurial reasons* oppose it.[144] There are three possible reasons to justify a refusal:

- the organization of the enterprise[145] or

- the course of work[146] or

- the safety of the enterprise

are severely restricted or

the change causes unproportional costs.[147]

Contrary to the wording and the history of the origins of the law[148] the Bundesarbeitsgericht has reduced the justification for refusing the offer of the employee de facto on "important entrepreneurial reasons".[149] Recently the BAG has even intensified the requirements: Opposite to the prevailing opinion the employer is obliged to search in his whole enterprise for appropriate free part-time workplaces.[150]

Generally an employee can, together with his offer to reduce his working hours, demand a new disposition of his hours. In a certain case this may be an abuse of rights; so when the employee wants to use a small reduction of his working hours to obtain a bloc of free time

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[140] Annuß/Thüsing-*Mengel*, § 8 TzBfG Rn. 21 ff.; *Laux*/Schlachter, § 8 TzBfG Rn. 97 ff.
[141] Annuß/Thüsing-*Mengel*, § 8 TzBfG Rn. 37 ff.
[142] *Laux*/Schlachter, § 8 TzBfG Rn. 113 ff.
[143] *Laux*/Schlachter, § 8 TzBfG Rn. 124 ff.
[144] As regards the burden of proof see *Boecken*/Joussen, § 8 TzBfG Rn. 45 ff.; *Salamon/Reußе*, NZA 2013, 865.
[145] Annuß/Thüsing-*Mengel*, § 8 TzBfG Rn. 151 ff.; *Boecken*/Joussen, § 8 TzBfG Rn. 45 ff.; *Laux*/Schlachter, § 8 TzBfG Rn. 166 ff.
[146] *Laux*/Schlachter, § 8 TzBfG Rn. 192 ff.
[147] Annuß/Thüsing-*Mengel*, § 8 TzBfG Rn. 156 ff.; *Laux*/Schlachter, § 8 TzBfG Rn. 194 ff.
[148] Annuß/Thüsing-*Mengel*, § 8 TzBfG Rn. 134 ff.; *Laux*/Schlachter, § 8 TzBfG Rn. 140 ff.; *Boecken*/Joussen, § 8 TzBfG Rn. 36.
[149] *Wank*, RdA 2010, 193, 198 f.
[150] BAG AP TzBfG § 8 Nr. 31 with critical comment by *Heyn*.

before holidays.[151] It is characteristic for the bad quality of the law if such a demand is possible from the wording of the law.

If the employer has not informed the employee in writing at least one month before the beginning of the planned reduction, the employment contract is changed by law in the way asked by the employee.

There is hard critique against § 8 TzBfG:[152]

- It requires no reason at all on the side of the employee,[153]

- it contains no guidelines or restrictions regarding the amount of reduction,[154]

- it contains no guidelines or restrictions regarding the disposition of the planned working hours ,

- it does not require writing (different from the refusal of the employer).[155]

This rule exceeds unnecessarily the rules of EU law.[156] In spite of all this the prevailing opinion regards it in compliance with the constitution.[157]

(b) If the employee wants to **increase his working time**,[158] his position is remarkably weaker, § 9 TzBfG.

Of special interests are the rules concerning a change from fulltime to part-time. E. g. a female employee wants to work in part-time some time after the birth of her child. She does not know yet whether she will want to return to fulltime later on.

Other examples: An employee working part-time has bought a house and needs more money and wants to increase his working hours. - A mother that had worked part-time because of childcare as long as her child was not yet in school wants to return to her fulltime job.

The notice by the employee need neither be in writing nor does he need to give any reason.[159]

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151 BAG 11.6.2013 NZA 2013, 1074.
152 *Wank*, RdA 2010, 193, 198; also *Joussen*, JTZ 2010, 812, 815; *Waltermann*, Gutachten B zum 68 DJT, S. 27.
153 *Boecken*/Joussen, § 8 TzBfG Rn. 92.
154 *Boecken*/Joussen, § 8 TzBfG Rn. 92.
155 *Boecken*/Joussen, § 8 TzBfG Rn. 104.
156 *Boecken*/Joussen, § 8 TzBfG Rn. 2.
157 *Boecken*/Joussen, § 8 TzBfG Rn. 5; critical *Bauer*, NZA 2000, 1040; *Rolfs*, TzBfG, 2002, § 8 Rn. 2 f.; *Schiefer*, DB 2000, 2118.
158 *Davies*, EU Labour Law, p. 188.
159 Meinel/*Heyn*/Herms, § 9 TzBfG Rn. 14.

The employer only needs to come up to the wish if an appropriate *working place is free*. He is not obliged to create such a place.[160] If such a place exists, it is possible that several employees compete for this place. The part-time employee is – if he is equally able as the competitors [161]– to be chosen with preference. But even then he does not get the fulltime job, if

- important entrepreneurial grounds[162] or
- concurring wishes of other part-time employees[163]

oppose it.

ee) Legal Policy

For the political discussion there are two questions:

- Is an employer allowed to organize his personnel in such a way that for new working places he only engages part-timers?

- Would a quota of part-time work help?[164]

Different from the law of fixed-term work, where a fixed term – apart from § 14 Abs. 2 and 3 - is only allowed in case of a reasonable cause, § 14 Abs. 1 TzBfG, for a fixed term the TzBfG does not require any reason. If a corresponding restriction would be created it would heavily infringe the freedom of the job of employers, Art. 12 Grundgesetz (GG). But a quota of part-time work seems to be allowed.

The Landesarbeitsgericht (LAG) Baden-Württemberg, however, thinks that if an employer only engages part-timers the works council is allowed to oppose the engagement because of a violation of law; the employer prevents, following this concept, the claim of increase of working time, § 9 TzBfG.[165] The LAG fails to see that § 9 TzBfG concerns the change of an existing employment contract and not the conclusion of a contract.

As regards the return to a fulltime job after childcare, the agreement of the coalition says that a solution shall be found.[166] It will be difficult to find a solution in accordance with the

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[160] Annuß/Thüsing-*Jacobs*, § 9 TzBfG Rn. 14; *Boecken*/Joussen, § 9 TzBfG Rn. 19 ff.; *Laux*/Schlachter, § 9 TzBfG Rn. 23; Meinel/*Heyn*/Herms, § 9 TzBfG Rn. 16.

[161] Annuß/Thüsing-*Jacobs*, § 9 TzBfG Rn. 16 ff.; *Boecken*/Joussen, § 9 TzBfG Rn. 25 ff.; *Laux*/Schlachter, § 9 TzBfG Rn. 36 ff.

[162] Annuß/Thüsing-*Jacobs*, § 9 TzBfG Rn. 22 ff.; Meinel/*Heyn*/Herms, § 9 TzBfG Rn. 23; *Laux*/Schlachter, § 9 TzBfG Rn. 46 ff.

[163] Annuß/Thüsing-*Jacobs*, § 9 TzBfG Rn. 28 ff.; *Laux*/Schlachter, § 9 TzBfG Rn. 67 ff.; Meinel/*Heyn*/Herms, § 9 TzBfG Rn. 67 ff.

[164] As regards part-time quotas in collective bargaining agreements see Däubler/*Hensche/Heuschmidt*, § 1 TVG Rn. 763.

[165] LAG Baden-Württemberg 21.3.2013 6 TaBV 9/12.

[166] Deutschlands Zukunft gestalten, Koalitionsvertrag zwischen CDU, CSU und SPD, 18. Legislaturperiode, www.cdu.de/sites/default/files/media/dokumente/Koalitionsvertrag.pdf = NZA 23/2013, S. IX ff.

freedom of work of the employer. The most acceptable solution would be a right to return at a date fixed in advance. According to the existing laws an employee cannot demand a fixed-term reduction of his working hours; [167] he can only wait and later refer to § 9 TzBfG.

ff) Other Items

In the second part of the TzBfG there are rules going beyond non-discrimination creating a duty to support. Part-time work shall be promoted, § 6 TzBfG, the special kinds of work on demand, § 12, and division of the workings place, § 13 TzBfG, found special rules. Employers must inform their employees about free workplaces, part-timers have the right to participate in training measures, § 10 TzBfG.

gg) Sanctions

A special sanction is in § 8 Abs. 5 Satz 3 TzBfG: A change of the contract arises under certain circumstances by law. Generally violations of the law either lead to a claim of fulfillment or to voidness of the measure. There is no special sanction as regards the salary. This gap has been closed by the ECJ in its own way: if the payment of the part-timer falls below that of a full timer without justification, the employer is obliged to make an "*adaption to the top*".[168]

hh) Labour Law

The prohibition of discrimination, § 4 Abs. 1 TzBfG, does not only bind individual employment contracts but also *collective bargaining agreements*. Those agreements must not exclude part-timers from the validity of the collective bargaining agreement without a good cause. [169]

A right of the *works council* of codetermination may result from § 87 Abs. 1 Nr. 2 BetrVG.[170] § 8 TzBfG does not restrict the application of § 87 BetrVG.[171] In all cases of § 87 BetrVG a collective situation is required. [172] This is not the case if a single employee wants to reduce his working time. § 99 BetrVG is not applicable on this, as the reduction of working time is neither a posting nor an engagement.

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[167] *Laux*/Schlachter, § 8 TzBfG Rn. 51.
[168] *Laux*/Schlachter, § 4 TzBfG Rn. 180; critical *Löwisch/Rieble*, TVG, § 1 Rn. 833 ff.; Comment of *Krebber* on BAG AP BetrVG 1972 § 75 Nr. 59.
[169] BAG 28.3.1996 NZA 1996, 1280 on the one hand, BAG 25.4.2000 AP TzBfG Nr. 14 on the other hand; Boecken/Joussen, § 4 TzBfG Rn. 56 f.
[170] Meinel/*Heyn*/Herms, § 8 TzBfG Rn. 11.
[171] BAG 24.6. 2008 NZA 2008, 1309, 1312.
[172] *Wank*, Festschrift Kraft, 1998, S. 665.

a) Fixed-Term Work

The law of fixed-term employment being for many years judge made law, the Beschäftigungsförderungsgesetz 1985 first implanted it in written law; today it is ruled, following the directive 199/70/EC on fixed-term employment, in the Teilzeit- und Befristungsgesetz, TzBfG.

aa) Legal Facts

Almost every second new employment contract is meanwhile a fixed-term contract.[173] This kind of contract has taken over the function of probationary period. In absolute figures 2.7 million employees have a fixed-term contract.[174] 72 % get afterwards a job in the enterprise where they are working, namely 33 % a prolongation, 39 % an unlimited employment. [175] For 61 % of the employees with a fixed-term contract, collective bargaining agreements are applicable (for employees with unlimited employment 53 %). The reason is on the one hand that in the civil service there is a widespread appliance of collective bargaining agreements and on the other hand in the civil service a greater number of contracts are fixed-term contracts.[176] This is partly due to the fact that in universities a lot of fixed-term employments exist.

Different from Japan, further work in the same enterprise is neither usual nor is it a subject of authors in employment law. [177] Only 4. 5 % of employees older than 65 continue their work after retirement.[178] A fixed-term employment without just cause at the former employer is impossible because of § 14 Abs. 2 Satz 2 TzBfG. Perhaps it is possible to interpret the situation as a reason in the person, § 14 Abs. 1Sartz 2 Nr. 6 TzBfG. Preferably there would be an express clarifying in the act. Its contents should be that to continue work in the same enterprise is possible and that the employer needs no good cause for a fixed-term contract. Besides, the new employment contract should not contain any worsening compared with the old contract, other than containing the termination. With this idea a phrase in the Rosenbladt case of the ECJ can better be understood where the ECJ said the plaintiff could, having reached her retirement age, apply again at the former employer and he would be obliged to decide about the application without discrimination.[179]

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[173] Frankfurter Allgemeine Zeitung (FAZ) v. 23.3.2010, S. 13; see also *Waltermann*, Gutachten B zum 68. DJT, S. 64.

[174] *Hohendanner/Walwei*, WSI-Mitteilungen 2013, 239.

[175] Statement of the Bundesvereinigung der Deutschen Arbeitgeberverbände (BDA) v. 10.3.2014.

[176] Frankfurter Allgemeine Zeitung v. 6.8.2013 Nr. 180, S. 11.

[177] *A. Junker*, EuZA 2013, 3, 13.

[178] *Kraft*, Mitbestimmung 1-2/2014, S. 28.

[179] ECJ 12.10.2010 case C-45/09 – Rosenbladt NZA 2010, 1167.

bb) Interests

The interests in case of fixed-term employment are rather different from that in the case of part-time employment. Only a few *employees* have an own interest in being engaged only for a fixed term;[180] e.g. if they already have concluded a new employment contract and only want to get through the period till then or if they have other reasons to get through a period. Most employees engaged for a fixed term would prefer a contract without time limit. 61.7 % of employees with fixed-term contract in Europe have chosen it because no work without fixed term was offered to them.[181] The disadvantage of fixed-term work is that it makes difficult to plan future life.[182]

A positive aspect is that a fixed-term job may provide a workplace first that can be switched into an unlimited employment afterwards. The chance for this is greater for those with a limited employment than for those that have been unemployed before.[183]

For *employers* [184] the advantage of fixed-term work is that they can adopt e.g. the period of an employment contract to the period of a special project. Most of all fixed-term work gives a much easier chance to separate from an employee; the employer need no just cause for a dismissal and need not hear the works council.

The ruling of fixed-term contracts was based on the idea that employers envisaging the difficulties of dismissals would rather be willing to engage applicants on a fixed-term basis.[185]

cc) Definition

When defining a fixed-term employment, there are three possible ways:[186]

- The employment contract can be concluded for a time fixed by the calendar, § 3 Abs. 1 TzBfG,

- the end of the employment relationship may result from the kind, the aim or the performance of the work, § 3 Abs. 1 TzBfG,

- or the employment contract contains a condition of dissolution; this case is not ruled in the definition in § 3 TzBfG, but results from § 21 TzBfG.

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180 *Davies*, EU Labour Law, p. 182; *Giesecke /Groß* in Keller/Seifert, Atypische Beschäftigung, 2007, S. 83 f.
181 *Workinglives*, p. 16.
182 *Workinglives*, p. 20.
183 *Hohendanner/Walwei*, WSI-Mitteilungen 2013, 239, 240.
184 *Giesecke/Groß* in Keller/Seifert, Atypische Beschäftigung, S. 83, 103.
185 Bundestags-Drucksache 10/2012, S. 15 f.
186 *Annuß*/Thüsing, § 3 TzBfG Rn. 11 ff.; Boecken/*Joussen*, § 3 TzBfG Rn. 6 ff.

There is no minimum period. Even employment relationships for one day are possible.[187]

The problem how to find a *comparable employee* has been appreciably solved in § 3 Abs. 2 TzBfG.[188] There is a three step procedure:

The comparable employee may be

- an employee working in the same enterprise with the same or a similar work (real comparable person),
- an employee comparable by the collective bargaining agreement,
- a real employee working in the same sector of industry.

There is a gap in this rule as it does not, as is usual nowadays, refer to a hypothetical employee, i.e. the employee that would normally have been engaged under the usual conditions, but always asked for a really existing person. By the way, the rule is systematically in the wrong place; it belongs to § 4 Abs. 2 TzBfG.[189] But there is a discussion about the application of § 4 Abs. 2 TzBfG (see below).[190]

dd) Prohibition of Discrimination

§ 4 Abs. 2 TzBfG forbids to discriminate against employees with a fixed-term contract.[191] A different treatment is allowed based on a good cause. [192] Different from discrimination regarding part-time work there are no judgments before the TzBfG regarding an indirect discrimination of women.[193] This is due to the fact that whereas part-time work is dominated by women this is not the case with fixed-term work.

§ 4 Abs. 2 Satz 1 TzBfG does not only prohibit direct discrimination, but also – although this is not expressively said – indirect discrimination.[194] But in case of an indirect discrimination the causality of a measure of fixed-term employed must separately be stated.[195]

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[187] BAG 16.5.2012, SAE 2013, 67 with comment by *P. H. Müller*.

[188] *Annuß*/Thüsing, § 3 TzBfG Rn. 11 ff.; Boecken/*Joussen*, § 3 TzBfG Rn. 33 ff.; Meinel/Heyn/*Herms*, § 3 TzBfG Rn. 12 ff.

[189] Meinel/Heyn/*Herms*, § 3 TzBfG Rn. 12; *Wank*, Festschrift Schnapp, 2008, S. 839, 841.

[190] Meinel/Heyn/*Herms*, § 4 TzBfG Rn. 125 f.

[191] About EU law see *Thüsing*, Europäisches Arbeitsrecht, S. 163 f.

[192] The good cause problem is dicussed above regarding part-time.

[193] Annuß/*Thüsing*, § 4 TzBfG Rn. 9.

[194] Annuß/*Thüsing*, § 4 TzBfG Rn. 18; Laux/*Schlachter*, § 4 TzBfG Rn. 241 f.; Meinel/Heyn/*Herms*, § 4 TzBfG Rn. 124.

[195] Annuß/*Thüsing*, § 4 TzBfG Rn. 19; Laux/*Schlachter*, § 4 TzBfG Rn. 245; Meinel/Heyn/*Herms*, § 4 TzBfG Rn. 127.

Who is the comparable employee, § 4 TzBfG does not reveal, but – systematically in a wrong place - § 3 Abs. 2 TzBfG. As far as employers are obliged to grant fixed-term employed the same conditions as in the enterprises of competitors, this rule must be interpreted in a restrictive way.[196]

Different treatment is *justified* by a good cause. Besides, the measure must be appropriate. As far as money or benefits are concerned the pro-rata-temporis principle is applicable, § 4 Abs. 2 Satz 2 TzBfG. Although the EU has no competence concerning salary, Art. 157 paragraph 5 TFEU, the prevailing opinion is that it has a competence for rules with indirect effect on the salary, like the prohibition of discrimination.[197] The wording of § 2 Satz 2 does not allow a discrimination because of a good cause, but the prevailing opinion is right to accept this justification.[198] A good cause may be that seniority shall be appreciated. [199] If the employee is only engaged for a short period, the participation in further training can be useless.[200]

ee) Other Items

The third part of the TzBfG contains rules concerning the employer´s duty of information, §§ 18 and 20 TzBfG, a rule about further training, § 19 TzBfG, and a special rule about the end of an employment relationship, § 15.

ff) Fixed-term Employment with Grounds and without Grounds

This difference is of great importance for an understanding of the law of fixed-term employment.[201] Generally the employer needs a good cause to be allowed to conclude a fixed-term contract. If such a cause does not exist, the employment contract is by law a contract for an unlimited period. A similar rule is valid in France, Italy, and Spain. The accepted causes named in § 14 Abs. 1 TzBfG have in common, that the reason for the employment only exists for a temporary period.

But there are two exemptions: One is for *newly founded enterprises*, § 14 Abs. 2 a TzBfG.[202] The other is that a *limitation without cause* is allowed up to two years, and during these two years a prolongation without cause is allowed up to three times, § 14 Abs. 2 TzBfG.

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196 Laux/*Schlachter*, § 4 TzBfG Rn. 249.
197 ECJ 13.9.2007 case C-307/05 NZA 2007, 1223.
198 Laux/*Schlachter*, § 4 TzBfG Rn. 253; Meinel/Heyn/*Herms*, § 4 TzBfG Rn. 132.
199 BAG 28.3.2007 NZA 2007, 681.
200 Laux/*Schlachter*, § 4 TzBfG Rn. 251.
201 *Greiner*, ZESAR 2013, 305.
202 Annuß/Thüsing-*Maschmann*, § 14 TzBfG Rn. 79 a.

The rule can, however, only be applied if the same employee has not been employed by the same employer before ("restriction of former occupation").[203] Taken in a strict sense, this rule violates the constitution, because it disproportionally excludes persons from getting a job. If e. g. a student has worked four years ago during his semester vacations in one enterprise, it cannot engage him for a fixed term without good cause and will therefore engage others without this restriction. Therefore the BAG has made a "teleological restriction" that this section is not applicable if more than three years have passed since.[204] Most authors regard this judgment as illegal broad interpretation[205] - but they don´t understand that every restricting rule must obey the requirement of being proportional.- If two employers cooperate in a certain way to avoid the restriction, the courts do not accept the abuse of rights.[206]

As far as *prolongations* are concerned, the following difference is important: Fixed-term employment contracts without a cause can only be prolonged within a two year period, so that a fixed-term employment can at most last two years. Different rules are only allowed for collective bargaining agreements, § 14 Abs. 2 Satz 3 TzBfG.[207] During this period the employer is rather free. He can conclude e. g. one contract for two years, but as well one contract for three months and prolong it three times, up to altogether two years.

Contrary to this a contract with good cause can be prolonged as often as wanted, or they may be a series of contracts for a fixed term, each based on another ground, but always among the same partners of the contract (as regards the problem of a chain of contracts also see below gg).

gg) Termination with Grounds

§ 14 Abs. 1 Satz 2 TzBfG names some good causes. When interpreting them the judgment of the ECJ in the case Angelidaki must be observed.[208] The BAG generally does not control a series of fixed-term contracts, but, in accordance with EU law, only the last termination. [209] The employment contract need not state the reason for the termination if it is a termination by the calendar, but must name it in case of a certain aim of the contract.[210]

As for *temporary need* (no. 1) a prognosis is necessary.[211] In general the employer bears the risk of the future economic development. He must not transform it on the employee. A

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203 Annuß/Thüsing-*Maschmann*, § 14 TzBfG Rn. 69 ff.

204 BAG 6.4.2011 with approving comment of *Wank*, RdA 2012, 361; opposite opinion by LAG Baden-Württemberg 26.9.2013 – 6 Sa 28/13, denying a violation of the constitution.

205 E. g. *Lakies*, AuR 2011, 190.

206 BAG 15.5.2013 NZA 2013, 1267..

207 LAG Düsseldorf 21.6.2013 – 10 Sa 1747/12.

208 ECJ 23.4.2009 case C-378/07 – Angelidaki, Slg. 2008, I-2483 = NZA 2008, 581.

209 BAG 22.4.1998 AP BGB § 611 Rundfunk Nr. 25; BAG 25.3.2009 NJW 2009, 3180; see ECJ 26.1.2012 case C-586/10 - Kücük, NZA 2012, 135.

210 Meinel/Heyn/*Herms*, § 14 TzBfG Rn. 32 f.

211 Annuß/Thüsing-*Maschmann*, § 14 TzBfG Rn. 30, 33; Laux/*Schlachter*, § 14 TzBfG Rn. 14, 29.

termination is only allowed if there is a certain prognosis[212] that the demand for employment will be dropped at a later time.[213] Accepted cases are a limitation for a certain project or an occupation dependent of money from a third party or a seasonal engagement.[214]

A fixed-term contract *following an occupational training or a study* (no. 2)[215] is allowed, if afterwards the employee gets a permanent employment, but not if the employer tries to build up a personal reserve of employees that afterwards do not get a job. The engagement must take place directly following the training, so that only the first job is meant.[216]

One of the most important good causes is *deputizing* of another employee (no. 3).[217] This means mostly cases of absence because of sickness or vacancies. The limitation is only allowed with the prognosis that the replaced employee shall come back.[218] Although there must be a connection between the deputizing and the fixed-term employment, it is not necessary that the deputy does directly the job of the other; an indirect deputizing is sufficient.[219] E. g. the direct or indirect deputizing of a core employee may give a good cause.[220] As regards schools the BAG deems it as sufficient if there is a need of deputizing in general.[221] But in the last judgment the BAG required a "chain of replacement", meaning one employee replaces another one who himself replaces a third one.[222]

A special problem is "*chains of fixed-term contracts*". [223] According to the TzBfG an employer may, with good cause, employ the same employee again and again. In the case of a plaintiff at the ECJ, Mrs. Kücük, she had been engaged at a German Amtsgericht (local court) altogether thirteen times. The ECJ now demands that the courts control if there is an abuse of rights and if in reality a permanent workplace was taken.[224] Even after this judgment an employer can still add one fixed-term contract to the other; still only the last termination is controlled. There are two ideas that must be weighed against each other. If employers were forced to provide a personnel reserve of employees with no fixed term contracts for all cases of sickness or vacations, this would violate their freedom of organization. On the other hand the number and the duration of fixed-term contracts may indicate that such a workplace is needed.[225]

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212 Hard restrictions in BAG 11.9.2013 NJW 2014, 489 and 4.12.2013 – 7 AZR 277/12, not yet published.
213 *Meinel*/Heyn/Herms, § 14 TzBfG Rn. 48 ff.
214 Annuß/Thüsing-*Maschmann*, § 14 TzBfG Rn. 35.
215 Laux/*Schlachter*, § 14 TzBfG Rn. 38 ff.
216 *Meinel*/Heyn/Herms, § 14 TzBfG Rn. 66.
217 Laux/*Schlachter*, § 14 TzBfG Rn. 46 ff.
218 BAG 11.112.1990 AP BGB § 620 Befristetes Arbeitsverhältnis Nr. 141.
219 *Meinel*/Heyn/Herms, § 14 TzBfG Rn. 14, 79.
220 BAG 10.7.2013 NZA 2013, 1292.
221 Reference of the jurisdiction at Annuß/Thüsing-*Maschmann*, § 14 TzBfG Rn. 38.
222 BAG 16.11.2013 NZA 2013, 611.
223 *Kiel* in Jahrbuch des Arbeitsrechts 50 (2013); see *Workinglives*, p. 18.
224 ECJ 26.1.2012 case C-586/10 – Kücük, NZA 2012, 135; following it BAG 18.7.2012 NZA 2012, 135 and BAG 18.7.2012 NZA 2012, 1354; see *Adam*, AuR 2013, 1354; *Bruns*, NZA 2013, 769; *A. Junker*, EuZA 2013, 3, 6 ff.; *Kamanabrou* in Vielfalt oder Chaos, Hrsg. Uffmann/Dahm, S. 1ff.
225 BAG 10.7.2013 NZA 2014, 26.

The *characteristic of a special work* (no. 4)[226] refers to the interest of the employer specially protected by the constitution, like the freedom of broadcast, Art. 5 Abs. 1 GG, but also for stages [227] and sports.[228]

The fixed term because of *testing* (no. 5)[229] must be contrasted to the probationary time in an unlimited employment relationship, § 622 Abs. 23 BGB. This clause leads to an automatic end of the contract. The duration of the testing must comply with the aim of the probation.[230]

A cause *in the person of the employee* (no. 6)[231] is mostly regarded as given if the employee himself wants the termination[232], but also if the employee wants to get through a period.

No. 7 allows a termination because of the *budget*. [233] If the budget does no longer provide workplaces for a special kind of work, this workplace can be taken by a fixed-term employment until the end of financing. It is necessary that the rules in the budget law themselves give the details of fixed-term contracts.[234]There is critique against this privilege for the state referring to EU law and to constitutional law.[235]

The last named good cause is a *court settlement*, no 8.[236]

Besides these named good causes, *unnamed good causes* are justified "especially" if they are similar to the named ones and of equal weight, § 14 Abs. 2 Satz 1 TzBfG.[237]

There is no convincing solution for those that want to continue their work when having reached their retirement age (see above sub aa). As the legal situation is now, the normal law of dismissal is to be applied, and a dismissal because of reduced abilities has hardly success in the courts. The grounds in § 14 Abs. 2 TzBfG do not cover this case, and if the employer wants a fixed-term contract without cause, § 14 Abs. 2 TzBfG, this is prevented by § 14 Abs. 2 Satz 2 TzBfG.[238]

§ 14 Abs. 3 TzBfG allows a fixed-Term contract with applicants that had been unemployed and who have finished their 52nd year.[239]

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226 Annuß/Thüsing-*Maschmann*, § 14 TzBfG Rn. 39; Laux/*Schlachter*, § 14 TzBfG Rn. 543 ff.
227 *Meinel*/Heyn/Herms, § 14 TzBfG Rn. 96.
228 *Meinel*/Heyn/Herms, § 14 TzBfG Rn. 120 ff.
229 Annuß/Thüsing-*Maschman*n, § 14 TzBfG Rn. 48; Laux/*Schlachter*, § 14 TzBfG Rn. 62 ff.
230 *Meinel*/Heyn/Herms, § 14 TzBfG Rn. 133.
231 Annuß/Thüsing-*Maschmann*, § 14 TzBfG Rn. 52; Laux/*Schlachter*, § 14 TzBfG Rn. 68 ff.
232 Different: Münchener Handbuch zum Arbeitsrecht-*Wank,* § 95 Rn. 107: unnamed good cause.
233 Annuß/Thüsing-*Maschmann*, § 14 TzBfG Rn. 58.
234 BAG 18.10.2006 NZA 2007, 332.
235 Laux/*Schlachter*, § 14 TzBfG Rn. 90.
236 Laux/*Schlachter*, § 14 TzBfG Rn. 90.
237 BAG 9.12.2009 NZA 2010, 495.
238 *Gräf* in Neue Arbeitswelt, 3. Assistententagung im Arbeitsrecht, 2013.
239 *Waltermann*, Gutachten B zum 68. DJT, S. 68; *Wiedemann*, Festschrift Otto, 2008, S. 609.

hh) Sanctions

Possible sanctions are the voidness of the rule, a right to the abatement or damages.[240] The sanction of the law in case of voidness of the termination clause is very effective: The employee has by law a contract without termination, § 16 TzBfG. In cases of unjustified fixed-term the BAG also acknowledges an "adjustment to the top".[241]

ii) Labour Law

If an employee is engaged with a fixed-term job, the *works council* has a right of co-determination, § 99 Betriebsverfassungsgesetz (BetrVG). [242] § 20 BetrVG demands of the employer to inform the works council about the number of fixed-term employed. Usually in cases of important changes in the organization fixed-term employees are exempted from Sozialpläne (= "severance schemes"); this is justified because severance schemes shall have the "function of a bridge".

Collective bargaining agreements must also apply the principle of non-discrimination.[243]

b) Temporary Agency Work

aa) Legal facts[244]

The actual version of the Arbeitnehmerüberlassungsgesetz (AÜG) is based on the temporary agency work directive of the EU 2008/104/EC.[245]

The share of temporary agency workers among the whole number of employees covers in the longtime average about 2 %.[246] In times of economic upward trends it was even higher. During the economic crisis it went down, because temporary agency workers were the first to be dismissed. Correctly said: The enterprises ordered less temporary agency work, and the agencies could only engage less.[247] At the moment the number increases again. In the year of 2013 there were 852 000 temporary agency workers in Germany. Two thirds of them had

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240 Laux/*Schlachter*, § 4 TzBfG Rn. 265 ff.

241 BAG 6.4.2011 NZA 2011, 970; critical *Hartmann*, Festschrift v. Hoyningen-Huene, 2014, S. 123, 129.

242 GK-BetrVG-*Raab*, § 99 BetrVG.

243 Meinel/Heyn/*Herms,* § 4 TzBfG Rn. 145 ff.

244 Regarding the share of temporary agency workers among the total number of employees see *Ulber*, AÜG, Einleitung E Rn. 1 ff.

245 As regards the transformation in the member states see *Bericht der Kommission*.

246 See *Waltermann*, Gutachten B zum 68. DJT, S. 44.

247 *Zwölfter Bericht*, S. 42 f., 47.

been unemployed before. Half of the temporary agency workers were only engaged for up to three months.[248]

The salary of temporary agency workers were sometimes remarkably lower than that of core workers.[249]

At the end of June 2013 there were about 18.000 temporary work agencies in Germany. 38 % among them were so called mixed enterprises that did not perform exclusively agency work, but had mainly another activity.[250]

bb) Interests

As regards the interests involved,[251] temporary agency work is dominantly in the interest of *employers*. [252] The energy for the organization of work is much reduced; the user enterprise has only to observe health and safety law. As far as the reduction of costs is concerned, on the one hand the temporary agency demands a plus on the salary for their costs and their profit; on the other hand the said advantages are worth the costs.[253]

Organizationally there is an advantage by the fact that the employer need not engage employees himself; he need not place advertisements, to hold job interviews and need not fulfill duties of an employer like continued payment in case of sickness.

Employees have an interest in temporary agency work, if they have no or little other chances in the labour market, if they want to try the work in a special industrial sector, or if they hope that the user company will afterwards engage them for a permanent job ("Klebeeffekt" = effect of gluing).[254] There are advantages for starts in the labour market, or for those returning into the labour market after a break. [255]

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248 Frankfurter Allgemeine Zeitung (FAZ) of 23.1.2014 Nr. 19 S. 10; see also *Waltermann*, Gutachten B zum 68. DJT, S. 44 f.; *Zwölfter Bericht*, S. 44.

249 *Waltermann*, NJW Beilage 2010, 81.

250 Answer of the Federal Government to a „Kleine Anfrage , Bundestags-Drucksache 18/573; *Zwölfter Bericht*, S. 39.

251 ErfK-*Wank*, § 1 AÜG Rn. 1.

252 *Ulber*, AÜG Einleitung C Rn. 1 ff.; *Waltermann*, Gutachten B zum 68. DJT, S. 49, 57.

253 *Grünbuch* der Kommission, KOM (2006) 708 endg.; *Bayreuther*, NZA 2007, 371; *Wank*, AuR 2007, 244.

254 *Hohendanner/Walwei*, WSI-Mitteilungen 2013, 239, 241.

255 *Zwölfter Bericht*, S. 48.

cc) Definition

The definition of temporary agency work in Germany is based on the temporary agency directive. It was transformed into German law in 2011.[256]

Temporary agency work must be distinguished from *arrangement of employment*. The (pivate) agency of arrangement of employment has no contractual relationship with the employee.[257]

The directive describes temporary agency work as a "*temporary*" employment by a temporary agency at a user company, Art. 1 Abs.1 1, 3 Abs. 1 lit. c) directive 2008/104/EC. Some authors think that the wording of "temporary" only has a describing character. [258] But as was stated by other authors[259] and has meanwhile been confirmed by the BAG, it is a mandatory requirement for legal temporary agency work.[260] As far as the EU conformity of a time limit is concerned there is a preliminary junction at the ECJ.[261]

There are still some questions. It is not clear, *how long* "temporary" is. The courts and the authors suggest different solutions.[262] Common is the idea that permanent demand of workforce is not covered by temporary agency work. At the moment it is possible to take § 14 TzBfG as standard. The coalition government plans a legal maximum duration of 18 months.[263]

Another question is if temporary *refers* to the single employee[264] - which would make it possible to perform a permanent job by always sending new employees – or *to the workplace.* [265]

The temporary agency worker is covered by the general definition of an employee. His partner of the contract is only the temporary agency, between them exists a "temporary agency employment relationship". The user company has to fulfill the duties of an employer only if it is expressively said by law, like about health and safety; between the two exists an occupational relationship.[266]

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256 BGBl. I Nr. 18 v. 29.4.2011, S. 643; *Böhm*, DB 2011, 473; *Hamann*, RdA 2011, 321; *Hamann*, ZESAR 2012, 103; *Lembke*, NZA 2011, 319; *Schüren/Wank*, RdA 2011, 1, 2 ff.; *Ulber*, AuR 2010, 412; *Waas*, ZESAR 2012, 103; *Wank*, Jahrbuch des Arbeitsrechts 49 (2012), S. 23 ff.

257 *Boemke*/Lembke, § 1 AÜG Rn. 157 ff.; ErfK-*Wank*, AÜG Einleitung Rn. 12 b.

258 *Rieble/Vielmeier*, EuZA 2011, 474, 2488; *Boemke*/Lembke, § 1 AÜG Rn. 115.

259 ErfK-*Wank*, § 1 AÜG Rn. 37 a.

260 BAG 10.7.2013 – 7 ABR 91/11 –NJW 2014, 331, to be published in AP with critical comment by *Hamann*.

261 ECJ case C-533/13 – Auto ja Kuljetusalan Työntekijäliitto AKT ry.

262 ErfK-*Wank*, § 1 AÜG Rn. 37 b; the latest being *Nießen/Fabritius*, NZA 2014, 263; *Steinmeyer*, DB 2013, 2740, 2742.

263 Supra note 166.

264 *Steinmeyer*, DB 2013, 2740, 2741.

265 *Boemke*/Lembke, § 1 AÜG Rn. 114; *Deinert*, RdA 2014,65, 71; *Nießen/Fabritius*, NJW 2014, 263.

266 ErfK-*Wank*, AÜG, Einleitung Rn. 32 ff.

In contrast to this clear arrangement the ECJ has lately – by violating EU law which reserves the definition of the employer in a temporary agency relationship to national law – invented the figure of an "employer outside the contract".[267] It is not clear, whether the ECJ will give up this error.

A special problem is the transfer *inside a group*. Until the new act based on the directive this transfer was exempted from the scope of the AÜG. As the directive does not contain such a privilege, to preserve it would be a violation of EU law.[268] It is necessary to distinguish some cases.

Companies in a group that only have a common office are not covered.

As long as an employee who has not been engaged for the purpose of being transferred has his proper workplace at one member company of the group and - by keeping his working conditions – is temporarily sent to another daughter, there is no temporary agency work.

But if an employee is engaged for the purpose of being transferred to another group member, the sending company now needs a license. If it has a license, it may restrict itself on transfer only within the concern. The BAG saw no abuse in this construction. [269] The result is doubtful. It is not sufficient to control each single case.[270] The comparison with the status of a core employee leads to the conclusion that the employee cannot be dismissed if his workplace in the group member where he works is no longer needed, as long as there is work for him in the other group member.

Another item that has newly been changed because of the directive is that the criterion of "gewerblich" (= commercial business) has been exchanged by "*on business*".[271] So now even temporary agencies are covered that do not intend to make profits.[272]

dd) Administrative Law

The AÜG contains a mixture of employment law and administrative law. According to § 1 AÜG an employer who wants to start business needs a license.[273] No license is given in the building sector, § 1 b AÜG. The license can be given under conditions, § 2 AÜG. It is not given if the danger exists that the temporary agency will not come up to its duties as an employer or cannot by lack of organization, § 3 AÜG. If the license had been given under violation of law, it can be revoked, § 4 AÜG; it can also be revoked for the future, § 5 AÜG.

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267 ECJ 21.10.2010 case C-242/09, Slg. 2010 I-10309 – Albron Catering; critical ErfK-*Wank*, AÜG, Einleitung Rn. 33 a.

268 *Boemke*/Lembke, § 1 AÜG Rn. 50; ErfK-*Wank*, § 1 AÜG Rn. 57.

269 BAG 15.5.2013 NZA 2013, 1214.

270 *Forst*, ZESAR 2011, 316; *Thüsing*, Europäisches Arbeitsrecht, S. 169.

271 *Wank*, Jahrbuch des Arbeitsrechts 49 (2012), S. 23, 25 f.

272 ErfK-*Wank*, § 1 AÜG Rn. 34; Thüsing-*Waas*, § 1 AÜG Rn. 101 a.

273 *Zwölfter Bericht*, S. 25.

ee) Legal Status of Temporary Agency Workers

During recent years there have been many changes in the law of temporary agencies. The present law results partly on the EU directive, partly on the so called Hartz law.[274] To promote more employment, the prohibition of a temporary agency contract parallel to being sent to one user and the maximum period of transfer of 24 months were abolished (former § 3 Abs. 1 Nr. 4 – 6 and § 1 Abs. 3 Nr. 2 AÜG).

Temporary agency workers have a relationship to two "employers", the temporary agency and the user company. The question is to whom they may be assigned, to the temporary agency or to the user. There is a parallel question as regards the works council in both enterprises.

The idea of the AÜG is that they are employees of the temporary agency. In the user company they work on a "*Vertrag zugunsten Dritter*" (= agreement in favour of a third party), meaning a contract to the benefit of a third party.[275] The user company has instead of the temporary agency the right to give orders to the employees sent in its enterprise. It has only a few further duties, like procuring access to common organizations, § 13 b AÜG), obeying health and safety rules (§ 11 Abs. 6 AÜG) and to inform the employee about his conditions and of other jobs (§ 11 Abs. 2, § 13, § 13 a AÜG).[276]

In the *law of works councils* the legislator has partially integrated temporary agency workers – besides their belonging to the works council of the temporary agency – into the enterprise of the user company. They cannot be elected as members of the works council in the user company, § 14 Abs. 2 Satz 1 AÜG; but after an employment of more than three months they can participate in the election to the works council in the user company, § 7 Satz 2 BetrVG. As far as engagements are concerned although temporary agency workers are no employees of the user company, the works council of the user company has a right of co-determination it has when own employees are engaged, § 14 AÜG. The temporary agency worker is allowed to attend the consulting hours of the works council of the user company, § 14 Abs. 2 AÜG in connection with the rules in the Betriebsverfassungsgesetz. Besides, there is - so far – no other special rule; but the coalition agreement of the Federal Government intends to add a rule making temporary agency workers by definition part of the user´s staff.

So far beyond the wording of the law it is accepted that the works council of the user company has a right of co-determination as far as rules valid for the organization of the user enterprise are concerned, like start and end of working time, breaks or vacations. Furthermore the BAG has in some new judgments counted temporary agency workers as members of the user company in case of *thresholds*; like with the question how many employees are

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274 Based on *Hartz u, a.,* Moderne Dienstleistungen am Arbeitsmarkt.

275 ErfK-*Wank*, AÜG, Einleitung Rn. 33; *Schüren*/Hamann, AÜG, Einleitung Rn. 168.

276 ErfK-*Wank*, AÜG, Einleitung Rn. 35.

necessary that a member of the works council is exempt from work, §§ 9, 38 BetrVG[277] or which number makes a severance scheme necessary, § 111 BetrVG.[278] Contrary to this the Landesarbeitsgerichte deny a temporary agency worker the taking into consideration of his work in the user company if he gets a job in the user company later and needs half a year until his protection by the Kündigungsschutzgesetz (dismissal protection act), § 1 Abs. 1 KSchG, begins.[279]

In *employment law* the question is how is the status of temporary agency workers in comparison with the core employees of the user company? It is often suggested that in case of a crisis the employer must at first cancel the contracts with agencies so that he has less temporary agency workers.[280] In a recent judgment the BAG included temporary agency workers when it had to decide how many employees were engaged in the enterprise; the Kündigungsschutzgesetz is only applicable if there are at least ten employees.[281]

Contrary to the opinion of the BAG and of some authors the recent judgments concerning thresholds are an illegally broad interpretation. The question is not, if Kündigungsschutzgesetz and Betriebsverfassungsgesetz allow such a new interpretation, but if the law of temporary agency work allows it. Although the directive would have allowed to include temporary agency workers, the legislator only wanted their inclusion in the cases he named.[282]

There are no problems as regards the temporary agency workers in the agency. There they are employees like any other employees. That means e. g. if there is a legally prescribed choice between the employees that shall be dismissed, they are to be counted as the other employees staying in the administration of the agency.[283]

According to the coalition agreement, the Federal Government plans a rule that in all rules of works council law – as long as it is not contrary to the sense of the rule – temporary agency workers shall be counted as members of the user company;[284]

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277 BAG 13.3.2013 NZA 2013, 789 = BAG AP BetrVG 1972 § 9 Nr. 15 (*Reichold*).

278 BAG 18.10.2011 NZA 2012, 221 = BAG AP BetrVG 1972 § 111 Nr. 70 (*Hamann*).

279 LAG Rheinland-Pfalz 8.5.2011 – 8 Sa 137/11 – BeckRS 2011, 76110; LAG Niedersachsen 5.4.2013 – 12 Sa 50/13 - .

280 Critical *Hasler-Hagedorn*, Die „Austauschkündigung", S. 108 ff.; see *Fuhlrott/Fabritius*, NZA 2014, 122.

281 BAG 24.1.2013 NZA 2013, 726.

282 ErfK-*Wank*, AÜG, Einleitung Rn. 35 f.; *Fandel/Zanotti*, BB 2012, 969; *Mosig*, NZA 20212, 1411; *Rieble*, NZA 2012, 485; *Tschöpe*, NJW 2012, 2161; opposite opinion by the judges of the BAG *Linsenmaier/Kiel*, to be published in RdA 2014.

283 BAG 20.6.2013 NZA 2013, 837.

284 Coalition agreement, supra note 166; critical *Bauer*, DB 2014, 60.

ff) Prohibition of Discrimination

The law of temporary agency work also contains a prohibition of discrimination;[285] the terms are "equal pay" and "equal treatment". If the same model would be applied as with part-time work and with fixed- term work it would mean that a temporary agency worker gets the same working conditions as a comparable employee in the user company. This is in fact the solution valid in some European countries. [286] In Germany and in some other EU member states, however, another model is applied. According to this model the temporary agency workers have a permanent contract with the agency. Their salary must be paid also in times when they cannot be sent to a user company.[287] If a separate collective bargaining agreement contains special working conditions for temporary agency work and if an employment contract refers to it, then the principle of equal treatment is replaced. As by this way it is possible with the help of employer friendly trade unions to reduce salaries, the presumption of fair agreements that is usually valid for collective bargaining agreements cannot be applied here.[288]

But the directive only allows such a replacement in the case that the national law respects the "*overall protection of the employees*", Art. 5 of the directive.[289] It seems as if the German legislator thinks that by introducing § 3 a AÜG, a rule concerning minimum pay,[290] it has complied with this rule. But this is a mistake; the AÜG should provide exact provisions as regards temporary agency employment contracts.[291]

But anyway, as consequence of § 3 a AÜG and the "Verordnung über die Lohnuntergrenze in der Arbeitnehmerüberlassung" since January first 2014 there is a minimum salary of 8.50 € in Western and of 7.86 € in Eastern Germany.[292]

In fact, the equal pay principle for temporary agency workers is not applied in Germany. The agencies use their own collective bargaining agreements, different from agreements applied in the user companies. The users are regularly not bound by these agreements by membership, so that they are not bound by § 4 TVG. But they refer to the agreements in the special collective bargaining agreements of temporary agencies so that these agreements are *applicable by reference*.[293]

For a better protection of temporary agency workers the requirements for the acknowledgement of trade unions in this sector of industry may be intensified and according

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285 As regards the EU law see *Thüsing*, Europäisches Arbeitsrecht, S. 170 ff.

286 *Wank*, RdA 2003, 1 ff.

287 *Wank*, Jahrbuch des Arbeitsrechts 49 (2012), 23, 24.

288 *Waltermann*, Gutachten B zum 68. DJT, S. 60 f.

289 *Deinert*, RdA 2014, 65, 70; ErfK-*Wank*, § 3 AÜG Rn. 22; *Wank*, Jahrbuch des Arbeitsrechts 49 (2012), S. 23, 28.

290 Similar rules exist in other laws, Boemke/Lembke-*Marseaut*, § 3 a AÜG Rn. 19.

291 *Boemke*, RIW 2009, 177, 183; ErfK-*Wank*, § 3 AÜG Rn. 23 a, 23 b; *Fuchs*, NZA 2009, 57, 63; *Waltermann*, Gutachten B zum 68. DJT, S. 52.

292 *Zwölfter Bericht*, S. 16 f.

293 *Wank*, Jahrbuch des Arbeitsrechts 49 (2012) S. 23, 30; as regards the conformity with EU law Boemke/*Lembke*, § 9 AÜG Rn. 193 f.

to EU law there must be provisions concerning the contents of collective bargaining agreements. But – in spite of proposals[294] - the chance to refer to collective bargaining agreements should not be abolished.[295]

The problem becomes less important as the strong trade unions have concluded collective bargaining agreements with the associations of agency work, containing extra pay for temporary agency employees for certain sectors of industry.[296]

The coalition agreement announces that after an occupation of nine months in the same enterprise the principle of equal treatment shall be applied.[297]

Some trade unions, calling themselves Christian, have in the past concluded collective bargaining agreements extremely profitable for employers. But the BAG declared their holding organization as not having negotiation capacity.[298] The result was that a reference to the collective bargaining agreements of *CGZP* was invalid and that the principle of equal treatment, § 10 AÜG, was to be applied instead. That meant that the temporary agency employees had to be paid for the past the same – and normally much higher - salary as was paid to the core employees of the user company. Salaries in this sense were all kinds of payments that were paid in connection with the employment relationship.[299]

The BAG did not accept the argument that the user companies had trusted that the collective bargaining agreements were valid.[300] But many claims were unsuccessful because of preclusive time limits[301] or of limitation of claims.

If by chance [302] the principle of equal treatment is applicable, the temporary agency employees must be given the same working conditions as the core workers in the user company, they must be paid the same salary.[303] This includes not only the regular salary but also all benefits.[304] They must either be given in real or transformed in money. Standard are the working conditions of a comparable employee. If there are several comparable employees the one is to be chosen whose work resembles most that of the temporary agency worker.[305]

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294 *Waltermann*, Gutachten B zum 68. DJT, S. 62.

295 *Joussen*, JZ 2010, 812, 817; *Schüren/Wank*, RdA 2011, 1, 5.

296 Boemke/*Lembke*, § 9 AÜG Rn. 218 ff.; *Deinert*, RdA 2014, 65, 71; *Krause*, NZA 2012, 830; *Zwölfter Bericht*, S. 19.

297 Coalition agreement (supra note 166); *Thüsing*, NZA 2014, 10, 11.

298 BAG 14.12.2010 NZA 2011, 289; BAG 22.5.2012; BAG 23.5.2012; generally concerning Tariffähigkeit BAG 11.6.2013 – 1 ABR 33/12 – NZA-RR 2013, 64 (medsonet“).

299 BAG 13.3.2013 NZA 2013, 1226.

300 BAG 13.3.2013 NZA 2013, 680.

301 BAG 13.3.2013 NZA 2013, 680, 685; *Deinert*, RdA 2014, 65, 71 f.

302 *Dieterich* in Bieback, Tarifgestützte Mindestlöhne, S. 103, 106 ff.

303 Boemke/*Lembke*, § 3 AÜG Rn. 104 ff.

304 ErfK-*Wank*, § 3 AÜG Rn. 14; *Ulber*, § 9 AÜG Rn. 47 ff.

305 Boemke/*Lembke*, § 9 AÜG Rn. 114; ErfK-*Wank,* § 3 AÜG Rn. 15.

gg) Other Items

The directive introduced a *claim for information* about the contents of the employment contract, transformed in § 13 AÜG, and a claim for information about free workplaces as well as a claim for access to common institutions, § 13 b AÜG.

The employer is obliged to an advertisement of those workplaces in his enterprise where he plans to engage temporary agency workers.[306]

The dismissal of a temporary agency worker follows general law of dismissal;[307] but in times of an economic crisis the contracts with agencies are cancelled first.[308] In a case of dismissal in the agency the temporary agency workers must be included in the "social choice" of those to be dismissed.[309]

Fixed-terms must comply, as all fixed-term contracts, the Teilzeit- und Befristungsgesetz.[310] But as the ECJ says, the fixed-term directive of the EU is not applicable here.[311]

hh) Sanctions

There is no convincing system of sanctions in the AÜG. Different from the directives about part-time or fixed-term work the directive on temporary agency work demands in Art. 10 paragraph 1 expressively "appropriate measures" as sanction. This does not only refer to violations of the principle of equal treatment[312], but also to other violations of the directive, like violation of the prohibition of more than transitory transfer.

(1) There are sanctions in four areas, in administrative law, in the law of fines, in employment law and in labour law. In *administrative law* a license can be denied or be combined with conditions or not be prolonged, §§ 1, 2, 3 AÜG. In those cases named in the law *a fine* is due, § 16 AÜG. In 2011 §§ 16 Abs. 1 Nr. 7a, 7b were introduced in the AÜG.[313]

(2) In *employment law* § 10 AÜG as a hard sanction provides that if the contract between the agency and the user company is invalid, because the agency had no valid license, by law a contract exists between the user company and the temporary agency worker. For other cases of violation there is no corresponding sanction in employment law. Therefore some authors discuss if an analogy to § 10 AÜG is possible. This includes especially the case that the

306 BAG 15.10.2013 NZA 2014, 214..
307 ErfK-*Wank*, AÜG, Einleitung Rn. 17; *Schüren*/Hamann, AÜG, Einleitung Rn. 278 ff.
308 LAG Hamm, DB 2007, 1701; LAG Berlin-Brandenburg, DB 2009, 1353; *Hamann*, NZA 2010, 1211, 1214 f.; critical *Hasler-Hagedorn*, Die „Austauschkündigung", S. 108 ff.
309 BAG 20.6.2013 NZA 2013, 837.
310 ErfK-*Wank*, AÜG, Einleitung Rn. 6.
311 EuGH 11.4.2013 case C-290/12, NZA 2013, 495 – Della Rocca; *Franzen*, EuZA 6 (2013), 433.
312 Opinion of *Thüsing*, Europäisches Arbeitsrecht, S. 178.
313 *Zwölfter Bericht*, S. 16.

employee is engaged for more than a temporary time or that there is a pseudo contract for work and services.

In the case of non temporary engagement some courts and authors say that in this case it is no temporary agency work but an arrangement of employment;[314] others say that then there is no sanction.[315] Others suggest a direct application of § 10 AÜG, others an analogy to § 10 AÜG by interpretation of the German law.[316] Other authors state that German law in itself does not provide an analogy here, but because of Art. 10 of the directive it can be introduced as EU law conform broad interpretation.[317] The BAG decided recently that a broad interpretation or analogy is not allowed because there is no gap in the law.[318] The legislator had deliberately renounced a sanction. The directive does not demand a certain sanction, but Art. 10 paragraph 2 sentence 1 of the directive leaves it to the member states to choose the appropriate sanction.

As the law of temporary agencies becomes more and more restrictive again – as it had been before the "Hartz-laws" - , there is a growing trend to use contracts for work and service.[319] Others call them "industry affine services".[320] If contrary to the description in the contract the contractual relationship is in fact that of temporary agency work, then the real character of the work is decisive and the law of temporary agency work is applicable.

The difference is as follows: By a contract for work and service the partner of the contract owes a result that he performs by the help of his employees as "Erfüllungsgehilfen", (=accomplice) § 278 BGB. The temporary agency only owes to provide workforce as their service. Although it seems easy to state the difference by this basic idea, there are problems caused by several ways how to conclude the contract. [321] E. g. the partner of the contract may instead of offering one result offer a framework contract and then offer several partial services. The payment may follow the hours that have been worked and not be a flat sum. The kind of work may require that the employee works on the premises of the other and work together with his employees etc.

The BAG uses the common criteria that it uses to differ between employees and self-employed. Methodically that is not quite correct, because concerning the contract for work and service and a temporary agency contract, in both cases employees are involved, either those of a contractor or those of an agency. So the comparison is to be made between two

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314 *Leuchten*, NZA 2011, 608, 609.

315 LAG Düsseldorf BeckRS 2013, 71617; *Boemke*/Lembke, § 1 AÜG Rn. 115; *Hamann*, RdA 2011, 321, 327; *Krannich/Simon*, BB 2012, 14114, 1418; *Ralph Weber*, Festschrift von Hoyningen-Huene, 2014, S. 581, 594.

316 LAG Berlin-Brandenburg 9.1.2013 BB 2013, 251; *Brors*, AuR 2013, 108, 113; Ulber/*J. Ulber*, § 1 AÜG Rn. 231 d.

317 ErfK-*Wank*, § 1 AÜG Rn. 37 d.

318 BAG 10.12.2013 NZA 2014, 196; critical *J. Ulber*, comment on this judgement to be published in AP.

319 BAG AP § 10 AÜG Nr. 19; LAG Berlin-Brandenburg 6.5.2013 BeckRS 2013, 71997; *Boemke*, Festschrift von Hoyningen-Huene, 2014, S. 43 ff.; *Boemke*/Lembke, § 1 AÜG Rn. 84 ff., §§ 3 Rn. 127 ff.; *Francken*, NZA 2013, 985; *Francken,* NZA 2013, 1192; *Greiner*, NZA 2013, 697; *Lembke*, NZA 2013, 13212; *Maschmann*, NZA 2013, 1305*; Reiserer*, DB 2013, 20126; *Rieble*, ZfA 2013, 137 ff.; Schüren, NZA 2013, 176 ff.; *Ulbe*r, AÜG, Einleitung C Rn. 34 ff.; *Wank*, Jahrbuch des Arbeitsrechts 49 (2012), S. 23, 35 ff.

320 See ErfK-*Wank*, § 1 AÜG Rn. 21 a.

321 ErfK-*Wank*, § 1 AÜG Rn. 12.

different types of self-employed, either a contractor or an agency. The BAG asks if the employee is bound by the right to give orders of the other party of the contract and if he is integrated into his organization.[322] Among authors there are many different proposals how to differ.[323] Taken all in all the BAG uses the right criteria.[324]

In legal theory this is a matter of teleological definition.[325] An inner connection must be found between the criteria used on the side of application of a rule and the legal consequences. The question is which facts have leaded the legislator to create the legal consequences he has chosen.[326] The reason is that an occupation at an agency bears more risks than that at a "normal" employer.[327]

Before the last election for the "Bundestag" the state of Niedersachsen has made a draft containing a definition.[328] As the coalition agreement says, the Federal Government plans to find a definition for the AÜG.[329]

(3) In *labour law* the works council can oppose the engagement of an employee that violates law, § 99 BetrVG, like an engagement that is more than temporary.[330]

ii) Labour Law

As temporary agency workers are mostly no members of a trade union, collective bargaining agreements on temporary agency work do not bind them directly. But almost always the contract with the agency refeers to such an agreement. This reference is, however, only valid if the agency is a union in the sense of the Tarifvertragsgesetz.[331]

Most important is § 3 a AÜG saying that special collective bargaining agreements for temporary agency work can be declared as generally binding for all temporary agency contracts. Such an agreement was concluded in October 2013, causing a general minimum salary for the whole sector.

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322 BAG 10.7.2013 NZA 2013, 1296.
323 See ErfK-*Wank*, § 1 AÜG Rn. 17 ff.
324 ErfK-*Wank*, § 1 AÜG Rn. 19 ff.
325 *Wank*, Begriffsbildung, S. 79 ff.
326 ErfK-*Wank*, § 1 AÜG Rn. 44.
327 ErfK-*Wank*, § 1 AÜG Rn. 19 ff.; *Fieberg*, NZA 2014, 187, 189.
328 Bundestags-Drucksache 18/14 v. 28.10.2013.
329 Coalition agreement, supra note 166.
330 BAG 10.7.2013 NZA 2013, 1296.
331 This was not the case with the CGZP, see BAG 14.12.2010 NZA 2010, 289; reference of authors in ErfK-*Wank*, § 3 AÜG Rn. 22 ff.

Furthermore the trade unions have concluded collective bargaining agreements with big enterprises that oblige them to pay additional benefits by these companies to the salary they get by the agency.[332]

jj) Proposals for Reforms

The coalition agreement of the Federal Government proposes some changes for the law of temporary agency work.[333] There shall be a definition to differ between a temporary agency contract and a contract for work and service. After 18 months the genuine principle of equal treatment shall come into force.

In an expert´s report for the Ministry of Labour in North-Rhine Westphalia *Brors* and *Schüren*[334] have some suggestions. They differ between fixed-term contracts and contracts without time limit.[335] With a fixed-term contract the agency bears no entrepreneurial risk, and therefore the genuine principle of equal treatment shall be applicable from the first day on. With other contracts and the risk of continued paying of salary even in cases of no transfer the agency can, as is usual now, refer to a special collective bargaining agreement for temporary agency work (§ 9 Nr. 2 Entwurf). After nine months the temporary agency worker has a claim on the same salary as an employee in the user company (§ 3a Abs.2 Entwurf). 18 months are the maximum period for legal temporary agency work (§ 1 Abs. 3 Satz 3 Entwurf).[336]

The term temporary shall refer to the demand of the third party and his workplace and not to the single contract of an employee (§ 1 Abs. 2 und 3 Entwurf).[337] After six months there shall be a presumption that the work is not temporary.[338] Generally if an employee works within the organization of a third party, there shall be a presumption of temporary agency work (§ 1 Abs. 4 Entwurf). Criteria for a real contract of temporary agency work instead of a contract for work and service shall be the liability of the agency and if the agency has a quality management.[339] In spite of a license for the agency a contract shall be void if the agency pretends to have a contract for work and service, but, as the performance of the contract shows, in fact does temporary agency work (§ 9 Nr. 1 Entwurf). The sanction in cases of illegal temporary agency work shall be an employment contract with the user company.[340]

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332 *Bayreuther*, NZA Beilage 4/2012, 115; *Krause*, NZA 2012, 830.
333 Supra note 166.
334 *Brors/Schüren*, Missbrauch von Werkverträgen und Leiharbeit verhindern, 2014.
335 *Brors/Schüren*, l.c. S. 7; already in *Schüren/Wank*, RdA 2011, 1 ff.
336 *Brors/Schüren*, l.c. S. 9.
337 *Brors/Schüren*, l. c. S. 8, 15. ff
338 *Brors/Schüren*, l. c. S. 9.
339 *Brors/Schüren*, l. c. S. 11; *Schüren*, to be published in Festschrift Wank, 2014.
340 Brors/Schüren, l. c. S. 19

The works council shall get a right of information (§ 90 Abs. 3, § 99 a BetrVG Entwurf); if the works council has not been informed correctly and in time, the temporary agency work is illegal[341].

2. Japan

As in Germany in Japan the number of atypically employed has continually risen in recent years.[342] In the law of atypical work there is an elementary difference between the German and the Japanese law. In German law atypically employed persons are employees, and the whole of employment law is applicable on them. The Teilzeit- und Befristungsgesetz and the Arbeitnehmerüberlassungsgesetz contain additional provision for protection, for all three kinds the principle of equal treatment is valid and at least for part-time work and fixed-term work it is practiced, § 4 TzBfG. For temporary agency workers the principle is also valid; in reality, however, it has – because user companies are allowed to refer to special collective bargaining agreements – little importance; but at least there is a minimum salary.

Opposite to this to be a non-regularly employed (hiseishain) in Japanese law means that a great number and practices of employment law are not applied on these persons.[343]

a) Part-time Work

aa) Legal Facts

Among the employees in 2010 23.3 % were part-time workers.[344] Sectors with a great deal of part-time workers are "those of accommodations, eating and drinking services, followed by wholesale and retail trade, living-related and personal services and amusement services, and education and learning support."[345]

bb) Interests

The interests in Japan are comparable to those in Germany.[346] Perhaps there are even more women in Japan that would prefer a fulltime job but are only offered a part-time job.[347]

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341 *Brors/Schüren*, l. c., S. 13 f.

342 *Araki*, new labour policies, sub 2; *Hashimoto*, Bulletin der Japanisch-Deutschen Gesellschaft für Arbeitsrecht, Nr. 12 (2011), S. 61, 62.

343 *Jennifer Junker*, Arbeitnehmerüberlassung, S. 43 f.

344 *Araki*, New labour policies; *Labor Situation 2013/2014*, p. 29 gives a quota of part-time workers of 14.2 %.

345 *Labor Situation 2013/2014*, p. 44.

346 Details in *Labor Situation 2013/2014*, p. 50.

347 *Kawada*, Gedächtnisschrift Zachert, S. 420 Fußnote 15.

cc) Definition

Art. 2 of the Japanese Part-Time Work Act (hereafter PWA) describes a part-timer as someone who works less than there is usually worked in the enterprise, with reference to a comparable employee ("ordinary worker" in contrast to a "regular worker"[348]).

Independent from this definition Japanese employment law differs, especially between

- (here so called) real part-time employees, working no more than 35 hours per week,[349]

- (here so called) pseudo part-time employees (giji-paato).[350] Even if they work in fact as much as a fulltime employee, this status is denied to them by definition and they are regarded as part-time employees. That leads to lower payments and worse working conditions.

The courts judge differently. One court regarded this practice as tort; another one referred to the freedom of contract and regarded it as legal.

The PWA of 2008 has forbidden different treatment compared with a fulltime employee, Art. 8 paragraph 1 PWA. But this is valid only under three conditions:

- The work must be identical to that of a regular employee,

- the performance of work must be identical and

- the contract must not be a fixed-term contract.

As the rule is only applicable on employees without a fixed-term contract and not for fixed-term work – as is usual in Japan for part-timers - , the new act has no practical effect. It covers only 0.1 % of the part-time employees.[351]

For legal theory this is an example for symbolic law. Generally in employment law – not only in Germany, but also in other countries, the wording of a contract does not matter, but the reality of the performance of a contract. Otherwise the employer as the stronger part of an employment contract can enforce a contract to his liking simply by using other words. Therefore usually there is in employment law a "mandatory kind of contract". [352] But Art. 8 PWA gives with one hand (equal treatment) and takes with the other (not for fixed-term contracts), which shows that this article has only a symbolic value. As the Japanese legislation, courts and scholars accept this solution, it cannot be called illegal.

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348 *Labor Situation 2012/2013*, p. 66 note 8.

349 *Asao* in JILPT (ed.), Non-regular-employment, p. 2.

350 *Araki*, Labor and Employment Law in Japan, p. 36; *Kawada*, Gedächtnisschrift Zachert, S. 412, 420; *Morozumi*, Japan Labor Review Vol. 6 (2009), no. 2, p. 39, 41; *Seifert*, Atypical Employment, p. 7.

351 *Hanami/Komiya*, Labour Law in Japan, p. 67, 71.

352 *Wank*, Arbeitnehmer und Selbständige, S. 102 ff.

Anyway Art. 9 PWA forces the employers to endeavor equal treatment, referring to duties, motivation, ability and experience. Besides, employers shall endeavor to transform the contract into that of a regular occupation, Art. 12 PWA.

There are two special kinds of part-time work:

A *contract of low income* (teichingin) is a part-time job with an income below the tax free limit.[353] *Arubaito* are part-timers in a second job[354], typically pupils as are usually seen in self service shops.

dd) Prohibition of Discrimination

As shown above an employer only needs to engage a part-timer by a fixed-term contract to avoid the application of equal treatment, and this is generally done. He even does not need a good cause for the limitation.

ee) Other Items

Part-timers in an enterprise shall be informed about job offers.There are guidelines as to promote part-time work by the ministry of employment. As Art. 25 PWA says the employer shall install a company for the support of part-timers as in Art. 34 Civil Code.

ff) Sanctions

There is a sanction only in case of violation of Art. 6 paragraph 1 (information about the working conditions), as a "non-penal-fee", Art. 47 PWA.

b) Fixed-term Work

aa) Legal Facts

19 % of the total number of employees and two third of the atypically employed are fixed-term employees.[355]

[353] *Seifert*, Atypical employment, p. 7.
[354] *Seifert*, Atypical employment, p. 7.
[355] *Araki*, New labour policies; *Hashimoto*, Bulletin, S. 61, 62.

bb) Interests

The interests of Japanese employees with a fixed-term contract are not different from those in Germany. But as it becomes more and more difficult to get a regular workplace, applicants are often bound to accept a fixed-term contract. Among the fixed-term employees are many arubaito. About 40 % are pupils and students. [356]

cc) Definition

There is no legal definition of a fixed-term contract. In Japanese law there are different types of fixed-term employees:[357]

- contract employees
- other employees with a fixed-term contract
- daily workers
- entrusted workers.

Contract employees (keiyaku shain) are engaged for a special project because of their special qualities.[358] 41 % choose this kind of contract because a regular employment was not offered to them.[359]

Other fixed-term employees (tanki keiyaku) may be engaged without a good cause; the termination without cause is the normal type in Japan.[360] Whereas in Germany the maximum period of a termination refers to the relationship with the employer, in Japan the maximum duration only refers to the single employment; prolongations are possible without restriction.[361]

The problem of a chain of terminations also exists in Japan. Following a judgment of the Supreme Court in the Toshiba Yanagi Cho Kojo case, the courts must control if the principle of abuse of rights can be applied in analogy.[362] The courts must consider

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356 *Hanami/Komiya*, Japanese Labor Law, p. 154.
357 *Sugeno*, Japanese Labor Law, p. 154.
358 *Asao*, Japan Labor Review Vol. 7 (2010), no. 4, p. 85; *Takeuchi-Okuno*, The Regulation of fixed-term Employment in Japan, in JILPT (ed.), Labour Policy in Fixed-term Employment Contracts, Tokyo 2010, p. 69, 72; *Labor Situation 2012/2013*, p. 63.
359 *Labour Situation 2012/2013*, p. 63.
360 *Takeuchi-Okuno*, in JILPT, Labour Policy, p. 69, 80.
361 *Takeuchi-Okuno*, in JILPT, Labour Policy, p. 69, 74.
362 Supreme Court, 22.7.1974, Saiko Saibansho, Hanreishu, Vol. 28, no. 5, p. 927.

- the number of nenewals or the total duration of the contract,
- how are other employees treated in a case of renewal,
- if the employer has created an expectation of renewal.[363]

One-day-worker (hiyatoi) are sent by agents for arrangement of employment only for a few days, mostly on building sites. Temporary agency work is not allowed for a period of less than thirty days.[364]

Entrusted employees (shokutaku shain) are a specialty of Japanese law. When an employee does not retire from an enterprise when reaching the age limit, but continues to work there, then this is not done by a prolongation of his employment contract, but by concluding a new, in half of the cases worse employment contract (see V 2 b cc).[365]

dd) Prohibition of Discrimination

A prohibition of discrimination in the usual sense does not exist**.**[366] One reason is that for regular employees and for atypically employed there are completely different systems of salary. For the salary of regular employees what matters is age and qualification,[367] but the salary of the atypically employed is regulated by the actual market. When the Democratic Party proposed in 2008 to introduce a prohibition of discrimination, this was refused. Fixed-term employees therefore get a remarkably lower salary; training measures are not offered to them.

Anyway the reform of 2012 brought some improvements. Since then Art. 20 of the Labour Contract Act (LCA) forbids a too great difference between the working conditions of an employee with no fixed-term and a fixed-term employee. Different from Germany, Art. 20 does not demand a case of the same kind of labour.

ee) Other Items

Different from Germany the maximum duration of fixed-term contracts is of no great importance, because fixed-term contracts can be prolonged as often as at will. Starting-point for the maximum duration is the single employment, not the total employment relationship between employer and employee.[368]

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363 *Takeuchi-Okuno*, in JILPT, Labour Policy, p. 69, 78.
364 *J. Junker*, Arbeitnehmerüberlassung, S. 27.
365 *Hanami/Komiya*, Labour Law in Japan, p. 73.
366 *Takeuchi-Okuno*, in JILPT, Labour Policy, p. 69, 81.
367 About the Japanese wage system see *Labor Situation 2013/2014*, p. 97.
368 *Takeuchi-Okuno*, in JILPT, Labour Policy, p. 69, 74.

To prepare the latest reform of fixed-term employment law, several commissions had studied the legal situation in Europe. They had come to the conclusion that the requirement of a good cause would not be appropriate, but that the focus should be on prolongation and on maximum duration.[369] In Germany, however, the requirement of a good caused has been developed long ago by the courts and has found broad acceptance. Another item, which is discussed in politics now, is if a termination without good cause should be abolished or restricted.[370]

The change in Japanese law in 2012 has left some problems. As before, no good cause for a termination is needed, whereas in Germany this is only possible during the first two years and for newly founded enterprises. There is no maximum duration in the Teilzeit- und Befristungsgesetz, but the period must be in compliance with the reason for the termination.

In Japan there is a maximum period of three years, sec. 14 paragraph 1 Labour Standard Act (LSA). Under certain conditions it can be prolonged up to five years. As said before, this limit is only given for the single employment relationship. Of great importance is an order of the Ministry for labour and social affairs based on sec. 14 paragraph 2 LSA. Following this the employer must inform the employee at the beginning of the employment relationship if and under what conditions the contract shall be prolonged. A notice of no prolongation must at least be given thirty days before the period ends.[371] In Germany this kind of notice is known for the engagement of actors, who usually only get an employment contract for one season.[372]

Some Japanese employers have, to avoid being bound by a promise, introduced a "non prolongation clause" in their employment contract. This clause says that no prolongation is planned. In the Kinki Coca Colla Bottling case the district court Osaka regarded this clause as valid,[373] different from the district court Tokyo in the Akashi Shoten case.[374]

In general, in Japan as well as in Germany fixed-term contracts can be concluded in a *chain of contracts*. An express prohibition exists neither in German nor in Japanese law. But the ECJ has ruled that in such a case the courts must control if there is no abuse of rights. [375] This is the case, if de facto a permanent workplace is taken again and again by fixed-term contract employees. Similarly the Japanese Supreme Court has performed a control of abuse, if either the fixed-term contract equals a contract without termination[376] or if the employer had created in the employee a special trust for prolongation,[377] so called denied prolongation (yatoi dome).

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369 *Araki*, New Labour Policies.

370 See *IAB-Stellungnahme* 1/2014, Hohendanner, Befristete Beschäftigung.

371 *Hashimoto*, Bulletin S. 61, 63 f.

372 BAG 15.5.2013 – 7 AZR 665/11 – to be published in AP with comment of *Pallasch*.

373 District court Osaka 13.1.2005 Rodo Hanrei Vol. 893, p. 150.

374 District court Tokyo 30.7.2010, not yet published.

375 ECJ 26.1.2012 case C-586/10 – Kücük, NZA 2012, 135.

376 Supreme Court 22.7.1974, Minshu Vol. 28-5, p. 927 – Toshiba-Yanagi-cho-Kojo case; *Araki*, Labor and Employment Law in Japan, p. 34.

377 Supreme Court 4.12.1986 Rodo Hanrei Vol. 486, p. 6 – Hitachi Medico case; see *Hashimoto*, Bulletin, S. 61, 64 f.; *Takeuchi-Okuno*, in JILPT, Labor Policy, p. 78.

A committee installed by the Ministry of employment and social affairs has in August 2010 presented a report on the reform of the law of fixed-term work. It proposes a duty for measures enabling the employee to get an employment without a fixed term.[378]

The new Art. 18 LCA contains the *five-year rule*. It means: If a fixed-term contract exists since at least five years, the employee may put in the application to continue this contract without termination. If the employer has no reason to refuse this, he must accept the offer. Compared with the former uncertainty the new law brings a progress. The necessary conditions can clearly be realized. The legal consequences are better for the employee. By judge made law the contract only had to be continued as a fixed-term contract, whereas by the new law the employee gets an unlimited contract. Another improvement is that the same working conditions as before shall continue.[379]

ff) Sanctions

Sec. 17 paragraph 1 LCA rules that a fixed-term employee may only be dismissed because of an extraordinary reason. Sec. 17 paragraph 2 contains an appall: Employers shall endeavor to prolong a fixed-term contract not more often than necessary.

There is no rule like § 14 Abs. 1 TzBfG in Germany which allows to control if there is a good reason for the termination. The good reason only matters when a prolongation is concerned.[380] If this is invalid, the law of dismissal is applied in analogy.[381]

If an employer does illegally not prolong a fixed-term contract, the sanction is not – as in § 16 TzBfG – a contract of unlimited time, but that a fixed –term contract comes into existence.

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[378] www.mhlw.go.jp/stf/houdou/2r-9852000000q2tz-img/2r9852000000qaxy.pdf; see *Hashimoto*, Bulletin, S. 61, 63.

[379] *Araki*, New labour policy, sub 8.3.

[380] Like in the Akashi-Shoten case, district court Tokyo 30.7.2010, not yet published, see *Hashimoto*, Bulletin.

[381] A comparison of German and Japanese law of dismissal in *Wank*, Nagoya University Journal of Law and Politics no. 248, p. 179; as regards dismissals and antidiscrimination see *Labor Situation 2013/2014*, p. 90.

c) Temporary Agency Work

aa) Legal Facts

As the statistics of the Ministry of public administration say, the share of temporary agency workers was 1.9 % in 2012 and about 2 % in 2013.[382]

bb) Interests

As in Germany, three aspects should be taken into account concerning temporary agency work (rodoshahaken): First there is the interest of employers in more flexibility.[383] Second is the interest of temporary agency workers to get a workplace without discrimination in comparison with the employees of the user company. Finally there is the interest of the employees of the user company not to be replaced by temporary agency workers.

As the principle of lifelong engagement is on its retreat, all kinds of atypical work have increased, among them temporary agency work, too.[384]

cc) Definition

Art. 2 paragraph 1 of the Japanese law on temporary agency work (rodosha haken ho = TAEA Temporary Agency Employment Act) defines a temporary agency worker as an employee[385] of an agency. The temporary agency worker is engaged by somebody else and is sent to work for another person following his orders. Between the employee and the company that has engaged him exists an employment relationship (as regards two kinds of contract see below dd).

The scope of TAEA refers, as in Germany, to employees according to the general definition of an employee. The agency in Germany must be one with "economic activity" and no longer a commercial business activity as before the last change of the law. In Japan there must be a

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382 See also *J. Junker*, Arbeitnehmerüberlassung, S. 49; *Takahashi*, speech at ZAAR; *Weathers*, Social Science Japan Journal Vol. 4 (2001), no. 2, p. 201.

383 *J. Junker*, Arbeitnehmerüberlassung, S. 49; *Takahashi*, speech at ZAAR; *Weathers*, Social Science Japan Journal Vol. 4 (2001), no. 2, p. 201.

384 *J. Junker*, Arbeitnehmerüberlassung, S. 45 ff.

385 Cf. Art. 9 LSA.

"gyo"; that means, as in Germany, that there must be the intention of repetition. [386] The agency is the employer of the employee.

Whereas in Germany temporary agency work is open for all kinds of jobs (excluding the building sector), temporary agency work in Japan is forbidden for some sectors, like transport in harbours, building contractors, security companies, Art. 4 paragraph 1 TAEA. Besides, it is forbidden for persons of health care, ruled by a cabinet order.[387] There is an exemption for substitutes in cases of pregnancy or motherhood or for work in far off regions.

As in Germany it is difficult to differ between temporary agency work, arrangements of employment, contracts for work and service and transfer within a group. The solutions are similar. Work by a contract for work and service is done by ukeio. As long as the activity in the other enterprise is still controlled by the enterprise that has engaged the employee, this is no temporary agency work.[388] In both countries a contract called a contract for work and service which is in fact performed as a temporary agency contract (giso ukeoi), is in law a temporary agency work contract.[389]

The sanction in a case like that judged by the Supreme Court is not that a contract with the user company is construed to be; this will only happen in 2015 when this clause of the Act comes into force. It is the same legal consequence in Germany now, but without a planned or realized change in the AÜG.[390]

Important is the ordinance no. 37 of the Ministry for labour and social affairs. Sec. 2 describes how to find out if there is really a contract for work and service: The employer himself gives orders to the employees and the employer is responsible in cases of mistakes.

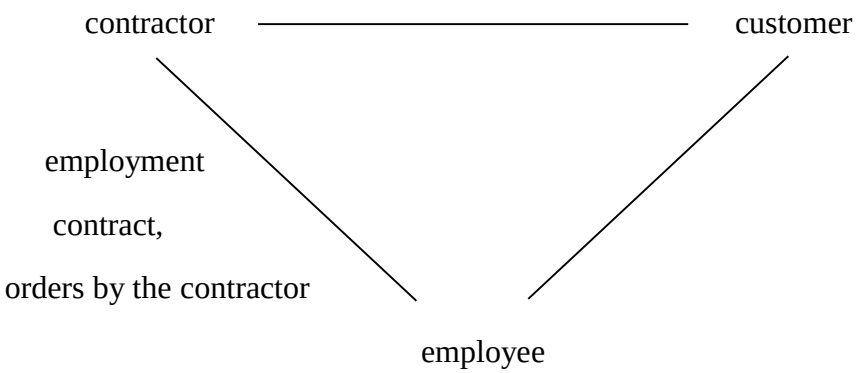
The following schemes show the three situations to be found in Germany and in Japan: [391]

[386] *J. Junker*, Arbeitnehmerüberlassung, S. 100 ff.
[387] *J. Junker*, Arbeitnehmerüberlassung, S. 139.
[388] *J. Junker*, Arbeitnehmerüberlassung, S. 341 ff.; *Sato*, Japan Labor Bulletin, April 2003, p. 7.
[389] Supreme Court 18.12.2009 www.courts.go.jp/english/judgments/text/2009.12.18.-Ja-.No,1240.html; *J. Junker*, Arbeitnehmerüberlassung, S. 37 ff.
[390] But in *Brors/Schüren*, Gutachten, proposal for a new AÜG, § 1 Abs. 4.
[391] See also the brochure of the Japanese Ministry for labour and social affairs.

Types of bringing in personnel in third enterprises

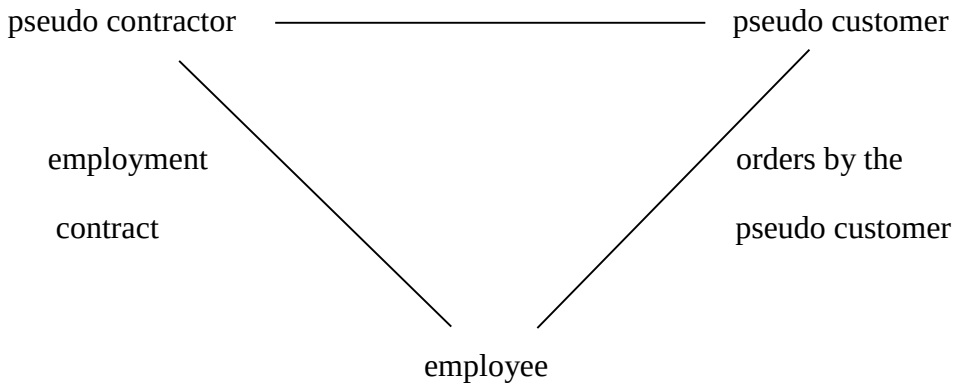
contract for work and service[392]

(ukeoi)



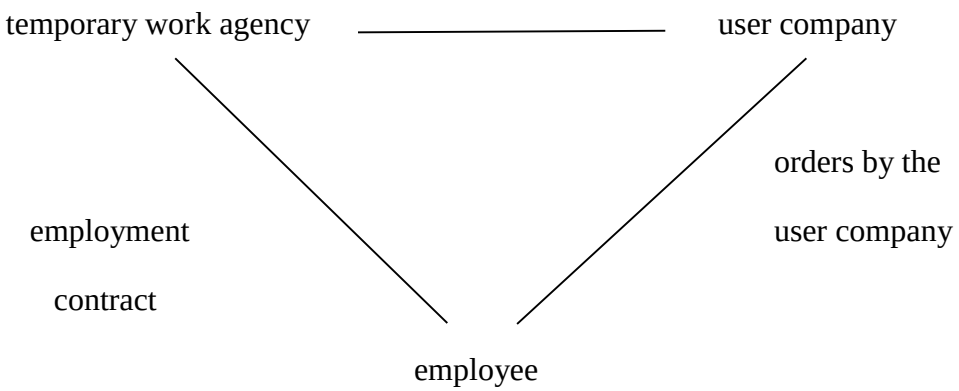
pseudo contract for work and service [393]

(giso ukeoi)



[392] *J. Junker*, Arbeitnehmerüberlassung, S. 34.
[393] *J. Junker*, Arbeitnehmerüberlassung, S. 34.

temporary agency work



Some enterprises had invented a construction in Japan as well as in Germany, to dismiss their employees and to engage them anew, with worth conditions, as temporary agency employees. Sometimes they worked on the same workplaces as before. This was regarded as an abuse of rights. In Germany this was prevented by a so called "*revolving door clause*" in the AÜG;[394] in Japan a similar clause has been introduced in 2012.

dd) Administrative Law

Different from Germany, there are two types of temporary agency work in Japan.

The administrative conditions for the two types are different. [395] For *the registered type dispatching* (general worker dispatching undertaking) the agency needs a license by the Ministry of Labour, Art. 5 paragraph 1 TAEA. The agency must present a business plan and a

[394] ErfK-*Wank*, § 3 AÜG Rn. 22 a.
[395] *J. Junker*, Arbeitnehmerüberlassung, S. 108 ff.

business report. The reasons, why a license can be denied, are similar to those in Germany. The first license is terminated on three years, a prolongation an five years.

For the *regularly-employed-type dispatching* (specified worker dispatching undertaking) no license is needed; a written message to the Ministry of Labour is sufficient, Art 16 paragraph 1 TAEA.[396] De facto, as a result the administration controls the agency, so that in the end the control equals each other.

Mixed enterprises, meaning those that do not provide only temporary agency work, need a license, as in Germany.

ee) Legal Status of Temporary Agency Workers

When temporary agency work was first ruled in an act of 1985, it was restricted on 13 professions, the maximum period of transfer was one year. During the following years the law of temporary agency work was changed several times.[397] The actual law is called "Act on the Procuring a performance according to the rules of temporary agency work and on better working conditions of temporary agency workers." It came into force an March 28, 2012; the rulings on an implied conclusion of an employment contract will come into force in 2015.

In Japan, too, there is an employment contract between the agency and the temporary agency worker. As in Germany, there are also some duties of the user company concerning employment law, Art 7 and 32 to 36 LSA.[398]

As in Germany, there is a difference between temporary agency work and arrangement of employment.[399] The agency for arrangement of employment does not conclude an employment contract with the applicant.

ff) Prohibition of Discrimination

There is no strict prohibition of discrimination concerning temporary agency work. As shown for Germany, such a principle exists de iure, but de facto it only comes into force if there is no valid reference on a collective bargaining agreement or if the agency has no valid license. In Japan such a prohibition exits, but only as soft law, Art. 30-2 TAEA. The agency is only

396 In Germany a notice is sufficient in the case of § 1 a AÜG.
397 *J. Junker*, Arbeitnehmerüberlassung, S. 68 - 96; *Takahashi*, report ZAAR.
398 *J. Junker*, Arbeitnehmerüberlassung, S. 152; *Sugeno*, Japanese Labor Law, p. 165.
399 *J. Junker*, Arbeitnehmerüberlassung, S. 41.

obliged to endeavor a balance between temporary agency workers and comparable workers of the user company (principle of adapted treatment) as far as salary, occupational training and benefits are concerned.

Although there are in Germany rules about where to find a comparable worker, § 3 TzBfG, German law does not say which criteria make a worker comparable. Japanese law enumerates the criteria:

- duties of the employee,
- result of the work,
- enthusiasm of the worker,
- abilities, experiences etc.

There would be a complete equal treatment, if temporary agency workers would get the same salary as the comparable works of the user company. But even the duty to endeavor is restricted: salary in the sense of Art. 9 paragraph 1 PWA – and the same is valid for temporary agency workers – only comprises the regular salary. Among the benefits paid to the core workers only those have to be paid that refer to additional duties of the worker, but no other benefits like flat rate for commuters or family friendly benefits.[400]

gg) Other Items

Among the agencies Japanese law differs between general agencies (Art. 5 TAEA), with temporary agency work following the principle of occupation (joyo gata), and special agencies (Art. 16 to 22 TAEA), with temporary agency work following the registration principle (toroku gata).[401] Only joyo gata is comparable with German law: The agency must conclude a contract independent from transfers and must pay a salary also in times without occupation. With toroku gata the work seekers are at first only registered and get an employment contract only when they are first sent. So the procedure consists of two steps, a kind of arrangement of employment and later on temporary agency work. During the period of registration the applicants may register with several agencies; the procedure is easy. The difference between the two types consists in the fact that in joyo gata a salary is also paid in times without employment and in toroku gata only if the applicant really has a job.

[400] *Morozumi*, Japan Labor Review, Vol. 6 (2009), p. 39, 45.

[401] *Coe/John/Ward*, Transforming the Japanese labor market, p.7; *Hashimoto*, Zeitschrift für japanisches Recht, Bd. 17 (2004), S. 81.

In Germany temporary agency work is only forbidden in one *sector*, in the genuine building sector.[402] There are a number of sectors in Japan, where temporary agency work is forbidden, like in harbour transport or with building contractors.

As far as a maximum duration of transfer is concerned, in Germany this is expressed by the word "temporary", but there is no express time. [403] In Japan, in the 26 original sectors Art. 40-2 TAEA allows temporary agency work without limitation of the period. Those are translation, software-programming, broadcast, advertising, guides, recipe, research etc. In other sectors there is a maximum duration of one year, Art. 40-2 No. 2 TAEA; under certain circumstances it may be up to three years, Art. 40 – 2 paragraph 3 TAEA.

In Japan there is also a *minimum duration* of thirty days, Art. 35-3 TAEA. An exemption is possible in certain cases. Before the changes in the law it was possible to have "one day temporary agency workers". In 2007 the Ministry of Labour stated that 70 % of these were under 34 years, were engaged on average for fourteen days and earned about 1,000 €. [404]

In Japan as well as in Germany temporary employment contracts can be concluded as fixed-term contracts or without a fixed term.

As in Germany meanwhile, the Japanese agency must inform the applicant before concluding the contract about details of the working conditions, Art. 34 paragraph 1 no. 2 TAEA in connection with Art. 26 TAEA and according to Art. 22 TAEA-Ordinance.[405] Besides, the agency must control if the applicant is suitable al all. [406]

Different from Germany the agency must take measures as well during the employment relationship as in connection with a dismissal to provide another occupation for the employee.[407] As in Germany, the general rules of the law of dismissal are applied.

Temporary agency work inside a group (zaiseki shukko) means that the employment contract with the sending enterprise keeps existing, but suspended, and during the period of sending to the other enterprise a new employment contract with this enterprise is concluded.[408] So two employment contracts exist one besides the other.[409] The employee must consent to the transfer. This consent can already be written in the collective bargaining agreement or in the work rules of employment (shugyo kisoku). But it is an abuse of rights, if the working conditions become much worse.

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402 Which violates EU law, ErfK-*Wank*, § 1 b AÜG Rn. 5.
403 ErfK-*Wank*, § 1 AÜG Rn. 37 a.
404 *Takahashi*, report ZAAR.
405 *J. Junker*, Arbeitnehmerüberlassung, S. 123.
406 Note by the Ministry of labour, no. 244, chapter 2, No. 8/ 82.
407 *J. Junker*, Arbeitnehmerüberlassung, S. 123 ff.
408 *J. Junker*, Arbeitnehmerüberlassung, S. 162 ff.; about tenseki shukko S. 167 ff.
409 *Nishitani*, Vergleichend Einführung in das japanische Arbeitsrecht, 2003, S. 18, 173; *Sugeno*, Japanese Labor Law, p. 380.

There is a discussion in Germany whether after the reform of the AÜG for the transfer within a group a license is needed.[410] Besides, there are no restrictions in this case. A group member may transfer all its employees to the other enterprise.

Recently the Bundesarbeitsgericht had to judge such a case and had to decide whether there was an abuse of rights.[411] It stated that an employee always bears the risk of being dismissed, whether he is in a regular employment or employed by an agency. But this argument does not convince. Not only the question of dismissal must be compared, but the legal status all in all. Then it can be stated that for an employee this construction is of disadvantage; the enterprises use it to save costs. Therefore in opposition to the BAG this should be regarded as abuse with the consequence that the employee becomes a regular employee of the user company. It seems that in this case the BAG missed to realize the construction of temporary agency work, as the ECJ in the case Albron Catering.

Japanese law seems to solve the problem in a better way. Agencies are obliged not only to transfer to one group member, but also to enterprises outside the group. Otherwise they do not get a license or their license is not prolonged.

hh) Sanctions

The protection of employees bases foremost on administrative law. For toroku gata the agency needs a license, Art. 5 TAEA. Different from Germany there is a sanction also in the case when the transfer has not respected the time limit.

In 2015 a rule comes into force that in a case of illegal temporary employment work an employment contract between the employer and the user company will come into life. Until then the problem can be solved by referring to a judgment of the Supreme Court with the same result.[412]

ii) Labour Law

Labour law in Japan is based on another system as that in Germany.[413] The interests of temporary agency workers cannot be represented by works councils and trade unions. But

[410] ErfK-*Wank*, § 1 AÜG Rn. 57.
[411] BAG 15.5.2013 NZA 2013, 1214.
[412] Saiko Saibansho 18.12.2009; *J. Junker*, Arbeitnehmerüberlassung, S. 37 ff.
[413] A comparison of labour law in Germany and Japan *Wank* in Düwell u. a., Das Verhältnis von Arbeitsrecht und Zivilrecht in Japan und Deutschland, 2013, S. 83 ff.

they understand their function as being the representative of the core workforce of the user company and do not much engage for temporary agency work. There is a separate trade union for temporary agency work, but it only has few members.[414]

So far the three kinds of atypical work were analyzed. The following text deals with especially protected groups of persons.

VI. Special Kinds of Employment other than Atypical Employment

1. Germany

a) Women

During recent years the number of employees increased. That was mostly due to the fact that more women were engaged. In spring 2013 13.5 million women had an employment covered by social security; these were 46 % of the total number of employees. Whereas the quota of employed women was 62 % in 2002, in 2012 72 % of women had a job. This rise happened mostly with women at the age of over 50 years; there was a rise from 49 to almost 67 % from 2002 to 2012. At the end of 2013 of the 7.5 million women covered by the social security system, 6 million women worked in part-time. The corresponding figures for men are 14.2 million to 1.4 million.[415]

Women are protected by antidiscrimination law in comparison to men and also in their role as pregnant, as mother or (together with fathers) as parent.

Antidiscrimination law covers women by the criterion of sex, § 1 AGG. In the legal definition in § 3 Abs. 1 Satz 2 AGG a worse treatment of a woman because of her being pregnant or mother is ruled as a case of direct discrimination.

The principle of equal pay is ruled in Art. 157 TFEU and in Art. 4 of the directive 2006/54/EC. It had been expressively ruled in the BGB, but because of bad legislation it is no longer expressively written in the AGG, but results from interpretation.

Of great and actual interest is the subject of a gap in salary between men and women. In public statements there is often named a difference of 22 %.[416] This number results from either ignorance or deceit, because it names the *unadjusted gap* in salary. The gap is based on the fact, that women prefer professions where less is earned anyway, their biography contains gaps, mostly because of childcare, and they work more often in part-time.[417] If e. g. in the research and development department of an enterprise – with high wages - only a few female

414 *J. Junker*, Arbeitnehmerüberlassung, S. 191.
415 Frankfurter Allgemeine Zeitung Nr. 57, 8.3.2014, S. 18.
416 E. g. Kölner Stadtanzeiger 19.3.2014, S. 9.
417 *Franzen*, Festschrift Kempen, 2013, S. 123 ff.; *Rieble*, RdA 2011, 36 ff.

engineers are to be found, the reason is that the share of women in the study of engineering is very low (in 2011 about 8 % of all absolvents of German universities).[418] The gap is the higher, the older female employees are[419] - which indicates that the problem will disappear. The *adjusted gender gap*, i.e. the gap that cannot be explained by reasons of sex, is at 8 %. Even the Zweite Gleichstellungsbericht der Antidiskriminierungsstelle des Bundes must state, "that criteria for a work gender neutral and without discrimination are not at hand."[420]

Perhaps it is not known that men in an occupational training or in a minijob or in part-time or in a job with a high share of women get on average fewer wages than women.[421]

As a sanction in cases of discrimination there is the right to complain, § 13, a right of retention, § 14, and a claim for damages, meaning material damages, § 15 Ab. 1, and damages for pain and suffering, § 15 Abs. 2 AGG.[422] Violating basic principles of a state under the rule of law the ECJ ruled in the case Draempaehl[423] that an employer must pay damages even if there is no fault on his side.[424]

The legal consequence of a violation is – contrary to the logic of the principle of equal treatment, which only requires an equal, eventually a bad, but equal – treatment, following the ECJ, an "adjustment to the top. [425]

In the other area of protection, the protection of especially protected groups, women are protected by the Mutterschutzgesetz (MuSchG) and the Gesetz zum Elterngeld und zur Elternzeit (BEEG).

The actual discussion has three topics, besides the gender gap the share of women in management positions, especially in the boards of public limited companies[426], and work life balance.

Guidelines of the Federal Government which will soon be followed by an act of parliament, from 2016 on all big public limited companies (about 110) must have in their "Aufsichtsrat" *(board) have a quota of 30 %.* Another 3,500 enterprises must give themselves mandatory aims.[427] The 30 % quota is counted separately on the owners'side and on the side of the employees in the board, indicating that the aim is not the quota as such, but a disciplinary measure. It will be of no influence if in this sector of industry, like metal or engineering, there are only few female employees. Besides, it would be logical to start at the basis and not on the

418 *Flothmann*, Mitteilungen 1-2/2014, 41, 43.
419 www.boeckler.de/wsi_38965.htm.
420 *Zweiter Gleichstellungsbericht*, BT-Drucksache 17/14400, S. 269.
421 Frankfurter Allgemeine Sonntagszeitung 16.3.2014 Nr. 11, S. 23.
422 Latest article by *Thüsing/Stiebert*, Festschrift von Hoyningen-Huene, 2014, S. 487 ff.
423 ECJ 22.4.1997 NZA 1997, 644.
424 A similar violation of basic law was made by the Bundesverfassungsgericht, see *Wank*, Auslegung und Rechtsfortbildung, S. 331 ff.
425 Critical *Krebber*, comment on BAG AP BetrVG 1972 Nr. 59.
426 *Stöbener/Böhm*, EuZW 2013, 371.
427 Frankfurter Allgemeine Zeitung 26.3.2014 Nr. 72, S. 17.

top, following the model of a cascade: The percentage of women in one lower level must correspond with the percentage in the next level.

As far as the *work life balance* is concerned, the attitude today is that everyone must be able to decide himself or herself about the biography of working life.[428] An article concerning women´s promotion in universities - whose results may be transferred in other areas – says: "The reasons for the under-representation of women are in first line not caused by the organization of labour, but ly in their personal life."[429]

Meanwhile the understanding increases that it is necessary to provide enough "Kindertagesstätten (Kitas)" and Kindergartens and a *more family friendly organization* of working time, for men, too. It is remarkable that the share of children, whose fathers have got "Elterngeld" (state subsidies for parents), has risen from 27.4 % in the year of 2009 to 29.3 % in the year of 2012. But in general the standard role model in the families remains.[430]

b) Children and Youths

There is a legal definition of children and youths in § 2 Jugendarbeitsschutzgesetz (JArbSchG). "Children" are persons occupied at the age under 15 years, § 2 Abs. 1, "youths" are those between 15 and 18 years, § 2 Abs. 3 JArbSchG.

In antidiscrimination law there might be claims for damages; but so far there have been no cases.

The sanctions in cases of violations of the Jugendarbeitsschutzgesetz are fines and criminal punishments, § 58 JArbSchG.

c) Older Employees

The number of old people still working increases in recent years.[431] A reason is that the amount of older people increases and that possibilities of early retirement have been abolished. The share of workers among those of 60 - 65 years has risen in 2012 to 42 %.[432]

The date when employees finish their working life according to employment law depends to a high degree on social security law. After an age of 65 years in social security law has remained for many years, it will since 2012 continually rise to 67 years. If the employee

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428 *Kocher u.a.,* Das Recht auf selbstbestimmte Erwerbsbiographie, 2013.

429 *Hirschauer*, Forschung & Lehre 2012, 994.

430 *Vorwerk Familienbericht* 2013.

431 *Sonntag*, Potenziale Erwerbstätiger bei verlängerter Lebensarbeitszeit, 2014; *Die Zukunft der Arbeitswelt*, Hrsg. Bosch-Stiftung, 2013.

432 Frankfurter Allgemeine Zeitung 16.8.2013 Nr. 189, S. 11.

wants to retire before, a deduction is made; besides there are limits regarding salary earned after retirement.

The new Federal Government has decided on January 29th 2014 to introduce for those employees that have worked for at least 45 years an earlier voluntary retirement age of 63.[433] At the moment it is much discussed, if times of unemployment shall be taken into account; that may lead to an actual retirement age of 61 or less.

In antidiscrimination law the protection of old employees is reached by the prohibition of discrimination in § 1 AGG. Different from the age discrimination law in the U.S., the protection does not refer to old age, but to any age difference at any age. Also different from the U.S. there need not be a minimum difference of age, but any difference in age is sufficient.

Discrimination may happen at the beginning, at the performance or at the end of the employment relationship. In the past employers in Germany disliked engaging applicants above a certain age, mostly 50 years. But as there is now a lack of qualified employees, the situation has changed.

There are age limits in law, like for firemen in action.[434] But it cannot be accepted to refuse applicants for the job of a professor at a university if they are older than 42 years.[435]

Long discussed has been the mandatory retirement age, i.e the age when the employment relationship ends by an act of parliament, a collective bargaining agreement or the employment contract.[436] The result of a chain of rulings by the ECJ is that a mandatory retirement age is generally accepted; but there must be a control by the principle of proportionality.[437] It is doubtful if a discrimination can be seen even in those cases when every employee will have the chance in his life to reach the same privilege, like longer annual leave for older employees.[438]

The sanctions are the same for each case of violating § 1 AGG, so that I can refer to the sanctions for sex discrimination.

There are no special rules in the law of especially protected groups. But in recent years there have been collective bargaining agreements referring to the special problems of older employees (demographic collective bargaining agreements).

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433 Entwurf eines Rentenversicherungs-Leistungsverbesserungsgesetzes.

434 ECJ 12.1.2010 case C-2233/08 – Wolf, Slg. 2010 I-46; see also ECJ 13.9.2011 case C-447/09 – Prigge, Slg. 2011 I-8003.

435 *Wank*, Forschung & Lehre 2013, 738.

436 As regards the employment contract see BAG 5.3.2013 – 1 AZR 417/12; will be published in AP with comment of *Polloczek*.

437 Reference of the rulings in *Huber*, Festschrift v. Hoyningen-Huene, 2014, S. 157 ff; *Wank*, Festschrift Bepler, 2012, S. 585 ff.

438 *Kamanabrou*, comment on BAG AP Richtlinie 2003/88/EG Nr. 6.

d) Other Groups

Besides the groups named before there might be further groups which might get a special protection by employment law, like those who have their origin or whose parents have their origin in other countries than Germany ("persons with migration background"). E. g. Turkish employees in Germany without a German passport are not protected by EU law in the same way as citizens of another member state of the EU (but there is an extensive protection by a special association agreement between Germany and Turkey). A protection may be given by antidiscrimination law referring to a discrimination because of race or ethnic origin, § 1 AGG.

2. Japan

In Japanese employment law, too, it would be possible to name different kinds of employees with special problems on the labour market; but the following text will only deal with women, children and youths and older employees.

a) Women

In recent years the number of women has increased to around 40 % of the total workforce. One reason is that employment in the healthcare and welfare sector, where women are numerous, has increased.[439] Whereas men have a ratio of non-regular work of around 20 %, it is more than 50 % with women.[440]

Art. 3 LSA contains the general principle of equal treatment for employment law. It does not cover also a discrimination of women compared to men, but there is a special rule in Art. 4 LSA. Whereas Art. 3 LSA demands equal treatment concerning salary, working time and other working conditions, Art. 4 only refers to wages.

There is a special act, the Equal Opportunity Act[441], of 1985, changed in 2006. After an amendment in 2006 the prohibition of discrimination has been extended on change of employee status, change to part-time work etc.[442]

Like in EU law and in German law direct discriminations are covered as well as indirect discriminations (Art. 6 EEOC). Different careers for men and women are forbidden, as

439 *Labor Situation 2013/2014*, p. 58.
440 *Labor Situation 2013/2014*, p. 59.
441 Equal Opportunity and Treatment between Men and Women in Employment.
442 *Labor Situation 2012/2013*, p. 30.

already stated in the EEOC of 1997.[443] Whereas this had been soft law before, a duty to endeavor, it now became mandatory law.[444]

The definition of indirect discrimination is as unprofessional as in EU law and in German law. What lacks is the statement that between the measure of the employer and the disadvantage for women there must be an inner relationship.

There are special rules for pregnant and for young mothers, Art. 64 LSA. The protection period for mothers is 6 weeks before giving birth, Art. 65 paragraph 1, and 8 weeks after birth, Art. 65 paragraph 2 LSA. There are restrictions for overtime and night work. Following the period after birth like in Art. 65 LSA, there is unpaid leave, Art. 12 paragraph 3 (ii) LSA, and also for maternity leave and there is leave by the Child Care Act, Art. 12 paragraph 3 (iv) LSA.[445]

In Japan, too, the topics equal pay, women in leadership positions[446] and work-life-balance (shigoto to seikatsu no chouwa)[447] are of great importance. The aims for the last topic are stated in the Work-Life-Balance Chart of 2007. In Japan, too, the understanding grows that a sufficient number of kindergarten is needed.

In 2012 the Nihon Keizai Shimbun claimed that the average pay of Japanese women was only 70 % of that of men.[448] Kawaguchi comes to the result, based on figures by the Ministry of Health, Labour and Welfare, that the average pay per hour was 2,412 for men and 1,724 for women.[449] The Japanese figures are statistically as little serious as those of the OECD or of Germany, as they omit the question of adjusted gender gap.

b) Children and Youths

Children[450] under the age of 13 years are only allowed under special conditions to work in theatre productions or movies, Art. 56 paragraph 2 LSA. In the age between 13 and 15 years only easy work without danger for the health and with administrative permission may be done, Art. 56 paragraph 1 LSA. There are special rules for the working time of minors, Art. 60 LSA.

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443 *Kawada*, Gedächtnisschrift Zachert, S. 412, 415 f.

444 *Sakuraba*, in JILPT Report no. 6, p. 181, 187.

445 Act on the Protection of Employees caring for Children or Other Members of the Family, Act No. 76 of 1991.

446 *Labor Situation 2013/2014*, p. 64.

447 *Labor Situation 2012/2013*, p. 26, 35; *Labor Situation 2013/2014*, p. 167.

448 On the subject see *Kawaguchi*, Japan Labor Review Vol. 10 (2013) no. 4, p. 24.

449 See also *Labor Situation 2013/2014*, p. 61.

450 Legal facts about children and youth employment in *Labor Situation 2013/2014*, p. 52.

c) Older Employees

The share of employees older than 60 years in Japan[451] is the highest of all industrially developed countries.[452] The amendment of the Act on Measures in Employment Law forbids an employer to differ when engaging applicants according to the age factor. Exemptions are only allowed for those enterprises practicing the principle of lifelong employment, Art. 9 paragraph 2 ASEOE.[453] In practice most employment contracts contain a certain age of mandatory retirement (teinen). At the beginning of the 70ties it was 55 years and is now 60 years, Art. 8 ASEOE.[454] It is planned that it shall rise until 2015 step by step up to 65 years.[455]The Act on the Protection of Old Age of Older Employees of 1985 expected of enterprises to raise the retirement age to 60 years or more, a kind of soft law; since the amendment of 1994 a lower retirement age than 60 years is forbidden. Usually when an employee reaches the mandatory retirement age he gets compensation by the employer.

With people living longer, between the end of employment and the death of the employee there is an income gap.[456] In Japan it is common that employees work again in their former enterprise,[457] but almost half of them with a lower income than before.[458] Where they get less, it is 60 up to 80 % of their former income.[459] 15 % of employees over the age of 60 cannot live from their salary if they do not get old age compensation by their former employer.[460] The average age when men really retire is that of 70 years with men and 67 with women.[461] The number of those continuing to work has been constant since 2006. Many older employees want to continue work; they wish that the other employees would accept the different way of work according to age.[462]

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451 Legal facts about older persons in *Labor Situation 2013/2014*, p. 55.

452 *Labor Situation 2012/2013*, p. 1.

453 Act on the Stabilisation of the Employment of Older Employees, in the following text ASEOE.

454 The mandatory retirement age of 60 years is practised in 90 % of the enterprises, *Labor Situation 2012/2013*, p. 2.

455 Actual figures in *Labor Situation 2013/2014*, p. 89.

456 As regards retirement benefits by the enterprises see *Labor Situation 2013/2014*, p. 109.

457 It is difficult to find a job in the open labour market, *Labor Situation 2013/2014*, p. 57.

458 Following a study in *Labor Situation 2012/2013*, p. 12, the share of employees after mandatory retirement age getting the same or better working conditions was 56 %.

459 *Labor Situation 2012/2013*, p. 7.

460 *Hamada*, Japan Labor Review Vol. 9 (2012) no. 1, p. 103, 108; *Labor Situation 2012/2013*, p. 10.

461 Die Zeit 6.3.2014, S. 33.

462 *Labor Situation 2012/2013*, p. 4.

VII. Comparison

1. General

a) Legal Basis

In Germany as well as in Japan there is the difference between the regular employment and non-regular employment. In both countries there are three aspects. In both countries the three aspects are regarded separately in legislation and in research, there is no overhead concept. That has consequences for legislation: The same questions, like protection of women or of disabled, are dealt with in one, two or three of these three areas, always independent from the others. In research there are seldom accounts referring to the total legal situation of one group, without respect to the different areas in law. The problem may be shown at the example of a pregnant Muslim woman from France, working part-time in Germany.

In the *law of atypical employment* she is protected inasmuch as that she must not be discriminated against compared with a comparable fulltime employee. As part-timers are mostly women, there may be an indirect discrimination of women, when part-time employed women are treated worse than fulltime employed men. But this protection only starts when she already has the job, not in the period of application. For different treatment it is sufficient if the employer has a good cause.

In *antidiscrimination law* the same woman is already protected when she applies. Being a woman, a direct discrimination is only accepted because of severe grounds; only in a case of indirect discrimination a good cause is sufficient. As she is pregnant, discrimination because of pregnancy is no direct discrimination; but EU law and German law order to regard it as direct discrimination. As she is a Muslim, she is also protected by antidiscrimination law in this regard. As she is a French, she is not only protected by an EU directive because of ethnic origin, and correspondingly by the German AGG, both being protection by secondary EU law; but she enjoys the protection of the EU Treaty and therefore the stronger protection because she is an EU citizen.

In the *law of especially protected groups* she belongs as pregnant woman to the especially protected.

Now imagine the problems of weighing the arguments of an employer in the period of application or during the performance of the employment contract or at its end, when this woman must be compared with a disabled Catholic employee from Italy with a fixed-term contract.

b) Different Groups of Employees

As just shown, non-regular employment describes different groups of people that are regarded in an isolated way in legislation, jurisdiction and in research. One aim of this article is on the one hand to see non-regular work as the overhead idea and then analyze the different groups on the other hand.

Model standard for all different kinds is the regular employment relationship. In a first circle this is opposed to atypical employment, to which belong in Germany as well as in Japan part-time worker, fixed-term worker and temporary agency worker.

In a second circle are all employees that are protected by antidiscrimination law. Whereas in the first circle the kind of employment contract matters, the starting-point are here characteristics of a person.

There is a third circle comprising partly the same group, with special rules concerning all kinds of working conditions. These comprise e. g. extra benefits, better protection in case of dismissals or to call in an authority.

This system is the same in Germany and in Japan.

Who have so far not been mentioned are pseudo self-employed.[463] This refers especially to solo self-employed.[464] In many cases the three kinds of atypical work are avoided by employing seeming self-employed, although the actual performance of the employment shows that they are employees. Some enterprises use pseudo contracts for work and service whereas in reality these are temporary agency workers. The employers want to integrate the employees in their organization and to give them orders without being responsible for the duties of an employer.

In Japan, too, pseudo contracts for work and service are not accepted. But different from Germany it is possible in Japan simply to call some fulltime employees part-timers and to give them worse working conditions; they may be called pseudo part-timers.

c) Prohibition of Discrimination

The best way to protect those not working in a regular employment relationship is to prohibit discrimination.[465] Each legal system knows a general principle of equal treatment. In Germany for the whole legal system it is stated in Art. 3 Abs. 1 Grundgesetz and especially in employment law in the unwritten "allgemeiner arbeitsrechtlicher

[463] *Dietrich* and *Wank*, Empirische Befunde zur Scheinselbständigkeit.

[464] *Waltermann,* Gutachten B zum 68. DJT, S. 101 f.

[465] *Riesenhuber*, Europäisches Arbeitsrecht, S. 303; as regards the legal facts see *Rotthleuthner/Mahlmann*, Diskriminierung in Deutschland, 2011.

Gleichbehandlungsgrundsatz." Whereas prohibitions of discrimination refer to special aspects and allow different treatment only because of certain grounds named in the law, the "general principle of equal treatment in employment law" refers to any aspect and gives a justification for any good cause.

In *Germany* in the first circle there are prohibitions of discrimination in favour of part-time and of fixed-term employees. The EU directive on temporary agency work contains the same principle also for temporary agency work, regarding the comparison of the temporary agency worker with comparable workers in the user company. But the directive allows different models, and that has been chosen in Germany. Temporary agency workers have special collective bargaining agreements, and a protection is reached by administrative law and recently also by a mandatory minimum wage.

In the second circle protection is given by antidiscrimination law in the AGG.

In the third circle there are especially protected groups; here a prohibition of discrimination is not sufficient, but a number of protective laws is necessary. E. g. pregnant part-time employees are protected as part-timers by the Teilzeit- und Befristungsgesetz, as women by the Allgemeines Gleichbehandlungsgesetz and as pregnant by the Mutterschutzgesetz.

In *Japan* the Constitution contains the general principle of equal treatment in Art. 14.[466] The transformation into employment law was performed by Art. 3 and 4 LSA:

Article 3: An employer shall not engage in discriminatory treatment with respect to wages, working hours or other working conditions by reason of nationality, creed or social status of any worker.

Article 4: An employer shall not engage in discriminatory treatment of a woman compared with a man with respect to wages by reason of the worker being a woman.

Although it seems that the constitution rules all that is necessary for equal treatment in employment law, special law only transforms this principle to a certain degree.

What makes the application of the principle of equal pay as part of the principle of equal treatment so difficult in Japan is the fact that there are other methods of determining the salary than in Germany. For those on whom the principle of lifelong employment is applicable,[467] the system is completely different anyway.

But for others the system is also quite different in Japan and in Germany. In Germany 30 % of the employees are directly bound by collective bargaining agreements, so that the conditions of the agreement are mandatory for them. For most of the others the collective bargaining agreements are applicable by reference in the employment contract; then they are not mandatory by the Tarifvertragsgesetz, but by the contract. The collective bargaining

[466] *Kawada*, Gedächtnisschrift Zachert, S. 412, 413.
[467] *Araki*, Labor and Employment Law in Japan, p. 18; *Nishitani*, Vergleichend Einführung, S. 3.

agreements contain detailed schemes which salary has to be paid for which activity. In Japan there is no comparable model, but the salary is rather a matter of the single employment contract.[468] There are no standardized jobs with standardized salary. Besides, regular employees are paid by the month, atypically employed by the hour.[469] Taken all in all, the principle of equal pay is difficult to realize in Japan.

For part-time employees there is a prohibition of discrimination; but because it is only applicable on employees without a fixed-term, in reality there is almost no appliance.

For fixed-term employees there is no genuine prohibition of discrimination, but a soft law rule in Art. 20 LCA.

There is a similar soft law rule for temporary agency workers in Art. 30-2 TAEA.

So for atypical work there are two types of prohibition of discrimination, a hard one for part-timers, but with no real appliance, and soft law[470] for the two other types. The soft law does not require equal treatment; but the employer must take into account if and how far a different treatment is acceptable.

But even if the principle of equal pay is to be applied at all, there remains a disadvantage for part-time employees and temporary agency workers inasmuch as a number of benefits need not be paid for them.

In the law of antidiscrimination equal treatment of men and women meanwhile not only covers the wages but all employment conditions.

A general prohibition of discrimination is valid for old employees. There is a difference in Japanese law from EU law and German law, as age is understood as "old age", Art. 2 ASEOE, whereas in the other two legal systems it means any age difference. In spite of the general rule, EU law, German law and Japanese law allow a mandatory retirement age.

d) Requirement of a Ground

Another way of protection in cases of non-regular work is the requirement to have a good cause not to choose regular work.

In *German law* this is the way with fixed-term work: To conclude a fixed-term clause, one of the enumerated grounds must be realized, § 14 TzBfG; but because it is possible for the first

468 *Sakuraba*, JILPT Report No. 6, p. 181, 182.

469 *Araki*, Labor and Employment Law in Japan, p. 37; *Hanami/Komiya*, Labour Law in Japan, p. 147.

470 Positive attitude to this soft law at *Tidten*, Gleichheitsorientierte Politik in Japan, 2012, S. 155; critical comment by *Foljanty*, Zeitschrift für japanisches Recht no. 35 (2013), S. 351, 353.

two years to conclude a fixed-term clause without any grounds, this restriction is only of reduced value.

There is no corresponding requirement for part-time work; an employer may organize his enterprise completely by part-time work. For temporary agency workers some protection is reached by the new requirement that the work must be a temporary one; besides, the Government plans that after 9 months the genuine principle of equal pay will come into force, which means that temporary agency work cannot be chosen at will, but only for a good cause, a temporary need. What is still not changed is that the employer may engage as many temporary agency workers as he likes. This can only be avoided, if the requirement of temporary work is interpreted as meaning the job and not the single employment relationship.

As regards persons endangered of discrimination the requirement of a good cause is given by the fact that as a justification the employer needs a genuine and necessary requirement for the job to treat employees differently.

There are sometimes even more restrictions for employers of members of a specially protected group. E. g. a pregnant women enjoys an almost unlimited protection from dismissals, § 9 Mutterschutzgesetz. Disabled applicants for the civil service cannot be exempted from a job interview if the employer does not think it necessary, but only if objectively seen they are evidently unable for the job, § 82 SGB IX.

In *Japanese law* there are no corresponding requirements. An employer can conclude a fixed-term contract without having any good cause for this. A control is made only when the employer does not prolong the contract. There is a similar problem in EU law, German law and Japanese law concerning a fixed-term employment without a good cause. Even if this is admitted, there is a judicial control regarding an abuse of rights when the contract is not prolonged.[471]

e) Justification

When a different treatment is generally forbidden, there may be a justification.

In *German law* the method is different as regards atypical work or antidiscrimination law. An atypical worker must not be treated worse than a comparable typical worker, but for all three types of atypical work a good cause is sufficient for a different treatment. In antidiscrimination law as a general justification a good cause is not sufficient; the employer must have a genuine and necessary reason for a different treatment, § 8 AGG, which is a much stronger requirement. This is accompanied by special justifications for single criteria, as for religion, § 9 AGG, for age § 10 AGG, for reverse discrimination § 5 AGG. This strong

[471] ECJ 26.1.2012 case C-586/10 – Kücük, NZA 2012, 135; Japanese Supreme Court 4.12.1986 Rodo Hanrei Vol. 486, p. 6 – Hitachi Medico case.

reason is needed in cases of direct discrimination. In cases of indirect discrimination a good cause (and proportionality) is sufficient, § 3 Abs. 2 AGG. Japanese law concerning equal treatment of women is similar.[472]

As far as especially protected groups are concerned, the justification is different according to the special group and the special kind of measure.

f) Integration

To realize the idea of equal treatment a formal attitude is not enough, like that in antidiscrimination law. As important is a substantial equality meaning an equal chance, as is shown by extra rules concerning integration.

In *Germany* part-timers must be informed about free working places, so that they may apply for them. They must get the chance to take part in vocational training, § 10 TzBfG.

Temporary agency workers are by the German model completely integrated in the enterprise of the agency. But besides, the aim of the legislator and of the courts is a growing integration in the enterprise of the user company, at least after being a certain period in this enterprise. Temporary agency workers can ask the works council of the user company for help, they are allowed to use institutions of the user enterprise, after three months they can take part in the elections for the works council in the user company (but not be elected themselves). In recent time this trend is being enforced: The Bundesarbeitsgericht has, in a number of rules, counted temporary agency workers as employees of the user company when a law required a certain number of employees, and the Government plans to change the law in such a way as to adopt these rulings.

Japanese law contains a number of comparable rulings especially as concerns temporary agency workers. As a collective protection by works councils is not possible in Japanese law and as the trade unions are not eager to represent the interests of atypical workers, the idea of integration and effective protection is realized by law and state institutions.

g) Soft Law

Most of the protective law named above is mandatory *in German law;* sometimes it is dispositive for collective bargaining agreements.

There has been soft law as regards the hope that enterprises would take more apprentices or that they would increase the number of women in higher positions [473] (so called Selbstverpflichtungserklärung, declaration of own duty). The duties were not mandatory, but

[472] *Sakuraba*, JILPT Report no. 6, p. 181, 189.

[473] See e. g. Bundesministerium für Familie, Senioren, Frauen und Jugend (Hrsg.), Fünfte Bilanz Chancengleichheit, 2013.

were under the threat that if they were not fulfilled, a mandatory act would follow. This can be seen by the actual plans of a mandatory women quota in higher positions.

In *EU law* of atypical employment, however, there are some rules that only ask the employer to endeavor.[474] Soft law has its place in the law of competition.[475] It consists to a great part of guidelines and informations by the Commission.[476]

Japanese law is characterized by a number of soft laws: Employers are not forced to a certain measure, but they are expected a certain behavior. If such a kind of legislation is effective, also depends on the legal culture of a country; if the addressees of law follow a rule even if there is no sanction. The attitude of employers is also guided by the experience that after some years the same rule may become mandatory anyway, so it allows them step by step to comply with the rule while it is not yet compulsory; with the mandatory retirement age a duty to endeavor was followed by mandatory law some years later.

h) Collective Representation

German labour law is different from the labour law of most countries by the two lanes of the representation of employees.[477] The interests of atypically employed are represented by trade unions as well as by works councils. Especially the right of co-determination of the works council in case of an engagement is an instrument of control. But in both countries the share of members of trade unions among atypically employed is very low, and the trade unions in both countries understand themselves primarily as representatives of the regular workers.[478]

Japanese employment law is determined by trade unions in the single enterprises and by work orders.[479] As in Germany, the trade unions represent above all typical employees, and only recently some trade unions have begun to accept atypically employed.[480] The share of organized employees among part-timers in 2010 was only 5.6 %.[481] As the legislation is rather reluctant, a representation by trade unions would be helpful.[482]

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474 *Barnard*, EU Employment Law, p. 437; *Riesenhuber*, Europäisches Arbeitsrecht, S. 307, 317.

475 See clause no. 5 no. 3 directive 97/81/EC; *Davies*, EU Labor Law, p. 187; *Riesenhuber*, Europäisches Arbeitsrecht, S. 307, 316.

476 *von Graevenitz*, EuZW 2013, 169; *Soltesz*, EuZW 2013, 881 f.

477 *Krause*, RdA 2009, 129 ff.; *Wank* in Düwell u.a., Verhältnis, S. 83 ff.

478 *Waltermann,* Gutachten B zum 68. DJT, S. 44.

479 *Araki*, Labor and Employment Law in Japan, p. 159; *Araki*, New labour policies; *Nishitani*, Vergleichende Einführung, S. 104 ff.; *Sugeno*, Japanese Labor Law, p. 416; *Takahashi*, ZIAS 2012, 174, 183; *Wank* in Düwell u. a., Verhältnis, S. 83, 94 f.

480 *Fujimura*, Japan Labor Review vol. 9 (2012), no. 1, p. 6, 10.

481 *Shuichi Hashimoto*, Japan Labor Review vol. 9 (2012), no. 1, p. 25, 26.

482 *Hashimoto*, l. c. p. 36.

i) Reforms

It is typical for some ideas for reforms that they regard atypical work as per se negative. One conclusion by the increase of atypical employment is that employees become poorer. There should be a more accurate attitude. If e. g. in a family so far only the husband was employed and the wife now starts a job with small income, the family income rises, although the wages of the wife alone could not support the family. Whereas in social security law sometimes the family income is relevant, regarding atypical employment mostly the income of one person alone is regarded.

The conclusion from atypical employment to discrimination is not generally justified. If e. g. part-time work is mostly done in jobs with low salary and if part-time work is mostly performed by women, the question is why in this job only low wages are paid and why do women prefer such a job. This is no matter of discrimination of part-timers but a general problem of who decides which value has the jobs in a certain sector.

In *Germany* the agreement of the coalition announces some reforms, which have been mentioned in the text. In the law of part-time work a right to return to fulltime after a period of reduced time shall be introduced.[483] The burden of proof in case of refusing part-time work shall be transferred to the employer.[484]

In the law of temporary agency work the period of transfer shall be limited to 18 months; exemptions shall be possible by collective bargaining agreements. At the latest after 9 months the genuine principle of equal treatment shall be applicable. It shall be forbidden to use temporary agency workers as substitutes in cases of strikes. In thresholds in the works council law temporary agency workers shall be counted as employees of the user company. The criteria to differ between contract for work and service and temporary agency work shall be defined in a statute.

No changes are planned regarding fixed-term work.

j) Summary

In Germany as well as in Japan there are some groups of employment relationships that differ from the regular employment relationship. In both countries it is recommendable to differ between atypical employment (part-time employees, fixed-term employees and temporary agency employees) on the one hand and persons endangered of discrimination and especially protected groups (like women, older employees, and children) on the other hand. Different from EU law and from German law there is no general antidiscrimination law in Japan. There are special rules in separate laws, like in the Part-time Act. Different from EU law and German law Japanese law knows two kinds of antidiscrimination rules, strict law and soft law. In soft law the employer must endeavor to perform equal treatment. Besides

[483] *Jöris*, NJW-Spezial 2013, 754.

[484] As regards the reform of the part-time law see SPD-Fraktion, Bundestags-Drucksache 17/13084, S. 3.

antidiscrimination law there are special laws for especially protected groups. The rules for atypically employed and for members of special groups are accompanied by rules to promote their integration.

The comparison between the different types of employment relationships other than the regular employment in Germany and in Japan has shown corresponding problems and solutions. There is a difference regarding the principle of equal treatment; in Japan with its tradition of lifelong employment and a different way of fixing wages, this principle is still in development.

2. The Separate Areas of Non-regular Work

a) Part-time Employment

In Germany as well as in Japan the part-timer is defined in comparison with a full timer. Among the group of part-time employees there is in Germany – not in employment law, but in social security law – a special group of low income employees. Advantages regarding social security premiums make this kind of employment attractive, with retroactive effect auf employment law. In Japanese law there is a special phenomenon, the difference between genuine part-time employees and so called part-time employees who may as well be full timers, but are not called so. For genuine part-time employees a prohibition of discrimination has been introduced. But almost all part-time employees are fixed-term employees with the result that this law has no effect. In the end part-time employees have a double disadvantage: They only have fixed-term contracts and they have worse employment conditions as regular employees.

Besides, in both legal systems there are rules promoting integration into the core staff. But in Japanese law there is no claim for a full timer to reduce his working hours.

In labour law in Japan, different from German law, there is no representation by a works council.

b) Fixed-term Work

In Japan no good reason is needed for a fixed-term employment as such. A control refers to the duration of the contract. In German law the duration as such is not controlled, but for a fixed-term contract a good cause is needed; the duration must comply the reason. The fixed-term can refer to a calendar date or to a certain event as the end of the contract. Subject of the control in German law is the relationship between the two parties, whereas in Japan only the single contract is regarded; as many prolongations as wanted are allowed.

In Germany the second way for a fixed-term contract is that for the first engagement no good reason is needed; but then the maximum duration is two years (with three possible prolongations during these three years). If a newly founded enterprise engages employees, during the first two years no other good cause is necessary.

In both countries even if the single fixed-term contract complies with the law, it may be different with a chain of fixed-term contracts. Both legal systems have the same solution: Then it may be an abuse of rights. But the reasons for an abuse are different: In Germany the fixed-term contracts may be an illegal substitute of a permanent job, in Japan the employer may have disappointed the confidence of the employee that the contract will be prolonged.

In Germany it is forbidden to discriminate against a fixed-term employee in comparison with a comparable permanent employee. In Japan in 2012 a rule was introduced in Art. 20 LCA forbidding too great a difference.

A specialty of Japan are the shokutaku shain, employees that continue to work in the same enterprise as before, although in half of the cases with worse conditions.

c) Temporary Agency Work

In Germany as well as in Japan temporary agency work has an administrative law and an employment law aspect. In both countries agencies are specially controlled.

German law differs between temporary agency work and arrangement of employment. The agency has an employment contract with the employee, the agency for arrangement of employment only arranges a contact between the two parties of an employment contract. In Japan there are two different kinds of temporary agency work; one of it is at the beginning similar to arrangement of employment.

The temporary agency employee has two "employers". The agency has the main duties of an employment contract, but in both countries the user company also has some duties of an employer.

In Germany there is at least de iure a prohibition to discriminate. That would mean equal treatment with the employees in the user company. But de facto there are special collective bargaining agreements for temporary agency work, resulting in conditions worse than they were by equal treatment. In both countries it is difficult to differ between temporary agency work and a contract for work and service. Often pseudo contracts for work and service are used to avoid the restrictions of temporary agency work. But the courts in both countries look at the real performance of the relationship and not at what the parties call it. The most important clue is who gives orders to the employee, the employer or the third person.

If temporary agency law is violated, there are sanctions in Germany in administrative law, in works council law and in employment law. In employment law the sanction if the agency

lacks a license is that by law a contract between the employee and the user exists. But this sanction is not applicable if the employee is engaged in the user company longer than "temporary". In Japan there are – at the moment – only sanctions in administrative law. But from 2015 on a sanction will be a contract with the user company.

d) Employees Endangered of Discrimination

Employees are endangered of discrimination because of several reasons in their person. EU Law provides a number of reasons that must not be taken to differ between employees, like religion, age, raced etc. They have been transformed into § 1 AGG; in both countries a special prohibition covers the difference between man and woman. This refers – in Japan meanwhile, too – to all working conditions. De facto in spite of this there is a gender gap in salary. But in both countries to get a serious view it is necessary to differ between the adjusted and the unadjusted gender gap. Another common problem of both countries is the work life balance. But it seems as only in EU law and in German law there is the discussion about more women in top positions in enterprises.

e) Especially Protected Groups of Employees

In both countries there are some groups of employees for whom the legal system provides a number of special rules for their protection, like old age employees or children and youth.

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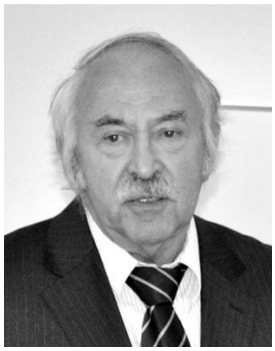

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