



# **‘Discrimination Map’ and inequalities in care sectors: German Report**

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## Abbreviations

- 6. PflegeArbbV** – 6. Pflegearbeitsbedingungenverordnung (Sixth Nursing Working Conditions Ordinance)
- ADS** – Antidiskriminierungsstelle des Bundes (Federal Anti-Discrimination Agency)
- ArbG** – Labour Court (Arbeitsgericht)
- ArbSchG** – Arbeitsschutzgesetz (Occupational Safety and Health Act)
- AufenthG** – Aufenthaltsgesetz (Residency Act)
- AÜG** – Arbeitnehmerüberlassungsgesetz (Temporary Employment Act)
- BA** – Bundesagentur für Arbeit (Federal Employment Agency)
- BAG** – Bundesarbeitsgericht (Federal Labour Court)
- BAuA** – Bundesanstalt für Arbeitsschutz und Arbeitsmedizin (Federal Institute for Occupational Safety and Health)
- BEEG** – Bundeselterngeld- und Elternzeitgesetz (Federal Parental Allowance and Parental Leave Act)
- BEMA** – Berliner Beratungszentrum für Migration und Gute Arbeit (Berlin Advisory Centre for Migration and Good Work)
- BeschV** – Beschäftigungsverordnung (Ordinance on the Employment of Foreigners)
- BGleiG** – Bundesgleichstellungsgesetz (Federal Act to Ensure Equal Opportunities for Women and Men in the Federal Administration and the Courts on Gender Equality)
- BGW** – Berufsgenossenschaft für Gesundheitsdienst und Wohlfahrtspflege (Employer's Liability Insurance Association for Health Services and Welfare Care)
- BQFG** – Gesetz über die Feststellung der Gleichwertigkeit von Berufsqualifikationen (Federal Professional Qualifications Assessment Act)
- BVerfG** – Bundesverfassungsgericht (Federal Constitutional Court)
- DEÜV Meldungen** – Datenerfassungs- und übermittlungsverordnung (Data Collection and Transmission Ordinance Reports)
- DGB** – Deutsche Gewerkschaftsbund (German Trade Union Confederation)
- DGUV** – Deutsche Gesetzliche Unfallversicherung (German Statutory Accident Insurance)
- DIMR** – Deutsches Institut für Menschenrechte (German Institute for Human Rights)
- DIMRG** – Gesetz über die Rechtsstellung und Aufgaben des Deutschen Instituts für Menschenrechte (Law on the Legal Status and Tasks of the German Institute for Human Rights)
- ECJ** – European Court of Justice
- EntgTranspG** – Entgelttransparenzgesetz (Transparency in Wage Structures Act)
- FachKrEG** – Fachkräfteeinwanderungsgesetz (Act for Skilled Workers)
- FPfZG** – Familienpflegezeit (Family Caregiver Leave Act)
- FreizügG/EU** – Freizügigkeitsgesetz/EU (Freedom of Movement Act/EU)
- FüPoG I & II** – Gesetz für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst I & II (Act on Equal Participation of Women and Men in Management Positions in the Private and Public Sectors I & II)
- GDP** – Gross Domestic Product
- GG** – Grundgesetz für die Bundesrepublik Deutschland (Basic Law, German Constitution)



**GleiBstiftG** – Gesetz zur Errichtung der Bundesstiftung Gleichstellung (Law on the Establishment of the Federal Foundation for Equality)

**HBS** – Hans Böckler Stiftung (Hans Böckler Foundation)

**HebG** – Hebammengesetz (Midwifery Act)

**IAB** – Institut für Arbeitsmarkt- und Berufsforschung (Institute for Employment Research)

**ILO** – International Labour Organisation

**ISCO-08** – International Standard Classification of Occupations 2008

**IS-GBE** – Informationssystem der Gesundheitsberichterstattung des Bundes (Information System of Federal Health Reporting)

**KldB 2010** – Klassifikation der Berufe 2010 (Classification of Occupations 2010)

**LADG** – Landesantidiskriminierungsgesetz (State Anti-Discrimination Act)

**LAG** – Landesarbeitsgericht (Regional Labour Court)

**LGG** – Gesetz zur Gleichstellung von Frauen und Männern im öffentlichen Dienst im Land Brandenburg, Landesgleichstellungsgesetz (Act to Ensure Equality of Women and Men in the public sector of Land Brandenburg)

**MuSchG** – Mutterschutzgesetz (Maternity Protection Act)

**PflAFinV** – Verordnung über die Finanzierung der beruflichen Ausbildung nach dem Pflegeberufegesetz (The Nursing Professions Training Financing Ordinance)

**PflBG** – Pflegeberufegesetz (Nursing Professions Act)

**PflegeZG** – Pflegezeitgesetz (Caregiver Leave Act)

**SchwArbG** – Schwarzarbeitsbekämpfungsgesetz (Act to Combat Undeclared Work and Unlawful Employment)

**SGB V** – Sozialgesetzbuch V (Social Security Code, Book V)

**SGB VI** – Sozialgesetzbuch VI (Social Security Code, Book VI)

**SGB VII** – Sozialgesetzbuch VII (Social Security Code, Book VII)

**SGB XI** – Sozialgesetzbuch XI (Social Security Code, Book XI)

**StAG** – Staatsangehörigkeitsgesetz (Nationality Act)

**StGB** – Strafgesetzbuch (Criminal Code)

**StPO** – Strafprozeßordnung (German Code of Criminal Procedure)

**TV** – Tarifvertrag (Collective Agreement)

**TVöD** – Tarifvertrag für den öffentlichen Dienst (Collective Agreement for the Public Sector)

**TVöD-B** – Tarifvertrag für Pflege- und Betreuungseinrichtungen (Collective Agreement for the Public Sector, Nursing and Care Facilities)

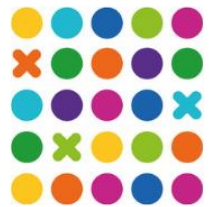
**TVöD-K** – Tarifvertrag für Krankenhäuser (Collective Agreement for the Public Sector, Hospitals)

**TzBfG** – Teilzeit- und Befristungsgesetz (Part-Time and Fixed-term Employment Act)

**ver.di** – Vereinte Dienstleistungsgewerkschaft (United Services Union)

**VKA** – Vereinigung der kommunalen Arbeitgeberverbände (Federation of Municipal Employers' Associations)

**ZuwandG** – Zuwanderungsgesetz (Immigration Act)



# GENDER

## 1. and 2. General overview

### 1. Provide a brief overview of your national legislation on gender discrimination in the field of employment.

The German constitution (GG, Grundgesetz, Basic Law), in Art. 3 (2) and (3), provides a strong ban on discrimination of women, and on gender discrimination. However, it is not directly applicable to employment contracts.

The General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, AGG) provides for rules against discrimination based on gender/sex in employment and covers direct (Sec. 3 (1) AGG) and indirect discrimination (Sec. 3 (2) AGG). It implements EU Directive 2006/54/EC, among others. The rules are therefore in principle similar to the directive.

There are also anti-discrimination laws at the level of the federal states, such as the State Anti-Discrimination Act (Landesantidiskriminierungsgesetz, LADG) for Berlin, which applies primarily to employees in the Berlin state administration and in public-law institutions (Section 3 (1) LADG).

In addition, the Transparency in Wage Structures Act of 2017 (Entgelttransparenzgesetz, EntgTranspG) is meant to enforce the right to equal pay for women and men for equal work or work of equal value (Sec. 1 EntgTranspG). It entitles individual employees to disclosure of information regarding the criteria and practices used to establish the level of remuneration (Secs. 10-16 EntgTranspG) and calls upon private employers with a workforce that usually counts more than 500 employees to use internal company evaluation procedures to assess their remuneration provisions and the various remuneration components disbursed, as well as the way in which they are applied, on a regular basis (Secs. 17-20 EntgTranspG). In addition, management reports on gender equality and equal pay have to be filed (Secs. 21 and 22 EntgTranspG).

For the public sector, special acts on gender equality provide for affirmation action. For federal institutions, the Federal Act to Ensure Equal Opportunities for Women and Men in the Federal Administration and the Courts on Gender Equality (Bundesgleichstellungsgesetz, BGleiG) aims at achieving gender equality, eliminating existing discrimination on the basis of gender, in particular discrimination against women, preventing discrimination in the future and improving the reconciliation of family life, care work and employment for women and men (Sec. 1 BGleiG). It contains specific provisions on gender mainstreaming and preference for women in recruitment and professional advancement (Secs. 4-10 BGleiG), on equality plans (Secs. 11-14 BGleiG), on working time (Secs. 15-18 BGleiG) and on the establishment of equal opportunities officers (Secs. 19-36 BGleiG).

Each federal state has a similar Act on Gender Equality (Landesgleichstellungsgesetz), e.g., the Act to Ensure Equality of Women and Men in the public sector of Land Brandenburg of 1994 (Gesetz zur Gleichstellung von Frauen und Männern im öffentlichen Dienst im Land Brandenburg, Landesgleichstellungsgesetz, LGG).

The Act on Equal Participation of Women and Men in Management Positions in the Private and Public Sectors of 2015 (Gesetz für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst, FüPoG I,) made it mandatory for (German-)listed or co-determined companies to name target quota for the percentages of women on the supervisory board, the



management board and two levels below the management board, respectively, as well as to submit a progress report. For some large companies, a minimum quote of 30% women was introduced. However, as the majority of the companies affected did not set any target quota at all or set a target quota of “zero”, the Second Act on Equal Participation of Men and Women in Management Positions (FüPoG II), in 2021, adds binding rules for listed companies in the private sector that are subject to co-determination, as well as certain companies in which the German federal government holds a majority. The supervisory boards of these companies must appoint at least one woman and one man to the management board if it consists of more than three persons. In case of non-compliance, the appointment of a board member in disregard of the rules will be null and void. Also, if the supervisory board or management board (with regard to the management level) set a target quota of zero, they must give clear and comprehensible reasons.

## 2. Make a brief social commentary on the presence of women workers in the care sector.

Overall, most employees in the German care sector are women (81%–83%), which is far above the average for the German labour market as a whole, where men predominate (54%, women 46%). If “live-in” employees are included, who are commuter migrants mainly from Central and Eastern European countries working temporarily in German private households, the share of women is even higher (90%)—however, there are no official statistics for live-ins due to the predominance of undeclared and irregular employment (see Migrant Status see below questions 5.-9.).

Women predominate in all care occupations, the only exception being emergency medical services, where three-quarters of all employees are men. Women are slightly more represented in outpatient care than in inpatient care, and more represented in elderly care (KldB<sup>1</sup> – 821) than in nursing in medical care (KldB – 813). As for the total numbers of employees in the care sector, most women are employed in nursing in medical care.

## 3. and 4. Statistics or databases

### 3. Have statistics or databases been published in your country on the care sector or on each of the occupations that are part of this sector, differentiating by gender?

The Federal Statistical Office (Statistisches Bundesamt) and the Federal Employment Agency (Bundesagentur für Arbeit, BA) have produced statistics and databases on employment in the care sector that differentiate by gender (men and women)—other genders are not included.

They classify occupations in the care sector according to the KldB 2010, a standardized classification system that categorizes individual occupations according to their field of activity on the labour market. The KldB 2010 was developed under the leadership of the BA and the Institute for Employment Research (Institut für Arbeitsmarkt, IAB) with the participation of the Federal Statistical Office and the federal ministries concerned as well as experts in occupational and empirical (social) research and introduced in 2011. It realistically represents the current occupational landscape in Germany and at the same time offers a high degree of compatibility with the international occupational classification—the ISCO-08 (International Standard Classification of Occupations 2008).

The KldB 2010 systematizes individual occupations in a system of up to five-digit keys, which are divided

<sup>1</sup> Refers to classification of occupations (Klassifikation der Berufe, KldB 2010), explanation see question 3.



according to the occupational specialization and requirement level: 1) occupational sectors (Berufsbereiche), 2) main occupational groups (Berufshauptgruppen), 3) occupational groups (Berufsgruppen), 4) occupational subgroups (Berufsuntergruppen), and 5) occupational categories (Berufsgattungen such as assistant, professional, etc.). Care work is systematised in the occupational sector 8 (Health, social services, teaching, and education), and there are two occupational groups that generally cover this type of work: 813 (nursing in medical care) and 821 (elderly care).<sup>2</sup> These two occupational groups further divide nurses into occupational subgroups (e.g., 8130 (nursing without specialization), 8134 (emergency medical services), 8218 (specific activities in elderly care)) and occupational categories (e.g., 81301 (assistants in nursing without specialization)). Occupational categories are further subdivided into multiple different care occupations, which are not available in the aggregate data (see below).

As of databases, the Federal Statistical Office uses the “health personnel accounting” (Gesundheitspersonalrechnung),<sup>3</sup> which provides detailed information on the number and structure of health care employees each December 31 of the respective reporting year. The health personnel accounting is a secondary statistical calculation that combines around 50 statistical data sources on employment, available in the health care sector at the time of calculation. In addition to the annual statistics for individual health care facilities (hospitals, preventive or rehabilitation facilities, outpatient or (partially) inpatient care facilities, etc.), the most important sources of employment statistics include, in particular, the employment statistics of the BA on persons who are regularly employed, including those who perform nursing work as part of marginal employment, e.g. on a mini-job basis, the results of the microcensus, and other statistics from various professional associations (Federal Medical Association, Federal Dental Association, etc.). The health personnel accounting contains data on gender in care occupations as classified by the KldB 2010, which can be combined with other variables such as age groups, type of employment, and workplace setting.

The Federal Statistical Office also publishes statistics for the care sector in the form of tables, with an analysis every two years. Among other things, it records the number of regularly and marginally employed staff in inpatient (excluding hospitals) and outpatient care services (see 2.2.1. of the WP 2 Report).<sup>4</sup> According to the sources used in the Federal Statistical Office reports, 1.2 million persons are employed in the German care sector.

The BA generates its data by the employment agencies and job centres in accordance with the German Social Code (Sozialgesetzbuch, SGB) in books SGB III and SGB II—unemployment statistics and basic security statistics. Other sources are employer reports according to the Data Collection and Transmission Ordinance (Datenerfassungs- und -übermittlungsverordnung, DEÜV-Meldungen)<sup>5</sup> which have to be delivered to the social insurance institutions and temporary employment agencies' reports on their employees (Sec. 3. DEÜV).

On its website, the BA makes available data on gender in care occupations in relation to other demographic

<sup>2</sup> Nursing in medical care and elderly care are in different main occupational groups, the first in 81 (medical health professions) and the second in 82 (non-medical health, personal care and wellness occupations, medical technology).

<sup>3</sup> Statistisches Bundesamt, ‘Gesundheitspersonalrechnung’ (26 January 2023) <[https://www.destatis.de/DE/Methoden/Qualitaet/Qualitaetsberichte/Gesundheit/gesundheitspersonalrechnung.pdf?\\_\\_blob=publicationFile](https://www.destatis.de/DE/Methoden/Qualitaet/Qualitaetsberichte/Gesundheit/gesundheitspersonalrechnung.pdf?__blob=publicationFile)> accessed 11 September 2023

<sup>4</sup> Statistisches Bundesamt, ‘Pfleigestatistik - Pflege im Rahmen der Pflegeversicherung - Deutschlandergebnisse - 2021’ (2022) <[https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Gesundheit/Pflege/Publikationen/\\_publikationen-innen-pfleigestatistik-deutschland-ergebnisse.html](https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Gesundheit/Pflege/Publikationen/_publikationen-innen-pfleigestatistik-deutschland-ergebnisse.html)> accessed 10 October 2023

<sup>5</sup> Employers are legally obliged to report the data of their employees to the social insurance institutions (Sozialversicherungsträger).





factors (age), average salaries, and employment relationship. Moreover, the BA publishes detailed annual reports that provide comprehensible statistics on the labour market situation in the German care sector.<sup>6</sup> These annual reports include care workers who are regularly employed (excluding marginal employment in mini-jobs) in inpatient (including hospitals) and outpatient facilities. It also provides data on gender participation in the care sector, including the unemployment rate between the two gender (see 2.2. of WP2 Report). According to the BA report, 1.7 million persons are employed in the German care sector.

**- In the case of databases, do these present aggregated data, micro-data, or both (aggregated data: data at national or regional level; micro-data: individual data, collected but not published, only available to researchers)?**

The Federal Statistical Office provides aggregated data that records health care workers in employment relationships by age, gender, occupations (elderly care, nursing care, etc.), workplace setting (inpatient (including hospitals) and outpatient care), and type of employment (full-time, part-time, unemployed and marginal/mini-job, as well as full-time equivalents by age, gender, occupations, and establishments.

The BA provides aggregated data that mainly divides by workplace settings (inpatient care (including hospitals) and outpatient care), demographics (gender background, age), employment relation (full-time, part-time, unemployed, and mini-job), level of training (assistants, professionals, etc.), national background (German/non-German), etc.

Further aggregate data and reports are made available at the database Information System of Federal Health Reporting (Informationssystem der Gesundheitsberichterstattung des Bundes, IS-GBE), established by the Federal Statistical Office, which brings together health data and health information from over 100 different sources in a central location.

**- Are these databases public and freely accessible to everyone, or only to researchers?**

The Federal Statistical Office and the BA offer free access to their data. The data are sorted according to KldB 2010. However, to obtain the data for specific nursing occupations belonging to occupational categories (see above), an individual request must be submitted to the Federal Statistical Office for a fee.

**- If databases exist, please provide links and/or how to request them.**

**Federal Statistical Office (registration is necessary):**

The data of the Federal Statistical Office made available by the health personnel accounting can be accessed here: [https://www-genesis.destatis.de/genesis/online?operation=find&suchanweisung\\_language=de&query=Gesundheitspersonal#abreadcrumb](https://www-genesis.destatis.de/genesis/online?operation=find&suchanweisung_language=de&query=Gesundheitspersonal#abreadcrumb)

To access the data sources that the Federal Statistical Office uses, see: [https://www.gbe-bund.de/gbe/hrecherche.prc\\_datenquellen?p\\_aid=61511467&p\\_uid=gast&p\\_sprache=D&p\\_knoten=STBA&tk=51310&tk2=51311&cnt\\_ut=1&ut=51311](https://www.gbe-bund.de/gbe/hrecherche.prc_datenquellen?p_aid=61511467&p_uid=gast&p_sprache=D&p_knoten=STBA&tk=51310&tk2=51311&cnt_ut=1&ut=51311).

<sup>6</sup> Bundesagentur für Arbeit, 'Arbeitsmarktsituation im Pflegebereich' (2023) <[https://statistik.arbeitsagentur.de/DE/Statischer-Content/Statistiken/Themen-im-Fokus/Berufe/Generische-Publikationen/Altenpflege.pdf?\\_\\_blob=publicationFile](https://statistik.arbeitsagentur.de/DE/Statischer-Content/Statistiken/Themen-im-Fokus/Berufe/Generische-Publikationen/Altenpflege.pdf?__blob=publicationFile)> accessed 10 October 2023



#### Federal Employment Agency:

The data of the BA can be accessed via the interactive statistics at its official website: <https://statistik.arbeitsagentur.de/DE/Navigation/Statistiken/Interaktive-Statistiken/Berufe-auf-einen-Blick/Berufe-auf-einen-Blick-Anwendung-Nav.html>

#### Information System of Federal Health Reporting (IS-GBE):

The data of the Information System of Federal Health Reporting can be accessed here: [https://www.gbe-bund.de/gbe/pkg\\_isgbe5.prc\\_isgbe](https://www.gbe-bund.de/gbe/pkg_isgbe5.prc_isgbe)

To access to its data sources is available here: [https://www.gbe-bund.de/gbe/abrechnung.prc\\_abr\\_test\\_logon?p\\_uid=gast&p\\_aid=61511467&p\\_sprache=D&p\\_knoten=TR51310](https://www.gbe-bund.de/gbe/abrechnung.prc_abr_test_logon?p_uid=gast&p_aid=61511467&p_sprache=D&p_knoten=TR51310)

#### 4. Describe or comment on what the statistics or databases you have found show in relation to the participation of male and female workers in the care sector workforce, either taking this sector as a whole, or in relation to each of the occupations that make up this sector.

The recent reports by the Federal Statistics Office and BA give a general overview of gender participation (women and men) across the entire nursing sector. Both of them report that between 81% and 83% employees are women (for the different sources they use, see above question 3.)—in comparison, according to the report by the BA, the German labour market as a whole employs more men (54%) than women (46%).<sup>7</sup>

There are differences across workplace settings according to the report by the Federal Statistics Office.<sup>8</sup> For example, in 2021, 82% of employees in inpatient care were women, while the figure for outpatient care was 85%. Further differences are noted in occupational subgroups. According to the latest data, women predominate in all subgroups in the care sector, the only exception being the emergency medical service (KldB 2010 - 8134 Rettungsdienst), in which 75% of all employees are men.

The BA's interactive statistics for 2022 (including regular employment in nursing in medical care (KldB - 813) and elderly care (KldB - 821)), shows that around 81% employed in the care sector are women—in elderly care, 82% are women, and 79% in nursing in medical care (in the live-in (domestic) sector the unofficial figure is around 90% women—see answers to questions 2, on gender, and 5, on migrant status). According to the occupational subgroups for the total number of employees in the care sector (1.7 million), most women were employed in nursing and medical care (without specialization, KldB - 8130 (42.3%, 8.91% for men), followed by professions in elderly care (without specialization, KldB - 8210 (27.81%, 6.05% for men). The least women worked in professional child care<sup>9</sup> (KldB - 8132) (0.25%, 0.01% for men). While most men, like women, were employed in nursing and health care (without specialization) and in elderly care (without specialization), emergency services was the third most common subgroup occupied by men (3.16%, 1.44% for women) and the only subgroup dominated by men.

<sup>7</sup> ibid

<sup>8</sup> Statistisches Bundesamt, 'Pflegerstatistik - Pflege im Rahmen der Pflegeversicherung - Deutschlandergebnisse - 2021' (n 4)

<sup>9</sup> This occupational subgroup contains the fewest employees in the care sector overall.



## 5.-11. Occupational classification and wages

5. If legislation exists on the care sector in general, or on the occupations that make up the care sector, please describe whether it is gender-neutral in terms of the workers, or whether it makes any reference to the presence of women in this sector or these occupations (e.g. acknowledging the majority presence of women in the sector, or granting them any special attention in terms of rights, etc.). If special reference is made to women, please specify.

Legislation does not make any special reference to women or gender. However, Sec. 55 of the Nursing Professions Act (Pflegerberufegesetz, PflBG) enables the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth and the Federal Ministry for Health to establish yearly surveys for the purpose of federal statistics, which may also cover gender as a differentiating criterion. This was implemented in Sec. 22 (2) No 1c) of the Nursing Professions Training Financing Ordinance (Pflegerberufe-Ausbildungsfinanzierungsverordnung, PflAFinV).

6. Does the legislation or, if applicable, collective agreements provide for occupational classification system in care sector? If so, do you consider any gender bias in this occupational classification (if so, please explain).

There are two types of regulation that are based on occupational classifications: Firstly, regulation on training and professions, and secondly, regulation on pay.

Regarding legislation, there are numerous regulations on midwives as well as on the training of nurses: Nurses complete three years of dual vocational training, whereby the proportion of practical training outweighs the theoretical training (Section 6 (1) PflBG). The training consists of theoretical and practical training and lasts three years at state, state-approved, or state-recognized nursing schools. While nurses' training is regulated in federal law, nursing assistants are regulated by the federal states, which have agreed on common minimum standards.<sup>10</sup> In the midwifery profession, training was transformed into a dual vocational training program in 2020 (Sec. 11 (2) of the Midwifery Act (Hebammengesetz, HebG); trainees receive a higher education bachelor's degree after six to eight semesters (Sec. 1 (7), 11 (1) HebG).

As for pay, both the minimum wages for the care sector established by the Sixth Nursing Working Conditions Ordinance (6. PflegeArbbV), and the collective agreements for the public sector that are prevalent in the care sector (see 3.2.3. and 5.1. in WP 2), differentiate according to occupational classification. Sec. 2 (1) 6. PflegeArbbV differentiates the minimum wage according to the level of training (nursing assistants without a degree, nursing assistants with one-year training, and nursing professionals with three years of training and a state examination) and their work experience.

Collective agreements for the public sector are generally negotiated at regional level for federal and municipal employees (TVöD) and for employees of the federal states (TV-L), as well as for civil servants and some specific occupational groups such as doctors (TV-Ärzte/doctors). At the respective regional level, there

<sup>10</sup> Bundesministerium für Familie, Senioren, Frauen und Jugend and Bundesministerium für Gesundheit (Deutschland), 'Eckpunkte für die in Länderzuständigkeit liegenden Ausbildungen zu Assistenz- und Helferberufen in der Pflege. Beschlüsse der 89. Arbeits- und Sozialministerkonferenz 2012 und der 86. Gesundheitsministerkonferenz 2013' (29 January 2016) <[https://www.bpa-arbeitgeberverband.de/fileadmin/user\\_upload/kleinedokumente/BAAnz\\_AT\\_17.02.2016\\_B3.pdf](https://www.bpa-arbeitgeberverband.de/fileadmin/user_upload/kleinedokumente/BAAnz_AT_17.02.2016_B3.pdf)> accessed 9 October 2023



are regulations for all public sector employees, as well as regulations for specific sectors. The latter applies above all to the regulation of wages according to the type of job and responsibility. In the care sector, these wages are set at the municipal and federal level and outlined in the pay tables (P-Table) of the collective agreements for nursing and care facilities (TVöD Pflege- und Betreuungseinrichtungen, TVöD-B) and TVöD Hospitals (TVöD Krankenhäuser, TVöD-K). In this respect, the TVöD-K is specific to the TVöD-B: the TVöD-B applies to all care workers except for those who fall within the scope of the TVöD-K. However, this has no effect on remuneration. The P-table applies equally in the special parts of TVöD-B and TVöD-K.

While there are no gender biases in legislation and collective bargaining agreements, empirical data show differences in pay between men and women with the same qualifications. For example, according to the most recent data from the BA's interactive statistics, in the occupational subgroup nursing without specialization (KldB - 8130), the median pay of full-time male nursing employees in 2022 was 3.956 EUR, while it was only 3.771 EUR for female nursing employees; in elderly care, it was 3.452 EUR for men and 3.283 EUR for women. There have also been legal analyses of collective agreements of the public sector that found systematic indirect discrimination of women;<sup>11</sup> these analyses have however not been undertaken specifically for the care sector.

**7. Have there been any legal disputes or conflicts publicised by the media in your country over “job classification” in the care sector and gender discrimination? If so, please summarise or comment on the case(s).**

There have been several legal disputes concerning job classification in the care sector. The following case concerned a care worker who was paid according to pay category (Entgeltgruppe) P 7 (TVöD/VKA: nurses with three-year training and corresponding activity), and claimed category P 8 (practical instructors in nursing with additional vocational pedagogical qualification). The Federal Labour Court (Bundesarbeitsgericht, BAG) dismissed the claim because it found her supervising activity did not account for at least 50% of her work.<sup>12</sup> Other similar cases concerned a Works Councils who lost the case against an employer (a nursing home for the elderly) who found that being in charge of a “living unit” (Wohngruppe) was not equal to being in charge of a “ward” as required by pay group P 10 TVöD/VKA.<sup>13</sup> Another recent case concerned extra pay according to EntgO TV-L that was granted to authorised nursing professionals. The Federal Labour Court found that the work in the outpatient department of a university hospital could be considered “nursing” activity within the meaning of the collective agreement (which had been referenced in the individual employment contract).<sup>14</sup>

A judgment by Regional Labour Court Hamm<sup>15</sup> concerned different treatment between sectors. The claimant was a nurse working in a forensic psychiatry hospital. The court confirmed that trained educators (pay category S 8 Entgeltordnung (TVöD-VKA) for educators or curative educators) could be paid significantly higher remuneration than trained nurses (P8 Entgeltordnung (TVöD-VKA)). The claimant may be doing essentially the same job; still, her qualification could in her case not considered equivalent to that of her

<sup>11</sup> djb, ‘Die Vereinbarkeit des BAT mit dem Grundsatz der Entgeltgleichheit’ (1996) 14(2) Streit 75 f; for the former version of the public services collective agreement „BAT“; Gertraude Krell and Katrin Tondorf, ‘Mittelbare Entgeltdiskriminierung in Tarifverträgen des öffentlichen Dienstes – ein Ende in Sicht?: Zugleich ein Beitrag zum Verständnis und zur Prüfung von Entgelt(un)gleichheit’ [2011] djbz - Zeitschrift des Deutschen Juristinnenbundes 174

<sup>12</sup> (2021) 4 AZR 327/20 (BAG); parallel cases from the same day are (2021) 4 AZR 218/20 (BAG), (2021) 4 AZR 359/20 (BAG), (2021) 4 AZR 360/20 (BAG)

<sup>13</sup> (2022) 4 ABR 25/21 (BAG); similarly: (2021) 19 TaBV 6/20 (LAG Stuttgart)

<sup>14</sup> (2023) 6 AZR 62/22 (BAG)

<sup>15</sup> (2022) 3 Sa 1022/21 (LAG Hamm)



colleagues.

**8. Does legislation or, where applicable, collective agreements provide for specific provisions on employment contracts in the care sector, which are different from employment contracts in other productive sectors? If so, do you consider that there is any gender bias in relation to employment contracts? (If so, please explain)**

There are special regulations for the care sector in the Working Hours Act. For example, the general rest period after the end of the daily working time can be reduced from eleven hours to ten hours for care workers according to section 5 (2) if this reduction is compensated by the extension of another rest period within one month. Section 5 (3) codifies an exception for on-call duty specifically created for care workers: Interruptions made during on-call duty can be compensated for at other times if the interruption does not exceed half of the rest period.

The collective agreements for the public sector (TVöD and TV-L, see WP 2, 5.2.) contain specific rules for the care sector only in relation to pay/wages.

**9. Have there been any legal disputes or conflicts publicised by the media in your country over “employment contracts” in the care sector and gender discrimination? If so, please summarise or comment on the case(s).**

There have no such cases or conflicts been published in the media. As for the legal debate, there is one judgment on the discrimination of part-time-workers that concerned a nurse in a specialised hospital. In that case, the courts found that a collective agreement that provided for overtime pay for part-time-workers only if they worked more than full-time was a discrimination of part-time-workers, but also an indirect discrimination based on gender.

**10. Do the legislation or, if applicable, collective bargaining agreements make any provision for wages in each of the care sector occupations, differentiating them in terms of their structure or amount from workers in the general or other production sectors?**

On collective agreements in the care sector, see above answer to question 6.

Collectively agreed wages in other sectors are mostly structured similarly to wages in the care sector: payment is based on tasks, education/qualification level and work experience. Even though these three characteristics are referred to with varying intensity, structural differences are not discernible. However, there are differences in the level of pay. See for example the wages for workers with three years of vocational training, corresponding tasks and six years of work experience, excluding bonuses, shift allowances or other variable pay components:

<p>TVöD-B P-Tabelle (care workers, excluding hospitals)</p>	<p>Metall- und Elektroindustrie ERA Berlin-Brandenburg  (workers in metal or electronic industries)</p>	<p>Entgelttarifvertrag für die Systemgastronomie - BdS Bund  (workers in the system gastronomy)</p>
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Remuneration group	Gross remuneration	Remuneration group	Gross remuneration	Remuneration group	Gross remuneration
P7 Stufe 4	3.379 EUR	EG 6 (HS)	3.395 EUR	TG 5	2.488 EUR

**11. Have there been any legal disputes or conflicts publicised by the media in your country over “wages” in the care sector and gender discrimination?**

See above answer to question 7.

## 12. Reconciling work and family life

**12. Do the legislation or, if applicable, collective agreements for the care sector or for each care sector job make specific provision for reconciling work and family life?**

Regulations for reconciling work and family life are set by general statutory laws (maternity protection will here be considered as health and safety protection, see below questions on gender 15.-19.).

Parental leave (Elternzeit) and parental allowance (Elterngeld) are regulated by the Federal Parental Allowance and Parental Leave Act (Elterngeld- und Elternzeitgesetz, BEEG). It allows parents who were employed at the time of their child's birth to take parental leave for up to 3 years (Sec. 15 (2) BEEG); during this time they are protected from dismissal (Sec. 18 BEEG). A share of up to 24 months can be taken between the third birthday and the child's completed eighth year. Parental leave may be taken, even on a pro rata basis, by either parent alone or by both parents jointly. An employee on parental leave may not be employed for more than 32 hours per week, averaged over the month (Sec. 15 (4) BEEG). A reduction in working time and its distribution may be requested and can only be turned down with justified reasons (Sec. 15 (5)-(7) BEEG).

Parental allowance (Elterngeld) is intended to compensate for the loss of earnings; it is covered by the state, i.e. it is not a social security benefit, and it is generally calculated on the basis of 67% of the parent's income before the birth of the child (Sec. 2 BEEG; at least 300 Euro, even for persons without an income). Employees as well as self-employed persons can claim parental allowance.

With the basic parental allowance (Secs. 2, 3 BEEG), the parents altogether can receive a parental allowance for 12 months per child. Parents are free to divide the months between themselves. Partners who share the rights to basic parental allowance with each other, win two more months of entitlement between them (single parents are entitled to 14 months of basic parental allowance) (Sec. 4 (3) BEEG). In the case of "ElterngeldPlus" (Sec. 4a (2) BEEG), parents can receive a parental allowance for 24 months, however at an amount half the basic parental allowance. "ElterngeldPlus" is granted for four additional months if a parent works between 25 and 32 hours per week during this time (Sec. 4b (1) and (2) BEEG) ("Partnerschaftsbonus").

In the case of care for close relatives, the Caregiver Leave Act (Pflegezeitgesetz, PflegeZG) entitles employees, trainees and employee-like persons (Sec. 7 (1) PflegeZG) leave to take care of their close relatives—who counts as a close relative is outlined in Sec. 7 (3) PflegeZG. Employees can take full or partial leave, without



pay by the employer (Sec. 3 PflegeZG) for a period of up to six months (Sec. 4 PflegeZG); short-term caregiver leave can be taken for up to 10 days (Sec. 2 PflegeZG), but be extended up to the maximum period. The employer may not terminate the employment relationship from twelve weeks before the announced start until the end of the leave (Sec. 5 PflegeZG).

Longer-term care of relatives for up to 24 months is also regulated by the Family Caregiver Leave Act (Familienpflegezeit, FPfZG)—in contrast to PflegeZG, this entitlement is only applicable in companies with 26 or more employees (Sec. 2a (5a) FPfZG). This Act enables employees to reduce their working time to take care of a close relative; the reduced working hours must be at least 15 hours per week (Sec. 2 FPfZG). To cover the temporarily reduced income, the employee may apply to the Federal Office for Family and Civil Society Tasks for an interest-free loan payable in monthly instalments for the time of relative care (Sec. 3. (1) FPfZG). Entitlements by the FPfZG and PflegeZG can be combined, but only up to a maximum of 24 months (Sec 4 (1) PflegeZG).

Moreover, employees who take leave to organize an acute care situation for a close relative for up to ten days, can receive a wage replacement benefit (care support allowance (Pflegeunterstützungsgeld)) from their health insurance fund or the private compulsory care insurance (Sec. 44a SGB XI).

Other ways to improve the work-life balance are the options guaranteed by the Part-Time and Fixed-term Employment Act (TzBfG) for employees to apply for part-time employment, which the employer can only refuse with justified reasons (Sec. 8 TzBfG). Under certain conditions, there is also a right to ask for part-time work for a specific time span (at least one year, a maximum of five years; Sec. 9a TzBfG, "Brückenteilzeit").

For employees who benefit from collective agreements in the public sector (TVöD/TV-L<sup>16</sup>), including the healthcare professions (TVöD-B), Sec. 29 (1)e) TVöD/TV-L provides for paid time off from work of one day per calendar year to care for a seriously ill relative living in the same household. Moreover, public employees have right to reduce their working time for up to five years if they care for at least one child below the age of 18 and look after or care for another relative in need of care (Sec. 11 (1) TVöD).

According to the coalition agreement of the governing parties for 2021-2025, government plans to implement a two weeks partner leave after birth with the intention of increasing both the duration of parental leave and the participation of fathers in parental leave and parental allowance.<sup>17</sup> This follows Directive (EU) 2019/1158, which Germany implemented with a revision of BEEG in 2023, without yet including the partner leave—this is currently debated for 2024.

**- Do the legislation or, if applicable, collective agreements make any reference to reconciling work and family life "for women workers" in the care sector in general or in each care sector job? If so, please summarise or comment.**

Gender is only explicitly referenced in the Maternity Protection Act (Mutterschutzgesetz, MuSchG), which is covered below (questions 15.-20.) as a health and safety regulation.

In the realm of parental leave and parental allowance (BEEG), the extra months of parental allowance as well

<sup>16</sup> Collective agreement of the public sector (Tarifvertrag für den Öffentlichen Dienst, TVöD) applies to federal and municipal employees, and the Collective Agreement for the Public Service of the Federal States (Tarifvertrag für den öffentlichen Dienst der Länder, TV-L) applies to state employees (except for Hessen, which has its own TV-H).

<sup>17</sup> SPD, Bündnis 90/Die Grünen und FDP, 'Koalitionsvertrag 2021-2025: Mehr Fortschritt wagen. Bündnis für Freiheit, Gerechtigkeit und Nachhaltigkeit' (2021)



as the rules on “Elterngeld Plus” are meant to incentivize fathers to take parental leave. However, the regulations are not gender-specific, but gender-neutral.

Pursuant to Sec. 27 (1) 1 AGG, any person may contact the Federal Anti-Discrimination Agency (Antidiskriminierungsstelle des Bundes, ADS) if they believe that they have been discriminated against on the grounds of gender (Sec. 1 AGG) because of taking time off or adjusting working hours as a parent or family caregiver under the BEEG, PflegeZG, or FPfZG.

**- Have there been any court rulings on this matter? If so, please summarise or comment.**

There are many court rulings on the right to reduce working hours according to Sec. 8 TzBfG. Among these, we found one judgment that concerned the care sector. The plaintiff was a single mother of a one-year-old child; she was employed as a nursing professional in elderly care and demanded that her employer reduce her working hours. She lost the case because the employer could argue that urgent operational reasons preclude the distribution of working time requested by the plaintiff.<sup>18</sup>

**- Do the legislation or, if applicable, collective agreements, provide for different provisions in terms of work-life balance for staff in each of these care sector occupations compared to ordinary workers or workers in other production sectors? If so, please summarise or comment on the case(s).**

For regulations to increase the compatibility of work and family in collective agreements in care sector see the answers to this question above. Other sectors provide collective agreements and company agreements on the topics of caring for relatives, flexible working hours, parental support, parental leave, childcare and employer-provided social benefits for families. However, there are too many existing collective agreements to summarize in this report.<sup>19</sup>

**- Have there been any court rulings on differences in conciliation between the care sector and other sectors? If so, please summarise or comment on the case(s).**

We do not know of any such rulings.

## 13.-16. Accidents, health and safety at work

**13. Have statistics or databases been published in your country on occupational accidents or illnesses arising from the work of personnel in the care sector as a whole or in each of the care sector jobs according to the workers' gender?**

Employers are obliged to report occupational accidents in their companies to the accident insurance institutions if insured persons are killed or injured in such a way that they become incapable of work for more than three days (Sec. 193 (1) SGB VII). For care sectors, the Employer's Liability Insurance Association for Health Services and Welfare Care (Berufsgenossenschaft für Gesundheitsdienst und Wohlfahrtspflege, BGW), (see section 7.1. in WP 2), collects annual data on occupational accidents (Sec. 8 SGB VII) and diseases

<sup>18</sup> (2014) 9 AZR 915/13 (BAG)

<sup>19</sup> For an overview, see Christiane Flüter-Hoffmann, 'Familienfreundliche Regelungen in Tarifverträgen und Betriebsvereinbarungen: Beispiele guter Praxis' (2005) <<https://www.bmfsfj.de/resource/blob/76376/34cf5d066c64a0f498ed612b45a6b1a7/familienfreundliche-regelungen-data.pdf>> accessed 5 October 2023





(Sec. 9 SGB VII) for employees in the health and care sector; data are not differentiated according to care professions). This data covers all healthcare professionals (e.g., nursing staff, doctors, veterinaries, etc.); to obtain data exclusively for nursing staff, an additional inquiry must be made to the BGW.

The data is published in the annual statistical reports of the German Statutory Accident Insurance institution (Deutsche Gesetzliche Unfallversicherung, DGUV),<sup>20</sup> the umbrella organisation for BGW and employer liability insurance associations for other sectors (Berufsgenossenschaften); it also covers the public sector accident insurance institutions (Unfallversicherungsträger der öffentlichen Hand).

There are no gender-specific data available.

**- If so, do the databases present aggregated data, micro-data, or both (aggregated data: data at national or regional level; micro-data: individual data, collected but not published, only available to researchers)?**

The data are aggregated on the national (federal) level.

**- Are these databases public and freely accessible to everyone, or only to researchers?**

The data published by the BGW on the website of the DGUV are available free of charge.

**- If published databases exist, please provide links and/or how to request them.**

The above-mentioned data for years 2021 and 2022 are available here: <https://www.dguv.de/de/zahlen-fakten/au-wu-geschehen/arbeitsunfaelle/index.jsp>.

Data for earlier years can be requested directly from BGW (free of charge): <https://www.bgw-online.de/bgw-online-de/kontakt/kontakt-service-43312>.

**14. Describe or comment on any statistics or databases you have found regarding the participation of male and female workers in the care sector workforce, either in general, or in relation to each of the various occupations that make up the care sector.**

Data on occupational accidents subject to reporting (Meldepflichtige Arbeitsunfälle) from the individual employer liability associations for 2022 show that the total number of accidents in the health and care sector (111.183) is among the highest compared to other sectors represented, surpassed by administration (149.822),<sup>21</sup> wood and metal industry (144.455) and trade and merchandise logistics (123.301), but ahead of construction (107.678), transport post-logistics-telecommunications (73.709), hotels and restaurants (68.376), energy, textiles, electrical and media (61.359) and basic materials and chemicals (28.665).<sup>22</sup> According to statistics requested from the BGW, of the 111.183 occupational accidents in the health and care sector in 2022, 29.465 were directly related to the care sector. In addition, 66.268 of 370.141 suspected occupational illnesses (Berufskrankheiten Verdachtsanzeigen) in all sectors<sup>23</sup> were reported in the care sector. The reports do not say anything about the reasons for these high numbers. Training material by the

<sup>20</sup> Deutsche Gesetzliche Unfallversicherung, 'Statistik - Arbeitsunfallgeschehen 2022' (September 2023) <<https://publikationen.dguv.de/widgets/pdf/download/article/4759>> accessed 10 October 2023

<sup>21</sup> Administration in private companies and occupations that do not belong to other employer's liability insurance associations.

<sup>22</sup> Deutsche Gesetzliche Unfallversicherung, 'Arbeits- und Wegeunfallgeschehen' <<https://www.dguv.de/de/zahlen-fakten/au-wu-geschehen/index.jsp>> accessed 4 October 2023

<sup>23</sup> ibid



Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (BMFSFJ) suggests that working under time pressure to be one of the mental stresses that lead to increasing number of sick days in the sector.

**15. Do the legislation or, if applicable, collective agreements, for each of these occupations in the care sector, make specific provision for women in terms of occupational safety and health? If so, please provide details.**

Sec. 1 MuSchG explicitly refers to pregnant women in order to protect their health and that of their child.

MuSchG implements Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (Pregnant Workers Directive). To protect the pregnant employee, the employer is prohibited from sending the pregnant employee to work during late pregnancy (six weeks before the birth – unless the pregnant woman expressly declares her willingness to perform work) and after childbirth (eight weeks) (Sec. 3 (1) MuSchG). The employee cannot be fired during pregnancy and for four months after giving birth (Sec. 3 MuSchG). The employer is not allowed to employ the pregnant or breastfeeding employee to work overtime (Sec. 4 MuSchG), nightshifts (Sec. 5 MuSchG), and Sundays and holidays (Sec. 6 MuSchG).

**16. Have there been any court rulings on this matter? If there have been court rulings, please summarise or comment on them.**

We do not know of any such cases.

## 17.-20. Termination of contract, social protection

**17. Is there any specific provision for termination of contract that differentiates between men and women in each of these occupations? If so, please provide details.**

The employee cannot be fired during pregnancy and for four months after giving birth (Sec. 17 MuSchG). This regulation generally applies to all employees, not just to care workers.

The AGG, by implementing Art. 2 (2b) Directive 2006/54/EG, states that direct discrimination on grounds of sex shall also be taken to occur in the event of the less favourable treatment of a woman on account of pregnancy or maternity (Sec. 3 (1) AGG).

**18. Have there been any court rulings on this matter? If there have been court rulings, please summarise or comment on them.**

In 2021, the Regional Labour Court in Mecklenburg-Vorpommern had to decide a case that involved a female professional nurse who worked for a severely disabled person, who was also her employer. Her contract was supposed to end in the event of his death. As was pregnant at the time of his death, she argued, on the basis of Sec. 17 MuSchG, that her contract could not be terminated in the late stages of her pregnancy. She lost the case because the judges deemed the employment contract to be a fixed-term contract; the provision according to which the employment contract ended with the death of the employer is also sufficiently definite, since the date of death of a person can be determined beyond doubt.<sup>24</sup>

<sup>24</sup> (2021) 5 Sa 295/20 (LAG Mecklenburg-Vorpommern)



**19. Is there any specific provision for social protection that differentiates between men and women in each of these occupations? (The term social protection refers to benefits provided by the State such as unemployment benefits, social security, or social assistance, etc.)**

Parental allowance (Elterngeld) is covered by the state, it is not a social security benefit. It is intended to compensate for the loss of earnings, but it is not limited to a specific gender (Sec. 1 BEEG)—parents are free to divide the 12 (up to 14 months) between themselves (Sec. 4 (3) BEEG), with “ElterngeldPlus” Sec. 4a (2) BEEG up to 24 months (for more details, see above question 12.).

During maternity leave, the employee is entitled to a maternity allowance (Mutterschaftsgeld) (max 13 EUR per day) (Sec. 19 MuSchG), covered by their statutory health insurance (Sec. 19 (1) MuSchG) or by the state (Sec. 19 (2) MuSchG), and a maternity allowance supplement from her employer. The maternity allowance supplement equals the difference between 13 euros and the employee’s average daily pay (Sec 20 (1) MuSchG).

Women who are barred from working activity due to maternity protection, are entitled to maternity protection pay (Mutterschutzlohn) from their employer—it corresponds to the average pay for the last three calendar months before pregnancy (Sec. 18 MuSchG).

**20. Have there been any legal disputes in your country concerning the granting of social benefits to staff working in the care sector that have led to direct or indirect discrimination on grounds of sector? If so, please summarise or comment on the case(s).**

We do not know of any legal disputes on the matter.

## 21. Equality Bodies, reports

**21. If there are Equality Bodies in your country, do you know if they have undertaken any action, report, monitoring, or judicial activity in relation to the rights of women workers in care occupations? If so, please summarise or comment.**

The Federal Anti-Discrimination Agency (Antidiskriminierungsstelle des Bundes, ADS) is an independent agency with the German Federal Ministry for Family Affairs, Senior Citizens, Women and Youth. The ADS was established in 2006 in accordance with Secs. 25-30 AGG which implemented EU Directives 2000/43/EC, 2000/78/EC, and 2006/54/EC. The Independent Federal Anti-Discrimination Commissioner (Unabhängige:r Bundesbeauftragte:r für Antidiskriminierung – since July 2022: Ferda Ataman) is the head of the ADS (Sec. 25 (3) AGG). The Commissioner is elected by the German Parliament (Deutscher Bundestag) for five years (Secs. 26-26i AGG).

The ADS provides information, counselling, support in settlements, and carries out measures to prevent discrimination and commissions scientific studies (Sec. 27 AGG). It also sends regular reports to the German Federal Parliament (Bundestag) every four years (Sec. 27 (4) AGG) and publishes the Annual Report of the Independent Federal Anti-Discrimination Commissioner, which summarizes and describes the various forms



of discrimination which have been reported to ADS during the year. The reports rather focus on users of services, including health and care services, rather than on employees (e.g., care workers).<sup>25</sup> The same is true for the sectoral study "Discrimination Risks and Protection in the Health Sector" (Diskriminierungsrisiken und Diskriminierungsschutz im Gesundheitswesen).<sup>26</sup> However, although the focus of the reports is on the gender discrimination of employees in the health and care sector, the data mostly concerns users of these services rather than employees themselves. There is only a mention of midwives as a severely understaffed care occupation. In another ADS report from 2015 entitled "Equal Rights – Against Gender Discrimination" (Gleiche Rechte – gegen Diskriminierung aufgrund des Geschlechts), one of the reasons cited for the gender pay gap in Germany is the higher presence of women in the care sector, as these professions are still predominantly perceived as "feminine."<sup>27</sup>

There are also anti-discrimination offices at the state level, such as the State Office for Equal Treatment - Against Discrimination in Berlin (Landesstelle für Gleichbehandlung – gegen Diskriminierung), which is responsible, among other things, for raising awareness of anti-discrimination rights and promoting the development and implementation of strategies against structural discrimination.

The German Federal Government regular presents Reports on Gender Equality before parliament. Its second report addressed the issue of gender and care work in particular, and called for necessary reforms to eliminate the unequal gender presence in this profession.<sup>28</sup>

The Federal Foundation for Equality (Bundesstiftung Gleichstellung) is a federal foundation under public law (Sec. 1 Act on the Establishment of the Federal Foundation for Equality (Gesetz zur Errichtung der Bundesstiftung Gleichstellung, GleichStiftG)) with the purpose to strengthen and promote equality between women and men in Germany (Sec. 2 GleichStiftG). Its tasks are, among other things, collecting, processing and providing information, data and facts on the subject of equality, commissioning studies (Sec 3 (1) 1 GleichStiftG) and strengthening practical gender equality work, in particular by advising administration, civil society, etc. (Sec 3 (3) 1 GleichStiftG).

## 22. General legal evaluation on no-discrimination

**22. Comment whether the care sector in your country complies with international and EU obligations regarding non-discrimination on the grounds of sex in the field of employment and social protection. Describe the main regulations in this field and refer to whether equal working conditions (e.g., pay) are**

<sup>25</sup> Unabhängige Bundesbeauftragte für Antidiskriminierung, 'Jahresbericht 2022' (June 2023) <[https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/Jahresberichte/2022.pdf?\\_\\_blob=publicationFile&v=7](https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/Jahresberichte/2022.pdf?__blob=publicationFile&v=7)> accessed 10 October 2023

<sup>26</sup> Susanne Bartig and others, 'Diskriminierungsrisiken und Diskriminierungsschutz im Gesundheitswesen – Wissensstand und Forschungsbedarf für die Antidiskriminierungsforschung: Studie im Auftrag der Antidiskriminierungsstelle des Bundes' (Juni 2021) <[https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/Expertisen/diskrimrisiken\\_diskrimschutz\\_gesundheitswesen.html](https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/Expertisen/diskrimrisiken_diskrimschutz_gesundheitswesen.html)> accessed 10 October 2023

<sup>27</sup> Antidiskriminierungsstelle des Bundes, 'Gleiche Rechte – gegen Diskriminierung aufgrund des Geschlechts. Bericht der unabhängigen Expert\_innenkommission der Antidiskriminierungsstelle des Bundes' (Berlin 2015) <[https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/Literatur/Literatur\\_Themenjahr\\_Geschlecht/Handlungsempfehlungen\\_Kommission\\_Geschlecht.pdf?\\_\\_blob=publicationFile&v=2](https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/Literatur/Literatur_Themenjahr_Geschlecht/Handlungsempfehlungen_Kommission_Geschlecht.pdf?__blob=publicationFile&v=2)> accessed 10 October 2023

<sup>28</sup> Bundesregierung, 'Zweiter Gleichstellungsbericht: Erwerbs- und Sorgearbeit gemeinsam neu gestalten' (BT-Drucks. 18/12840)



expressly provided for specifically in the care sector.

*To answer this issue, please take into account the UN Convention on the Elimination of All Forms of Discrimination against Women, adopted on 18 December 1979; ILO Conventions such as the Equal Remuneration Convention, n. 100; Non-discrimination in employment relations (Discrimination (Employment and Occupation) Convention, n. 111; the Workers with Family Responsibilities Convention, No. 156; the Maternity Protection Convention, n. 183; and the Domestic Workers Convention, n. 189.*

*At the European level, remember mainly Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security; Directive 2010/41/EU on the application of the principle of equal treatment between men and women who are self-employed.*

For the AGG and the EntgTranspG see above question 1. They do not provide for special rules for the care sector.

The General Equal Treatment Act (AGG) implements EU Directive 2006/54/EC, prohibiting direct and indirect discrimination, but does not make any direct references to the care sector. Moreover, Germany ratified the ILO Violence and Harassment Convention 190—whether and what legal adjustments, e.g. in the AGG, and enforcement the ratification of the convention will entail is still open.<sup>29</sup> According to Art. 8 (1) b), the members shall identify, in consultation with the employers' and workers' organizations concerned and through other means, the sectors or occupations and work arrangements in which workers and other persons concerned are more exposed to violence and harassment, and No 9 of Recommendation 206 recognizes that in the health sectors and occupations as well as in emergency services and domestic work exposure to violence and harassment may be more likely.

<sup>29</sup> Eva Kocher, 'ILO Convention No. 190 concerning the Elimination of Violence and Harassment in the World of Work and Recommendation No. 206' [2023] Z Problematyki Prawa Pracy I Polityki Socjalnej 1



# MIGRANT STATUS

## Attention – Authors' note:

A) General information on migrants in the care sector is requested in this section; broadly speaking, these are non-EU third country nationals (where appropriate, EU nationals will be included). In some questions, nationals of the countries covered by the report will also be included.

B) Some questions refer to undocumented migrants (or irregular migrants): See notions defined above. In general terms undocumented migrants are those who do not have a residence and work permit in the host country, while documented migrants (or regular migrants) have been granted a residence permit.

C) Some of the questions refer to legislation on foreigners or immigration: by this we mean the legislation that establishes the framework of rights and duties of foreigners in the country; requirements for gaining entry to and working in the country; requirements for bringing family members into the country, etc.

D) Some questions may be answered not only by referring to the specific legislation on aliens, but also to other legislation, such as, for example, the legislation established by each country in the field of human rights or labour rights.

## 1.-4. General overview

### 1. Provide a brief overview of your national legislation on anti-discrimination on the grounds of race or ethnic origin, religion, or belief, in the field of employment or occupation

Art. 3 (3) GG, provides a ban on discrimination because of sex, parentage, race, language, homeland, and origin, faith or religious or political opinions. However, it is not directly applicable to employment contracts.

The AGG provides for rules to prevent or to stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation. It implements EU Directives 2000/43/EC and 2000/78/EC, among others. The rules are in principle similar to the directives.

There are also anti-discrimination laws at the level of the federal state, such as the LADG, which applies to the Berlin public administration and other institutions under public law (Sec. 3 (1) LADG). Among other things, it expressly prohibits direct (Sec. 4 (1) LADG) and indirect (Sec. 4 (2) LADG) discrimination on the basis of ethnic origin, racist and anti-Semitic attributions, and religious beliefs (Sec. 2 LADG).

### 2. Also provide a brief overview of the legislation concerning the rights and duties of "foreigners": EU third country nationals (by this we mean the legislation that establishes the framework of rights and duties of foreigners in the country; requirements for gaining entry to and working in the country; requirements for bringing family members into the country, etc.)

The rights and obligations of EU third-country nationals are regulated by the Immigration Act (Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern, Zuwanderungsgesetz, ZuwandG). The main part of the Act is the Residence



Act (Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory, Aufenthaltsgesetz, AufenthG), which regulates the entry, residence, termination of residence, and integration of people from non-EU countries (Sec. 1). It also regulates residence for purposes of education (Secs. 16-17b), economic activity including employment and self-employment (Secs. 18-21), humanitarian reasons (Secs. 22-26), or family reasons (Secs. 27-36a AufenthG).

In August 2023, the Act on the further development of skilled labor immigration (Gesetz zur Weiterentwicklung der Fachkräfteeinwanderung) was passed. It is meant to implement the new EU Blue Card Directive 2021/1883 and to create better labour market access for workers with low skills, also enabling a “lane change” for asylum seekers. Skilled labour immigration now rests on three pillars, with skilled labour pillar still as the central element of immigration: Whoever is a skilled worker should be able to pursue any qualified occupation in the future. On a second pillar, workers with at least two years of professional experience and a professional qualification recognized by the state in their country of origin, should be able to exercise their profession in Germany with recognition in German – provided a salary threshold is met or the employer is bound by collective agreements. Also, anyone wishing to have their professional qualification recognized in Germany will be able to do so even after having entered the country, if they are in a “recognition partnership” with an employer. The third path focuses on people's potential and would introduce an “opportunity card” on a points system.

Foreigners from countries outside the European Economic Area and the EU may only work in Germany if their residence permit allows it. Sec. 18 (1) AufenthG regulates the “principle of skilled immigration”: “The admission of foreign employees is geared to the requirements associated with making Germany an attractive place to conduct business and research, giving due consideration to the labour market situation. The opportunities given to foreign skilled workers serve to guarantee the supply of skilled workers and to strengthen the social security systems. They are intended to promote the lasting integration of skilled workers into society and the labour market, with due consideration of public security interests.”

While Sec. 18 only applies higher education qualification ((2) No 4), Secs. 18 (3), 18a AufenthG opens the German labour market also to people with recognized vocational training. The provision was introduced in 2020 with the Immigration Act for Skilled Workers (Fachkräfteeinwanderungsgesetz, FachKrEG) and revised in August 2023.

According to Sec. 18 (2) AufenthG, a temporary residence permit to take up employment is granted if the foreigner has a concrete job offer, the Federal Employment Agency has given its approval and the equivalence of the qualification has been established. For foreigners over 44 years of age, there is also a minimum wage limit (unless the foreigner can prove that he or she is covered by adequate old age pension). Where there is a public interest in employing the foreigner, in particular under regional, economic or labour market policy aspects, exceptions are made.

The procedure and conditions for the consent/approval of the Federal Employment Agency, as required by Secs. 39-42 AufenthG, are regulated by the Ordinance on the Employment of Foreigners (Beschäftigungsverordnung, BeschV). For the consent, irrespective of their qualification, a “labour-market test” is required (Sec. 39 (3) AufenthG), i.e. the test if no German workers or foreigners having the same legal rights of access to the labour market (mostly EU workers) are available for the employment concerned.

Usually, an important barrier for making use of these permits, are processes of establish the equivalence of the professional qualification with a German professional qualification. The Federal Professional Qualifications Assessment Act (Gesetz über die Feststellung der Gleichwertigkeit von Berufsqualifikationen,



BQFG) regulates and standardises the procedure for the recognition of foreign professional qualifications. It applies to professions regulated by federal law (such as professions in the care sector regulated by PflBG). It mainly extends the regulations under the EU Directive on the Recognition of Professional qualifications (Directive 2005/36/EC) to non-regulated professions and to professional qualifications from third countries (Sec. 2 (2)). Recognition can be applied for from abroad.

In view of the the arduous and lengthy processes these assessments usually undergo, Sec. 16d (4) AufenthG (Sec. 2 BeschV) also provides for temporary residence permits that enable undergoing the process of recognition of the professional qualification in Germany. These permits however must be based on an agreement between the Federal Employment Agency and the employment administration of the foreigner's country of origin. The agreement are a way of taking into account the interests of the countries of origin and thus avoiding a "brain drain".

A consent of the Federal Employment Agency is not necessary in the case of the EU Blue Card (Sec. 18g AufenthG), implementing Directive (EU) 2021/1883.

*In terms of national legislation on foreigners or migrants, please make a brief overview of whether it contains any sections on non-discrimination, as well as the rights of foreigners in employment.*

According to Sec. 39 (2) No 1, the Federal Employment Agency may only give its approval to the employment of foreigners as skilled workers if the worker is not employed under less favourable terms than German nationals employed in an equivalent position.

There are no specific rights for foreigners in employment, apart from the provisions on undocumented workers (see questions 24.-27.). Art. 3 (3) GG contains a ban on discrimination based on origin, which applies to the public sector. Within the scope of EU law, Art. 21 (2) CFR any discrimination on grounds of nationality shall be prohibited. As for the private sector outside of the scope of EU law, experts hold that a discrimination of third-party nationals based on their origin will be considered a discrimination on the basis of ethnic origin.<sup>30</sup>

### **3. Make a brief social commentary on the presence of migrant populations (both EU and non-EU nationals), in employment in your country.**

Even before the implementation of the so-called "guest worker" programmes via the recruitment agreements (Anwerbeabkommen) between the 1950s and 1970s—for instance with Italy (1946), Greece (1960), Turkey (1961), and Yugoslavia (1965), Germany relied on labour by foreigners, especially in agriculture and mining, and later in booming industry. Their numbers have steadily increased throughout the 20th and 21st centuries and they have played an important role in the German economy.<sup>31</sup>

However, it was not until the beginning of the 21st century that federal government led by the Social Democrats (SPD) and the Green Party (Die Grüne) recognised Germany as a "country of immigration"

<sup>30</sup> Wolfgang Däubler, '§ 1, marg. 36' in Wolfgang Däubler and Thorsten Beck (eds), *Allgemeines Gleichbehandlungsgesetz: Mit Entgelttransparenzgesetz, Berliner LADG : Handkommentar* (5<sup>th</sup> edn. Nomos 2022); Gregor Thüsing, '§ 1 AGG, marg. 68' in Franz J Säcker and others (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (8<sup>th</sup> edn. C.H.Beck 2021)

<sup>31</sup> Jochen Oltmer, *Migration. Geschichte und Zukunft der Gegenwart, 2. aktualisierte und erheblich erweiterte Auflage* (Bundeszentrale für politische Bildung 2020); Manuela Bojadžijev, *Die windige Internationale: Rassismus und Kämpfe der Migration* (Verlag Westfälisches Dampfboot 2023)





(Einwanderungsland) by passing the Immigration Act (Zuwanderungsgesetz, ZuwandG) in 2005. The Act started to regulate state integration offers for immigrants (non-EU third country and EU nationals) in a uniform manner, with integration courses for foreigners as its core matter.<sup>32</sup> Importantly, it implemented the Residency Act (Aufenthaltsgesetz, AufenthG)—for EU citizens, the Freedom of Movement Act/EU (Freizügigkeitsgesetz/EU, FreizügG/EU) regulates these matters. With the newest revision of the FachKrEG the AufenthG has been amended with the aim of making Germany more attractive to skilled workers from non-EU third countries and facilitating their employment.<sup>33</sup>

According to the latest data for 2022, 23.8 million people with a migration background (Migrationshintergrund)<sup>34</sup> lived in Germany (29.27% of the total population (81.3 million)), of whom 13.4 million (16.48% of the total population) did not have German nationality.<sup>35</sup> Most of them came from EU countries (5.064.515 in total), the majority of them having Romanian nationality (883.670), followed by Polish nationals (880.780), Italian nationals (644.970), and Croatian nationals (436.325). Overall, however, most foreigners living in Germany had Turkish nationality (1.487.110), followed by Ukrainians (1.164.200) and Syrians (923.805)—the latter two mainly due to the on-going war in Ukraine and the unstable situation after the recent civil war in Syria, respectively.<sup>36</sup>

According to the data provided by the BA,<sup>37</sup> a total of 5.6 million (4.9 million regularly employed)<sup>38</sup> foreign employees were working in Germany in 2022, (14.43 %) out of 38.8 million altogether (34.4 million regularly employed). 2.7 million were from EU countries, the majority of them having Romanian nationality (564.000) and Polish nationality (553.000), as well as 2.9 million from non-EU third countries, the majority of them having Turkish nationality (650.000). Between 2021 and 2022, the presence of foreigners from non-EU third countries (2.5 million→2.9 million) overtook those from the EU (2.6 million→2.7 million)—in other words, now more non-EU third country nationals work in Germany than EU nationals. Most foreign employees worked in transport and logistics (998.530), followed by food and catering (668.780).

#### **4. Finally, make a brief social commentary on the presence of migrant populations (both EU and non-EU nationals), in the care sector in your country.**

Foreigners, i.e. people without a German passport, account for around one in seven employees in the German care sector. Whereas a few years ago it was predominantly EU citizens, third-country nationals now make up the majority of foreigners in the care sector—on the level of single nationalities, however, Polish

<sup>32</sup> Bundesregierung, 'Zuwanderungsland Deutschland' <<https://www.bundesregierung.de/breg-de/suche/zuwanderungsland-deutschland-403874>> accessed 25 September 2023

<sup>33</sup> On this general strategy, see also Kristin Noack and Greta-Marleen Storath, 'Migrantische Arbeitskräfte in der formellen Altenpflege in Deutschland und Schweden' [2022] WSI-Mitteilungen 401

<sup>34</sup> All persons who were either not born with German citizenship themselves or who have at least one parent who was not born with German citizenship. This category has been used by the Federal Statistical Office in surveys of federal statistics since 2005.

<sup>35</sup> However, they can be born in Germany to non-German parents (Sec. 4 StAG (Nationality Act, Staatsangehörigkeitgesetz)—the jus sanguinis rule.

<sup>36</sup> Statistisches Bundesamt, 'Ausländische Bevölkerung nach Altersgruppen und ausgewählten Staatsangehörigkeiten am 31.12.2022' (31 December 2022) <<https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Bevoelkerung/Migration-Integration/Tabellen/auslaendische-bevoelkerung-altersgruppen.html>> accessed 25 September 2023

<sup>37</sup> Bundesagentur für Arbeit, 'Migration und Arbeitsmarkt' <<https://statistik.arbeitsagentur.de/DE/Navigation/Statistiken/Interaktive-Statistiken/Migration-Zuwanderung-Flucht/Migration-Zuwanderung-Flucht-Nav.html>> accessed 25 September 2023

<sup>38</sup> Excluding marginally employed, such as on the mini-job basis (see WP2, 4.5.).



nationals are the largest group. Most of foreigners work in nursing in medical care (KldB – 813), and slightly less in elderly care (KldB – 821). While almost two-thirds of employed Germans are nursing professionals, it is only half of foreign employees (the other half are mainly nursing assistants)—the report does not give more precise information.<sup>39</sup>

The picture changes, however, if one includes the so-called live-in workers (domestic workers who live in the household they work in), who come as commuting migrants mainly from Central and Eastern European countries (especially Poland) and work temporarily in German private households. Live-in workers are not recorded in official statistics due to the high number of undeclared and irregular employment relationships (bogus self-employment); they represent the largest informal part of the care sector (see below questions 5.-9.). Due to the prevalence of home-based long-term care in Germany (80%)<sup>40</sup> and the resulting need for home care workers, live-ins came to form, unintentionally, what the research and consulting organisation “minor” (see below, question 5.) calls a fourth pillar<sup>41</sup> of the German care system, as the current supply of outpatient care does not meet the demand.<sup>42</sup>

## 5.-9. Statistic or databases on foreign and migrant workers

*This question includes both EU nationals and third-country nationals in the EU as the object of analysis.*

### 5. Have statistics or databases been published in your country on foreigners or immigrants who are part of the personnel providing services in each of these care sector occupations?

The BA provides databases and statistics (see above question 3. on gender) on employment for the entire labour market and differentiates by nationality, country of origin, and migration background (see above fn 34). Such data for the care sector can be (partially) found in the BA’s published statistics and reports, but not on its interactive statistics website. Moreover, there is no official data on live-in workers, but only estimations made by public expert organizations working in this field, such as minor,<sup>43</sup> and in scientific publications.<sup>44</sup>

The statistics “Employees by Occupation” (Beschäftigte nach Berufen) published by the BA uses the KldB 2010 (for an explanation, see above questions 3. and 4. on gender) and distinguishes between regularly employed German nationals and foreigners (not separate nationalities) in different care occupational categories.<sup>45</sup> The BA

<sup>39</sup> Bundesagentur für Arbeit, ‘Arbeitsmarktsituation im Pflegebereich’ (2023) <[https://statistik.arbeitsagentur.de/DE/Statischer-Content/Statistiken/Themen-im-Fokus/Berufe/Generische-Publikationen/Altenpflege.pdf?\\_\\_blob=publicationFile](https://statistik.arbeitsagentur.de/DE/Statischer-Content/Statistiken/Themen-im-Fokus/Berufe/Generische-Publikationen/Altenpflege.pdf?__blob=publicationFile)> accessed 10 October 2023

<sup>40</sup> See WP 2, 2.3.

<sup>41</sup> First pillar are family members, followed by outpatient (second pillar), and inpatient care (third pillar) (Minor – Projektkontor für Bildung und Forschung, ‘Die „vierte Säule“ der Pflege: Aktuelle Bedarfe und Erwartungen von 24-Stunden-Betreuungskräften (Live-Ins) in Bezug auf ihre Arbeit in Deutschland’ (2023) <<https://minor-kontor.de/die-vierte-saeule-der-pflege/>>)

<sup>42</sup> Minor – Projektkontor für Bildung und Forschung, ‘Tragende Säule bröckelnder Versorgungssicherheit ohne regulären Untergrund: Situation und zukünftige Entwicklung in der ambulanten Pflege und die Perspektive von Betreuerinnen aus der 24-Stunden-Betreuung (Live-Ins) auf die Pflegesituation vor Ort’ (2022) <[https://minor-kontor.de/wp-content/uploads/2022/10/FE\\_WP\\_Tragende-Saeule-broeckelnder-Versorgungssicherheit-ohne-regulaeren-Untergrund\\_22-10-20.pdf](https://minor-kontor.de/wp-content/uploads/2022/10/FE_WP_Tragende-Saeule-broeckelnder-Versorgungssicherheit-ohne-regulaeren-Untergrund_22-10-20.pdf)>

<sup>43</sup> Minor Kontor <<https://minor-kontor.de/>> accessed 21 September 2023

<sup>44</sup> See fn 52

<sup>45</sup> There are no data for specific care occupations that do not fall into the five-digit keys of the KldB 2010 (see question 3 on gender for explanation).



makes these data available on a monthly basis at the federal and state level.<sup>46</sup> Moreover, every two years, the BA publishes a report (BA Report), which contains statistics on foreigners employed in this sector and separates them according to migration status (EU nationals, non-EU third-country nationals, asylum countries, West Balkan countries, triple-win programme, and top five countries of origin of care workers (see below)).<sup>47</sup>

**- If yes, which care sector occupations are they most employed in?**

According to the BA report, of total 1.7 million care workers, 13% (218.000) of all employees in the care sector were foreigners in 2021;<sup>48</sup> as of March 2023, their percentage increased to 16% (270.460).<sup>49</sup>

According to the BA's monthly statistics, as of December 2022, 1.833.762 regularly employed German nationals and foreigners worked in two occupational groups: nursing in medical care (KldB – 813) and elderly care (KldB – 821).<sup>50</sup> Out of 1.2 million regularly employed nurses in medical care, 1.045.103 held German nationality and 150.048 were foreigners (12.5%), while out of 633.762 working in elderly care, 519.032 were German in comparison to 114.730 foreigners (22.1%). According to the occupational subgroups sorted via KldB 2010, most foreigners worked in nursing in medical care (without specialization, KldB – 8130) (137.887 (7.52% out of 1.833.762), followed by professions in elderly care (without specialization, KldB – 8210) (113.859 (6.21%). Foreigners are least employed in professional child care (KldB – 8132) (127 (0.006%) and leading positions in elderly care (KldB – 8219) (161 (0.008%)).<sup>51</sup>

In the absence of official figures on live-in workers, estimates based on available research suggest that between 200.000 and 700.000 live-ins were employed in Germany in 2020/2021.<sup>52</sup> Slightly more than 90% are female. The majority commute from Central and Eastern EU countries, especially Poland—according to some estimates almost 50% are from Poland, and the rest come mainly from Southern and Eastern European countries that are not part of the EU (Serbia, Ukraine, etc.).

**- If there are statistics or databases, do these establish the “nationality” or origin of foreign personnel providing**

<sup>46</sup> Bundesagentur für Arbeit, 'Beschäftigte nach Berufen (Klassifikation der Berufe 2010) - Deutschland, West/Ost und Länder (Quartalszahlen)'

<[https://statistik.arbeitsagentur.de/SiteGlobals/Forms/Suche/Einzelheftsuche\\_Formular.html?nn=1523064&topic\\_f=beschaeftigung-sozbe-bo-heft](https://statistik.arbeitsagentur.de/SiteGlobals/Forms/Suche/Einzelheftsuche_Formular.html?nn=1523064&topic_f=beschaeftigung-sozbe-bo-heft)> accessed 25 September 2023

<sup>47</sup> Bundesagentur für Arbeit, 'Arbeitsmarktsituation im Pflegebereich' (2023)

<[https://statistik.arbeitsagentur.de/DE/Statischer-Content/Statistiken/Themen-im-Fokus/Berufe/Generische-Publikationen/Altenpflege.pdf?\\_\\_blob=publicationFile](https://statistik.arbeitsagentur.de/DE/Statischer-Content/Statistiken/Themen-im-Fokus/Berufe/Generische-Publikationen/Altenpflege.pdf?__blob=publicationFile)> accessed 10 October 2023

<sup>48</sup> *ibid*

<sup>49</sup> The figure is derived from the statistical analysis of the BA we requested.

<sup>50</sup> The number is higher than the one used in the BA report (1.7 million) because the latter excludes some occupational subgroups such as emergency services (KldB – 8134).

<sup>51</sup> Bundesagentur für Arbeit, 'Beschäftigte nach Berufen (Klassifikation der Berufe 2010) - Deutschland, West/Ost und Länder (Quartalszahlen)'

<[https://statistik.arbeitsagentur.de/SiteGlobals/Forms/Suche/Einzelheftsuche\\_Formular.html?nn=1523064&topic\\_f=beschaeftigung-sozbe-bo-heft](https://statistik.arbeitsagentur.de/SiteGlobals/Forms/Suche/Einzelheftsuche_Formular.html?nn=1523064&topic_f=beschaeftigung-sozbe-bo-heft)> accessed 25 September 2023

<sup>52</sup> Greta Schabram and Nora Freitag, 'Harte Arbeit, wenig Schutz: Osteuropäische Arbeitskräfte in der häuslichen Betreuung in Deutschland' (Berlin 2022); Bernhard Emunds and others (eds), *Pflegearbeit im Privathaushalt: Sozialethische Analysen* (Lea Quaing, Brill Ferdinand Schöningh 2021)



### services in these sectors? What nationalities are predominant?

The results published in the BA report<sup>53</sup> for 2022 show that the majority of foreigners employed in the care sector were from non-EU third countries (62% (48% in 2017)), followed by EU nationals (38% (51% in 2017))—hence, non-EU third-country nationals have overtaken the EU nationals in the past 5 years. Of these, 35% (45% in 2017) are from the Top 5 countries (see below), 18% are from Western Balkan countries (18% (15% in 2017)), 17% (11% in 2017) are from the top triple-win countries (Vietnam, Philippines, Bosnia and Herzegovina, etc.), and 8% (3%) are from the top asylum countries.

According to the special evaluation (Sonderauswertung) we requested from the BA on employees in the German care sector by nationality, of the 270.460 foreign employees in 2023, the top five (Top 5) non-German nationalities are from Poland (22.859, 8.45%), Bosnia and Herzegovina (18.758, 6.93%), Turkey (16.755, 6.19%), Romania (16.549, 6.11%), and Croatia (15.238, 5.63%). Further data on the nationalities of foreign employees in the various nursing occupations can be requested for a fee.

#### - Do databases also distinguish by gender? If yes, please describe what the statistics show.

Databases by the Federal Statistical Office and the BA distinguish by gender for different care occupations according to KldB 2010 (see above question 3. on gender)—on the different gender representation in the care sector and in different occupational subgroups, see question 4. on gender. However, these do not show how many among them are foreigners. The BA's interactive statistics provide only the figures on labour force participation of foreign women (41%, 38% for regular employees (2022)) and men (62%, 59% for regular employees) for the entire German labour market. There are no freely accessible databases that distinguish between the genders of different nationalities working in the care sector or in different care occupations.

#### Do databases exist for each of the occupations, with a distinction between labour migrants, refugees, and other categories of foreigners or migrants?

On the distinction into specific foreigner categories working in the care sector, see answers above—EU nationals, non-EU third-country nationals, asylum countries (not asylum status), West Balkan countries, triple-win programme, and top five countries of origin of care workers.

#### -Do these databases present aggregated data, micro-data, or both (aggregated data: data at national or regional level; micro-data: individual data, collected but not published, only available to researchers)?

This data is aggregated data on national level.

#### - these databases public and freely accessible to everyone, or only to researchers?

As mentioned, such data are mainly available via published statistics and reports from the BA and partially via BA's interactive statistics. However, if one wishes to have access to more detailed data, e.g., on the gender of different nationalities for a specific occupational subcategory in the care sector, individual inquiries must be made, for which there is a fee.

<sup>53</sup> Bundesagentur für Arbeit, 'Arbeitsmarktsituation im Pflegebereich' (2023)  
<[https://statistik.arbeitsagentur.de/DE/Statischer-Content/Statistiken/Themen-im-Fokus/Berufe/Generische-Publikationen/Altenpflege.pdf?\\_\\_blob=publicationFile](https://statistik.arbeitsagentur.de/DE/Statischer-Content/Statistiken/Themen-im-Fokus/Berufe/Generische-Publikationen/Altenpflege.pdf?__blob=publicationFile)> accessed 10 October 2023



- If published databases exist, please provide links and/or how to request them.

**Federal Employment Agency:**

The data of the BA can be accessed via the interactive statistics at its official website: <https://statistik.arbeitsagentur.de/DE/Navigation/Statistiken/Interaktive-Statistiken/Berufe-auf-einen-Blick/Berufe-auf-einen-Blick-Anwendung-Nav.html>

Access to different monthly statistics that contain the percentage of foreigners in different care occupations (according to the KIdB 2010): [https://statistik.arbeitsagentur.de/SiteGlobals/Forms/Suche/Einzelheftsuche\\_Formular.html?nn=1523064&topic\\_f=beschaeftigung-sozbe-bo-heft](https://statistik.arbeitsagentur.de/SiteGlobals/Forms/Suche/Einzelheftsuche_Formular.html?nn=1523064&topic_f=beschaeftigung-sozbe-bo-heft)

**6. Describe any statistics or databases you have encountered:**

See answers to question 5. on migrant status and questions 3. & 4. on gender.

-Describe what these statistics show in relation to the nationality of the person working in the care sector and, if applicable, in relation to the gender by nationality of these staff.

See answers to question 5. on migrant status.

-If you have found statistics or databases, please describe whether these show a distinction between general migrants, refugees, or other categories of migrants?

See answers to question 5. on migrant status.

**7. Have statistics or databases been published on people working in the care sector, whether nationals of your country, EU, or non-EU nationals, differentiating them by race or ethnic origin, religion, or language?**

Such statistics and databases do not exist.

- Do these databases present aggregated data, micro-data, or both (aggregated data: data at national or regional level; micro-data: individual data, collected but not published, only available to researchers)?

Not applicable.

- Are these databases public and freely accessible to everyone, or only to researchers?

Not applicable.

- If published databases exist, please provide links and/or how to request them.

Not applicable.

**8. Describe what statistics or databases you have found, i.e., summarise and comment on the data found on participation in the care sector by workers on the basis of race or ethnicity, religion, and language.**



Not applicable.

**9. Have there been any legal disputes or conflicts publicised by the media about the race or ethnicity, religion or language of staff providing services in the care sector? If so, please describe the situation and the solutions provided.**

The publication “Workplace Integration of Nursing Professionals from Abroad” (Betriebliche Integration von Pflegefachkräften aus dem Ausland),<sup>54</sup> commissioned by the Hans Böckler Foundation (Hans Böckler Stiftung, HBS), a research and study organisation of the German Trade Union Confederation (Deutsche Gewerkschaftsbund, DGB), addresses workplace conflicts between newly immigrated foreigners and German nationals working in the German care sector. Based on interviews with foreign nursing professionals, it shows the complicated cooperation between nurses educated in Germany (often also with a migrant background), and foreign nurses. Expectations and different professional experiences play an important role here. For example, nurses in Southern Europe or Latin America are used to taking over tasks that are assigned exclusively to doctors in Germany. Foreign nurses will therefore miss professional acknowledgment. If such different expectation and disappointments are explained away with stereotypical “cultural differences”, this can have effects as micro-aggressive racism. In addition, due to their weaker knowledge of German, foreign nurses often act only as listeners to German nurses rather than playing an active role, or feel excluded from information; sometimes, language might also be used more or less directly as an instrument of hierarchisation against foreign nurses. An article in the daily newspaper *Süddeutsche Zeitung*<sup>55</sup> that reported on the research findings of this study,<sup>56</sup> pointed out that structural racism in the nursing sector is also related to the fact that foreigners working as nurses in Germany are less likely (14%) to participate in daily meetings with their supervisors than German nationals (37%). In general, any study of the problem should keep in mind that the general public attitude towards migration has worsened in the last years. As migration restriction policies take the lead in public opinion, daily racism and racist attacks increase, and this reflects in workplaces against foreign workers.

Legal disputes in this regard have not been published in the media.

Religion is often an issue, due to the strong involvement of the churches institutions in care sectors. For example, a Catholic hospital in an older case turned down an application for a position as an intensive care nurse in a Catholic hospital, because of the applicant's lack of religious affiliation. The labour court held that the rejection constituted inadmissible discrimination that triggered compensation under Section 15 (2) AGG.<sup>57</sup> According to in 2022 reformed Basic Regulations of Church Service (Grundordnung des kirchlichen Dienstes), Art. 6 (3) of the regulation states that pastoral and catechetical are the only activities that can only be assigned to persons who belong to the Catholic Church—previously this also applied to persons working in educational

<sup>54</sup> Robert Pütz and others, *Betriebliche Integration von Pflegefachkräften aus dem Ausland: Innenansichten zu Herausforderungen globalisierter Arbeitsmärkte* (Study der Hans-Böckler-Stiftung vol 416, Hans-Böckler-Stiftung 2019); see also Grace Lugert-Jose, ‘Philipinische Pflegekräfte in Deutschland’ (September 2023) <[https://gracelugert.com/wordpress/wp-content/uploads/2023/09/GLJ-Arbeitsplatz-Studie-Phil.Nurses-Fokus-D\\_R-14May23-DE.pdf](https://gracelugert.com/wordpress/wp-content/uploads/2023/09/GLJ-Arbeitsplatz-Studie-Phil.Nurses-Fokus-D_R-14May23-DE.pdf)> accessed 2 October 2023

<sup>55</sup> Kristiana Ludwig, ‘Ausländische Pflegekräfte sind nicht willkommen’ *Süddeutsche Zeitung* (7 August 2018) <<https://www.sueddeutsche.de/karriere/arbeitsmarkt-auslaendische-pflegekraefte-sind-nicht-willkommen-1.4083810>> accessed 29 September 2023

<sup>56</sup> Hildegard Theobald, ‘Pflegearbeit in Deutschland, Japan und Schweden: Wie werden Pflegekräfte mit Migrationshintergrund und Männer in die Pflegearbeit einbezogen?’ (Düsseldorf 2018)

<sup>57</sup> (2012) 2 Ca 4226/11 (ArbG Aachen); the case was published by ADS in its handbook: Antidiskriminierungsstelle des Bundes, *Handbuch „Rechtlicher Diskriminierungsschutz“* (Nomos 2017)



and leadership roles.

An article in the weekly newspaper *Zeit*<sup>58</sup> mentions study results by sociologist Aleksandra Lewicki, who investigated the discrimination privilege for Christian churches based on Sec. 9 AGG, which allows affiliated institutions of religious communities to be treated differently based on their religious beliefs. In her studies, she points out that non-Christians, often Muslims, are more likely to receive fixed-term employment contracts than their Christian counterparts.<sup>59</sup> The issue of religious affiliation and working in faith-based organizations, such as nursing, was also highlighted in the ADS report, “Dealing with Religious Diversity in the Workplace” (Umgang mit religiöser Vielfalt am Arbeitsplatz).<sup>60</sup>

## 10.-12. Formal/informal employment

*(This question refers to third country nationals of the EU)*

### 10. Have statistics or databases been published in your country on the percentages of formal or informal employment that may affect the care sector?

For formal employment see questions 3. and 4. on gender and question 5.-9. on migrant Status.

There is no data available on the proportion of informal employment in employment by sector in the Federal Statistical Office.<sup>61</sup> Such data is also not available at the BA, given that it uses only data collected by the employment agencies and job centres (see question 3. on gender).

According to the database by the website World Economics, which covers 155+ countries and adjusts World Bank and IMF estimates of GDP and the size of the informal economy,<sup>62</sup> estimates that the size of Germany's informal economy is 11.2% which would represent approximately \$561 billion at GDP levels.

Due to the high number of undeclared and irregular employment relationships (bogus self-employment) of live-in workers, they represent the largest informal part of the care sector. However, there are no databases or official statistics, only estimates (see question 5. on migrant status).

**- Do databases exist for each of the occupations, distinguishing between formal and informal employment and/or between foreigner and immigrant?**

<sup>58</sup> Lars-Thorben Niggehoff, ‘Muslimische Pfleger dürfen keine Karriere machen’ *Zeit Online* (7 February 2018) <[https://www.zeit.de/gesellschaft/2018-01/pflegenotstand-fluechtlinge-religion-diskriminierung-kirchliche-pflegeeinrichtung?utm\\_referrer=https%3A%2F%2Fwww.google.com%2F](https://www.zeit.de/gesellschaft/2018-01/pflegenotstand-fluechtlinge-religion-diskriminierung-kirchliche-pflegeeinrichtung?utm_referrer=https%3A%2F%2Fwww.google.com%2F)> accessed 2 October 2023

<sup>59</sup> Aleksandra Lewicki and Linda Supik, ‘On Institutions, White Christian Privilege and the Politics of Equality and Citizenship’ in Tobias Neuburger and others (eds), *Gender, Race and Inclusive Citizenship. Dialoge zwischen Aktivismus und Wissenschaft*. (Springer VS 2022)

<sup>60</sup> Antidiskriminierungsstelle des Bundes, ‘Umgang mit religiöser Vielfalt am Arbeitsplatz’ (August 2016) <[https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/Expertisen/expertise\\_umgang\\_mit\\_religioeser\\_vielfalt\\_am\\_arbeitsplatz\\_20160922.html](https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/Expertisen/expertise_umgang_mit_religioeser_vielfalt_am_arbeitsplatz_20160922.html)> accessed 2 October 2023

<sup>61</sup> Statistisches Bundesamt, ‘Indicator 8.3.1 - Proportion of Informal Employment in Total Employment, by Sector and Sex’ <<https://sdg-indikatoren.de/en/8-3-1/>> accessed 27 September 2023

<sup>62</sup> World Economics, ‘World Economics GDP Database’ (May 2023) <<https://www.worldeconomics.com/Concepts/World-Economics-GDP-Database/>> accessed 27 September 2023



We know of no such databases.

**- Do you know whether these statistics or databases distinguish between work migrants, refugees, or other categories of foreigners or migrants?**

Not applicable.

**- Do these databases also distinguish by gender?**

Not applicable.

**- Do these databases present aggregated data, micro-data, or both (aggregated data: data at national or regional level; micro-data: individual data, collected but not published, only available to researchers)?**

Not applicable.

**- Are these databases public and freely accessible to everyone, or only to researchers?**

Not applicable.

**- If published databases exist, please provide links and/or how to request them.**

Not applicable.

**11. Describe or comment on any statistics or databases you have found regarding the participation of migrant workers in the care sector in either the formal or informal economy. Where statistics show data by gender and by category of migrants within the formal and informal economy, please comment on them or include a description of them.**

On statistics or databases for the formal economy, see question 5 on migrant status.

There are no statistical databases on the informal work of third-country nationals or EU citizens in the German care sector. There are only estimates from various research institutes and associations (see question 5. on migrant status), which indicate that the rate of irregular employment is high among live-ins. According to these estimations, slightly more than 90% are female.<sup>63</sup>

**12. Have any statistics or databases been published in your country on the possible presence of “undocumented” or “irregular” immigrants (without authorisation to reside or work in your country) who may be providing services in care occupations?**

There are no official statistics or databases on this topic—not even on how many people are undocumented or without a residence permit in Germany.

There were only estimates from the Pew Research Institute, a Washington-based think tank, which claimed that there were around 1.2 million irregular migrants living in Germany in 2017. This figure was disputed by the Berlin-based German Center for Integration and Migration Research (Deutsches Zentrum für Integrations-

<sup>63</sup> Schabram and Freitag (n 52)





und Migrationsforschung, DeZIM), which criticized the methods and different categories used in the U.S. to arrive at these results. The actual estimate, according to DeZIM, is most likely 63.000, but there is no information on how many of these irregular migrants actually work in the care sector.<sup>64</sup>

- Do these databases also distinguish by gender?

Not applicable.

- Do these databases present aggregated data, micro-data, or both (aggregated data: data at national or regional level; micro-data: individual data, collected but not published, only available to researchers)?

Not applicable.

- Are these databases public and freely accessible to everyone, or only to researchers?

Not applicable.

- If published databases exist, please provide links and/or how to request them.

Not applicable.

- Comment on any statistics or databases you have found regarding the participation of irregular or regular migrants in the care sector. Where statistics have been found which differentiate by gender, please comment on the data.

Not applicable.

## 13. Facilitation of migrants' access to the care sector

*(This question refers to third country nationals of the EU)*

**13. Have measures been taken in your country to facilitate access to work specifically in the care sector for migrants? If yes, please describe them. Also indicate if this sector is understaffed (Are there staff shortages in the sector?).**

The care sector in Germany suffers from severe staff shortages due to the mixture of demographic (aging population), social (gendered character of care, which assigns care work as feminine work), and work-related factors (bad working conditions, absence of an sectoral collective agreement, devaluation of care work, high drop-out rate during training, etc.) (see WP 2, 2.4.).

The provision on granting temporary residence permit to have one's qualification recognised in Germany, based on a bilateral agreement between the competent employment agencies (Sec. 16d (4) AufenthG), has a special clause for the care sector (No 1), referring to professions in the health and care sector regulated by

<sup>64</sup> Roland Hosner, 'One million irregular migrants in Germany? A methodological critique of estimates of irregular migrants in Europe published by Pew Research Center' (February 2020) <[https://www.dezim-institut.de/fileadmin/user\\_upload/Demo\\_FIS/publikation\\_pdf/FA-5003.pdf](https://www.dezim-institut.de/fileadmin/user_upload/Demo_FIS/publikation_pdf/FA-5003.pdf)> accessed on 11 October 2023



federal or state law that can only be exercised with a special authorisation, such as health-, elderly- and child-care nurses (incl. assistants) (Sec. 1 PflBG), midwives (Sec. 5 HebG), and others. The temporary residence permit may in these cases not only aim at establishing the equivalence of the professional qualification with a German professional qualification, but also at having the authorisation granted. These permits are granted for a year, and may be extended up to a maximum period of residence of three years.

Since 2013, the Federal Employment Agency has concluded placing agreements on the bases of this provisions with the employment agencies of several countries. As a general rule, the agreements demand an elementary knowledge of the German language (CEFR level B1). These are organised in the so-called "Triple-Win" programme, cooperation between the German Society for International Cooperation (Deutsche Gesellschaft für Internationale Zusammenarbeit, GIZ) and the Central Placement Office (ZAV) of the Federal Employment Agency, for the sustainable recruitment of nursing staff from abroad. The "triple" benefit is that employers gain linguistically and professionally well-prepared nurses, the foreign nurses gain professional and personal prospects through a transparent placement procedure, and the countries of origin benefit by relieving the burden on their labour markets. Employers not only pay a fee of 7.900 EUR gross) for each nurse placed with them, but also have to cover the costs of having the qualifications recognised in Germany, language training to CEFR level B2, as well as organise appropriate accommodation.

In this framework, more than 3.500 qualifizierte Pflegekräfte from Bosnia-Herzegovina, Serbia, the Philippines and Tunisia have been placed with German employers in the care sector (for numbers: BT-Drs. 19/16732; numbers for 2020/2021: BT-Drs. 20/5615, p. 103. Serbia dropped out of the programme in 2020, due to its own need for care workers. At the moment (July 2023), placement agreements have also been concluded with employment agencies of Indonesia, Kerala (India), Mexico, Jordan and Columbia (the latter two since 2022). Informal cooperation agreements exist since 2019 with El Salvador and Vietnam (in the latter case, for people with work experience but no formal qualification in care work).<sup>65</sup> So far, slightly more than 4.700 care professionals were recruited altogether, most of the from the Philippines (more than 2.000), from Serbia (ca. 900), from Bosnia-Herzegovina (almost 900) and from Mexico (almost 600).<sup>66</sup>

The Federal Ministry of Health funds the German Agency for International Healthcare Professionals (DeFa - Deutsche Fachkräfteagentur für Gesundheits- und Pflegeberufe), established in 2019, to support employers including personnel service agencies in the application processes with German authorities at home and abroad. The Federal Government holds the website [www.make-it-in-germany.de](http://www.make-it-in-germany.de), which gives information to qualified professionals.

## 14.-.21 Legal situation (labour rights and immigration law)

*(This question refers to third country nationals of the EU)*

**14. Describe whether migrants with residence and work authorisation have the same labour rights as other "national" workers in the care sector.**

*Take into account the provisions of European law, according to which third-country national workers enjoy*

<sup>65</sup> Sabine Dittmar, 'Answer of the Parliamentary State Secretary Sabine Dittmar to Question 157. of the MP Tino Sorge (CDU/CSU) of 7 February 2023' (BT-Drs. 20/5615 10 February 2023)

<sup>66</sup> See fn 81



*equal treatment with workers who are nationals of the Member State in working conditions or Social Security (art. 12 of Directive 2011/98/EU, of 13 December 2011, on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State). Also, if your country has ratified them, ILO Conventions No. 97 (Revised) on migrant workers, 1949; and Convention No. 143 on migrant workers, 1975*

Germany ratified the Migration for Employment Convention (Revised), 1949 (No. 97) in 1959, but has not yet ratified Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143).<sup>67</sup>

There are no differences in the legal situation of migrant workers as regards labour and employment rights.

Art. 12 of Directive 2011/98/EU has been discussed in relation to access to social rights. The provision was implemented by Art. 3 (2) Act to Improve the Rights of Beneficiaries of International Protection and Foreign Workers (Gesetz zur Verbesserung der Rechte von internationalen Schutzberechtigten und ausländischen Arbeitnehmern), which repealed Secs. 113 (3)-(4) and 114 (3)-(4) SGB VI: now providing comprehensive equality for all insured persons when receiving pensions abroad.<sup>68</sup> However, further implementation deficits do not seem to be ruled out in view of the scope of the directive.<sup>69</sup>

Already in 2012 the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) held that provisions violate the general right to equality (Art. 3 (1) GG) as well as the ban on indirect discrimination based on gender (Art. 3 (3) GG) and are therefore unconstitutional and void, if they restrict the access of foreigners to child allowances (Kindergeld), parental allowances (Elterngeld) and maintenance advance (Unterhaltsvorschuss) to foreign residents.<sup>70</sup> However, there is a similar provision in Sec. 62 (2) of the Income Tax Act (Einkommenssteuergesetz, EStG) according to which persons from non-EU states granted residency in Germany on humanitarian, political, or international law grounds may only claim child allowance (Kindergeld) after three years of continuous legal or otherwise allowed residency and only if they demonstrate their integration into the labour market, i.e. show that they are either legally employed in Germany, receive “unemployment benefits I” (Arbeitslosengeld I, ALG I) or are taking parental leave. The provision has been declared void in 2022 for the reasons stated above (unequal treatment of different groups of foreigners without adequate justification).<sup>71</sup>

There are some special rules regarding diplomats working in Germany. Firstly, they can bring domestic workers with them for up to two years (Sec. 22 BeschV). The German Foreign Office also proposes a model contract to be used in these cases.<sup>72</sup> Labour law is generally applicable in the households of diplomats, but the possibility of judicial enforcement against diplomats may be lacking because they enjoy immunity from

<sup>67</sup> On the requirements for German law, see Katharina Spieß, ‘Die Wanderarbeitnehmerkonvention der Vereinten Nationen: Ein Instrument zur Stärkung der Rechte von Migrantinnen und Migranten in Deutschland’ (Berlin 2007); Katharina Spieß, ‘Der Schutz irregulärer Migrantinnen und Migranten in ihren Rechten in der Arbeit durch die UN-Menschenrechtskonventionen – Ein Überblick’ in Andreas Fischer-Lescano, Eva Kocher and Ghazaleh Nassibi (eds), *Arbeit in der Illegalität: Die Rechte von Menschen ohne Aufenthaltspapiere* (Campus 2012)

<sup>68</sup> Daniela Schweigler and Stefan Stegner, ‘Die Abschaffung der Rentenkürzung für Drittstaatsangehörige mit Auslandswohnsitz: Europa- und Völkerrecht als Antidiskriminierungs-Schrittmacher’ [2015] ZESAR 10

<sup>69</sup> Frank Schreiber, ‘§ 34 Soziales EU-Verfassungsrecht, Rn. 96’ in Franz Ruland, Ulrich Becker and Peter Axer (eds), *Sozialrechtshandbuch (SRH)* (7 Edition. Nomos 2022)

<sup>70</sup> (2021) 1 BvL 3/10 (BVerfG)

<sup>71</sup> (2022) 2 BvL 9/14, 2 BvL 10/14, 2 BvL 13/14, 2 BvL 14/14 (BVerfG)

<sup>72</sup> Cornelia Pieper, ‘Answer of the Minister of State in the Foreign Office, Cornelia Pieper, to question of MP Eva Högl (SPD) of 29 February 2012’ (Deutscher Bundestag, 17. Wahlperiode, Session 161, 29 Febr 2012 19159)



German civil jurisdiction under Sec. 18 of the German Civil Procedure Act (Gerichtsverfassungsgesetz , GVG) and cannot be sued in court during the period of immunity, even in the event of serious violations of the law.<sup>73</sup> However, the BAG has held a diplomat liable for exploitative employment of a domestic worker, stating that a foreign diplomat's immunity under Sec. 18 GVG ends when he or she leaves the country.<sup>74</sup>

**15. Do the "labour" legislation (i.e., on working conditions) or, if applicable, collective agreements in your country, make any reference to the migrant or foreigner status of the person working in each of these care sector occupations?**

No.

**16. Have there been any court rulings on this matter? If so, please summarise or comment on them.**

No.

**17. Does the legislation on foreigners or immigration in your country (e.g., on residence or work permits, family reunification, permit renewal, etc.) specifically mention people working in one of these care sector occupations? Have there been any court rulings on this matter? If so, please summarise or comment on them.**

Sec. 16d (4) AufenthG mentions the health and care sector in the section "Measures for the recognition of foreign professional qualifications". It regulates that the residence permit for persons who want to stay in Germany as long as their foreign professional qualifications are in the recognition procedure by the competent German state administration. This is the legal basis for specific programs such as "triple win" (see question 13 on migrant status). The provision was introduced by the FachKrEG of 2019, which was meant to counter the shortage of skilled workers especially in the health and care sector. Accordingly, Sec. 2 BeschV mentions health and care sector in the context of placement agreements. In addition, Annex to Sec. 38 BeschV also lists certain countries in which the recruitment and placement of health and care workers to Germany may only be carried out by the BA.

Furthermore, domestic work is mentioned in Sec. 15 BeschV, which states that "approval of a residence title to engage in full-time employment [...] for up to three years for domestic work and necessary everyday care assistance in households with persons in need of care (SGB XI) may be granted subject to a labour market test if the persons concerned have been placed on the basis of an agreement governing the procedure and selection between the BA and the public employment service of the country of origin. Within the three-year period of admission to the labour market, approval may be granted for a change of employer. For renewed employment after leaving the country, approval may only be granted if the person concerned has stayed abroad after leaving the country for at least as long as he or she was previously employed in Germany."

**18. Do migrants with the corresponding residency permit and authorisation to work in the care sector (in each of these occupations) have access to the same rights as other workers in other production sectors?**

There are no differences in the legal situation of migrant workers regarding labour rights (see also Migration

<sup>73</sup> Eva Kocher, 'Hausangestellte im deutschen Arbeitsrecht: Ratifikation der ILO-Konvention 189' [2013] NZA 929

<sup>74</sup> (2012) 5 AZR 949/11 (BAG)



14).

**19. Have there been any court rulings on this matter? If so, please summarise or comment on them.**

We do not know of any court cases in the matter.

**20. Have there been any collective bargaining provisions to favour the integration of migrant workers in the care sector on the basis of their language, religion, particular difficulties in visiting their families in their countries of origin, ethnic origin, etc.?**

We are not aware of any collective bargaining provisions regarding this issue. In 2018, the United Services Trade Union (Vereinte Dienstleistungsgewerkschaft, ver.di), that organises employees in the care sector, took the following position on the issue of recruiting care workers from abroad: "The trade unions in Europe emphasise that the migration of care workers from other European and international countries may solve short-term operational staffing needs, but is not a contribution to balancing the staffing needs in care in Germany."<sup>75</sup>

Sec. 28 Collective Agreement for the Public Sector (Tarifvertrag für den öffentlichen Dienst, TvöD) grants public employees special leave for good cause, waiving continued payment of remuneration. Sec. 29 TVöD grants leave from work for several days in cases of (eg) death of a partner, child or parent, or fulfilment of general civic duties under German law. These provisions may probably be used for the purpose of visiting families.

**21. Do you know if there have been any conflicts publicised by media between migrant workers of the care sector and the people they care for in terms of non-discrimination on the basis of ethnicity, religion, or nationality? If so, please explain.**

Everyday discrimination against foreign employees in inpatient and outpatient care is occasionally reported in the media. For example, in 2020, a weekly newspaper edited by the protestant church reported on the daily racism foreign nurses face in elderly care facilities, such as relatives of the elderly complaining about the lack of "Germans" in senior homes.<sup>76</sup> In 2023, an a study on the satisfaction of Filipino nurses working in various health care facilities in Germany found that 64% of the nurses had been confronted with racism on the part of patients as well as by their German colleagues.<sup>77</sup> Also, in 2021, various employment issues for

<sup>75</sup> ver.di, 'Ausländische Fachkräfte nicht die Lösung' (8 April 2018) <<https://gesundheit-soziales-bildung.verdi.de/themen/fachkraeftemangel/++co++cbbc3a02-44b7-11e8-b234-525400f67940>> accessed 28 September 2023

<sup>76</sup> Jana-Sophie Brüntjen, 'Der Rassismus in Deutschland zeigt sich auch in der Pflege' *Sonntagsblatt* (3 July 2020) <<https://www.sonntagsblatt.de/artikel/rassismus-deutschland-pflege-studie>> accessed 27 September 2023

<sup>77</sup> Grace Lugert-Jose, 'Philipinische Pflegekräfte in Deutschland' (September 2023) <[https://gracelugert.com/wordpress/wp-content/uploads/2023/09/GLJ-Arbeitsplatz-Studie-Phil.Nurses-Fokus-D\\_R-14May23-DE.pdf](https://gracelugert.com/wordpress/wp-content/uploads/2023/09/GLJ-Arbeitsplatz-Studie-Phil.Nurses-Fokus-D_R-14May23-DE.pdf)> accessed 2 October 2023; the study is also reported in the regional daily *Neue Osnabrücker Zeitung* (Ankea Janßen, 'Rassismus in der Pflege: „Sie nennen Asiaten Schlitzaugen“' *Neue Osnabrücker Zeitung* (25 September 2023) <<https://www.noz.de/deutschland-welt/politik/artikel/pflegekraefte-ueber-rassismus-sie-nennen-asiaten-schlitzaugen-45551169>> accessed 2 October 2023)



“live-in” workers (including their relations with care-receivers) are summarized in the documentary “Eine Polin für Oma” (A Polish Woman for Grandma) by the German public broadcaster ARD.<sup>78</sup>

The ADS report entitled “Discrimination risks and protection in the health care sector” also analyses discrimination based on ethnic origin and racial discrimination in the care sector. It focuses on different forms of discrimination based on skin colour, language, etc. and thus provides a more detailed insight into the category “migration background” (see Footnote 34), which national statistical analyses ignore—the ADS also collects its data through counselling it offers to possible victims of discrimination. However, as with gender discrimination, the report focuses only on care users and not on nurses themselves—for example, their lack of access in comparison to German nationals.<sup>79</sup> A few examples of direct (Sec. 3 (1) AGG) and indirect discrimination (Sec. 3 (2) AGG) of nurses with migration background are covered in the ADS’s report and strategies against racist bullying.<sup>80</sup> However, this report only mentions a few anecdotal examples of nurses who were harassed by their German colleagues and by patients because of their skin colour—the patients refused to be cared for by them.

The study “Workplace Integration of Nursing Professionals from Abroad” commissioned by the HBS contains some examples on the discrimination on foreign nurses working in Germany.<sup>81</sup> One example is discrimination in outpatient care, as foreign nurses are sometimes seen as incompetent by those in need of care or their relatives because of their origin. However, the report also makes clear, disagreements between foreign nurses and their patients can also be due to different work cultures in care in Germany and the knowledge acquired in the nurses’ home countries.

## 22./23. Statistics on salaries

*(This question refers to third country nationals of the EU)*

### 22. Have any statistics or databases been published in your country on migrant workers’ salaries in the care sector?

The BA publishes data on median salaries of German and non-German nationals (foreigners) not specifically for the care sector, but for the occupational segment: health and social work, education, and teaching. Foreigners are further subdivided into third-country nationals and EU citizens, nationals of main asylum seeker countries, nationals of the Western Balkan countries and Eastern European third countries. In addition, the statistics also include the median salary of every nationality in the occupational segment. These statistics only cover the regularly employed—this means that e.g. most of live-ins are excluded.

For the data on the salaries of foreigners specifically for the care sector in the narrower sense, a special

<sup>78</sup> Mirjana Momirovic and Caroline Haertel, ‘Eine Polin für Oma’ (2021) <<https://www.youtube.com/watch?v=67kXGFJj0aY&t=1s>> accessed 2 October 2023

<sup>79</sup> Bartig and others (n 26)

<sup>80</sup> Antidiskriminierungsstelle des Bundes, ‘Strategien gegen rassistisches Mobbing und Diskriminierung im Betrieb’ (2015) <[https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/Handreichung-Betriebsraete/handreichung\\_betriebsraete.pdf?\\_\\_blob=publicationFile&v=9](https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/Handreichung-Betriebsraete/handreichung_betriebsraete.pdf?__blob=publicationFile&v=9)>

<sup>81</sup> Pütz and others (n 54)



evaluation can be requested from the BA for a fee.

**- Have any statistics or databases been published in your country on the occupational classification of migrant workers in the care sector?**

See answers to question 5 on migrant status.

**- Do these databases present aggregated data, micro-data, or both (aggregated data: data at national or regional level; micro-data: individual data, collected but not published, only available to researchers)?**

The data is aggregated on national level.

**- Are these databases public and freely accessible to everyone, or only to researchers?**

The databases are publicly accessible. Access to the databases for the average salaries of foreigners working in the care sector is subject to a fee.

**- If published databases exist, please provide links and/or how to request them**

Specific data from the BA database can be requested here:  
<https://statistik.arbeitsagentur.de/DE/Navigation/Service/Datenanforderung/Datenanforderung-Nav.html>

**23. If you have found statistics or databases, please describe what they show in relation to the job classification and wages of migrant workers in the care sector.**

According to data made available by the BA for the entire German labour market in 2022, the median income for German nationals was EUR 3.785 (EUR 3.541 in 2020), and for foreigners EUR 2.881 (EUR 2.638 in 2020). For the occupational segment of health care, social work, education and teaching, data available for 2020 show that the median for German nationals was EUR 3.482 and for foreigners EUR 3.227—for EU nationals EUR 3.228 and for third-country nationals EUR 3.220.<sup>82</sup>

## 24.-27. Undocumented workers

*(This question refers to third country nationals of the EU)*

**24. Are migrants in an undocumented situation (without authorisation to reside or work) entitled to employment rights when working in the care sector in your country? Please outline your views on this issue.**

There are no differences in the legal situation of migrant workers as regards labour rights, independent of their legal situation concerning residency. As a consequence, undocumented and irregular migrants have

<sup>82</sup> Bundesagentur für Arbeit, 'Sozialversicherungspflichtige Bruttoarbeitsentgelte – Deutschland, West/Ost, Länder und Kreise (Jahreszahlen)'

<[https://statistik.arbeitsagentur.de/SiteGlobals/Forms/Suche/Einzelheftsuche\\_Formular.html?topic\\_f=beschaeftigung-entgelt-entgelt](https://statistik.arbeitsagentur.de/SiteGlobals/Forms/Suche/Einzelheftsuche_Formular.html?topic_f=beschaeftigung-entgelt-entgelt)> accessed 2 October 2023



the same legal rights arising from an employment relationship as regular workers: wage and compensation claims, leave, continued payment of wages in case of illness.<sup>83</sup> According to Sec.10 (1) of the Act to Combat Undeclared Work and Unlawful Employment (Schwarzarbeitsbekämpfungsgesetz, SchwArbG), it is a criminal offense if the employer employs a worker without the required residence and employment permit under conditions that are conspicuously less favourable than comparable German workers.

For foreigners who lack the necessary employment permit, the law assumes, for the purpose of remuneration, that the foreigner has been employed for three months (Sec. 98a (1) AufenthG). The agreed remuneration is considered to be the usual remuneration unless employer and foreign employee agreed on a lower or higher remuneration on a permissible basis (Sec. 98a (2)). Contractors and intermediaries, even without a direct contractual relationship to the employer are also liable for these obligations, unless they could assume, on the basis of due diligence, that the employer did not employ any foreigner who lacks the authorisation for employment (Sec. 98a (3)-(5)). The rights can be enforced in a German labour court (Sec. 98a (6)).<sup>84</sup>

However, when these rights are enforced at labour courts, workers often fear that the court or any other official will report their residency status (respectively the lack thereof) to authorities responsible for foreigners. Sec. 87 (2) AufenthG regulates the conditions of such a transfer of data and information to authorities (Übermittlungspflicht). Although it is not clear if a labour court is really obliged to transfer these data,<sup>85</sup> the fear of transfer hampers enforcement.<sup>86</sup>

## 25. Have there been any court rulings on this matter? If so, please summarise or comment on them.

An example is the case of the domestic worker in a diplomat's household (see question 14 on migrant status). In the 2003 case of a Polish national<sup>87</sup> who was working in a private household in Germany and injured herself, the labour court ordered the employer (the family) to pay wages and compensation; the existence of an employment relationship was based on prima facie evidence.<sup>88</sup> Further case of undocumented domestic workers represented by the lawyer Christian Lewek<sup>89</sup> has been covered by the

<sup>83</sup> Heike Rabe and Manuela Kamp, 'Arbeitsausbeutung und Menschenhandel. Arbeitnehmerinnen und Arbeitnehmern zu ihren Rechten verhelfen: Eine Handreichung für Beratungsstellen' (July 2012) <[https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/handreichtung\\_arbeitsausbeutung\\_und\\_menschenhandel.pdf](https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/handreichtung_arbeitsausbeutung_und_menschenhandel.pdf)> accessed 2 October 2023; Tschenker T, 'Arbeit ohne Lohn. Irreguläre Migrant\_innen nach wie vor ohne Zugang zum Recht' (2015) <[http://forum-recht-online.de/wp/wp-content/uploads/2015/03/FoR1501\\_8\\_Tschenker.pdf](http://forum-recht-online.de/wp/wp-content/uploads/2015/03/FoR1501_8_Tschenker.pdf)> accessed 3 October 2023

<sup>84</sup> Eva Kocher and Ghazaleh Nassibi, 'Rechte für Beschäftigte als Sanktionen gegen Arbeitgeber\_innen: Eine erste Einschätzung der Neuregelung in § 98 a AufenthG' in Andreas Fischer-Lescano, Eva Kocher and Ghazaleh Nassibi (eds), *Arbeit in der Illegalität: Die Rechte von Menschen ohne Aufenthaltspapiere* (Campus 2012)

<sup>85</sup> According to the German Red Cross handbook on illegality of residence, which refers to the wording in Sec. 2 of the AufenthG, this obligation of the labor court does not exist if the court becomes aware of the employee's illegal stay only "on occasion" and not in an individual case in order to fulfill its duty (Marie von Manteuffel, 'Aufenthaltsrechtliche Illegalität: Beratungshandbuch' (2017)).

<sup>86</sup> Christian Lewek, 'Arbeitsrechte für Menschen ohne Papiere in Deutschland' in Andreas Fischer-Lescano, Eva Kocher and Ghazaleh Nassibi (eds), *Arbeit in der Illegalität: Die Rechte von Menschen ohne Aufenthaltspapiere* (Campus 2012)

<sup>87</sup> At that time, Poland was not yet in the EU.

<sup>88</sup> (2003) 13/Ca 268/02 (ArbG Hannover)

<sup>89</sup> *ibid*





documentary film “Dringend gesucht – Anerkennung nicht vorgesehen” by Anne Frisius in cooperation with Mónica Orjeda and Nanja Heid (2014).<sup>90</sup>

Outside the care sector, there was the case in 2009 of a Serbian construction worker who worked irregularly in Germany. With the help of ver.di, he sued his employer in the labor court for EUR 25.000 and won the case.<sup>91</sup>

**26. With the onset of the Covid-19 pandemic, measures were adopted by the State to allow “undocumented” foreign personnel to obtain residence or work permit, both structural and extraordinary?**

There were no such extraordinary measures adopted during Covid-19 pandemic.

However, the AufenthG gives the federal states the right to decide whether to grant a residence permit to a foreigner who is subject to an enforceable obligation to leave the country if there are atypical circumstances that currently lead to hardship (Sec. 24 AufenthG). A special “hardship” commission decides whether the residency permit should be granted. These commissions, however, do not publish cases, statistics, or numbers; we do not know if the procedure has been used for the purpose of this question.

**27. From the onset of the Covid-19 pandemic to the present day, have measures been taken by the State to allow “undocumented” foreign personnel providing services “in the care sector” to obtain residence or work permits?**

No such measures were taken.

## 28./29. Equality Bodies, reports

**28. If there are Equality Bodies or Organisations fighting racial, ethnic, or religious discrimination in your country, have they undertaken any action or produced any report in relation to the rights of migrant workers in the care sector? If yes, please describe this report.**

*(This question refers to third country nationals of the EU)*

Next to gender equality, the ADS also covers racial, ethnic, or religious discrimination. Moreover, there are anti-discrimination offices at the level of federal states, such as the State Office for Equal Treatment - Against Discrimination in Berlin, that are responsible for this. The details about the work of these offices are already covered above (question 21 on gender—for the relevant ADS publications, see question 21 on migrant status).

The Office for the Equal Treatment of EU Workers (Gleichbehandlungsstelle EU-Arbeitnehmer) is an office of the Federal Government Commissioner for Migration, Refugees, and Integration. It provides basic information and counselling on labour rights and vocational training for EU citizens wishing to work in Germany (for publications see question 24 on migrant status).

<sup>90</sup> Anne Frisius and Mónica Orjeda, ‘Dringend gesucht – Anerkennung nicht vorgesehen’ (2014)

<sup>91</sup> Spieß, ‘Der Schutz irregulärer Migrantinnen und Migranten in ihren Rechten in der Arbeit durch die UN-Menschenrechtskonventionen – Ein Überblick’ (n 67)



The German Institute for Human Rights (Deutsches Institut für Menschenrechte, DIMR) is the general independent human rights institution in Germany. It was established by law in 2015, according to the UN Paris Principles (Resolution of the General Assembly 48/134 of 20 December 1993, on national institutions for the promotion and protection of human rights) to inform the public about the human rights situation in Germany and abroad, and to promote and protect human rights (Sec. 2 Law on the Legal Status and Tasks of the German Institute for Human Rights (Gesetz über die Rechtsstellung und Aufgaben des Deutschen Instituts für Menschenrechte, DIMRG). According to the Sec. 2 (5) DIMRG, the institute submits an annual report to federal parliament (the German Bundestag) on the work of the institution and the development of the human rights situation in Germany, on which Bundestag is to comment. While these annual reports do not mention the care sector, the institute has commissioned scientific reports on this topic (see below and fn 83).

Faire Mobilität (Fair Mobility) is an organisation affiliated to the DGB that has 13 centres for the counselling of foreign workers nationwide. Since 2020, it is being funded by the Federal State with around 4 Mio Euro yearly.<sup>92</sup> A local independent counselling organization for employment and social rights of foreigners working in Germany is the Berlin Advisory Centre for Migration and Good Work (Berliner Beratungszentrum für Migration und Gute Arbeit, BEMA).<sup>93</sup> The organisation minor (see fn 43) provides counselling for foreign workers in Germany in different sectors and areas, via social media. In addition to the counselling services, these organizations also publish information brochures. On a more general level, the Anti-Discrimination Association Germany (Antidiskriminierungsverband Deutschland) is an umbrella organization of independent anti-discrimination offices and regional counseling centers that represent specific groups such as Muslim women, lesbian women, gays, Kurdish teachers, or Turkish people.<sup>94</sup>

Organisations such as the Society for Civil Liberties (Gesellschaft für Freiheitsrechte)<sup>95</sup> and European Centre for Constitutional and Human Rights<sup>96</sup> promote strategic litigation and promote legal interventions with the help of studies, opinions, or draft laws.

**29. If there are Equality Bodies or Organisations fighting racial, ethnic, or religious discrimination in your country, have they undertaken any action or produced any report in relation to the rights of people, whatever their nationality, working in the care sector? If yes, please describe this report.**

*This question concerns both nationals of the country, EU nationals and EU third country nationals.*

In addition to question 28 on migrant status:

The Office for the Equal Treatment of EU Workers recently published a report on the legal issues of Polish live-ins who work in Germany through placement agencies.<sup>97</sup> The report analyses the civil-law contracts that

<sup>92</sup> Faire Mobilität, 'Über uns' <<https://www.faire-mobilitaet.de/ueber-uns>> accessed 3 October 2023; for the financing, see Bericht des Haushaltsschusses (BT-Drs. 19/20146 2 17 June 2020)

<sup>93</sup> Berliner Beratungszentrum für Migration und Gute Arbeit, 'Über uns' <<https://bema.berlin/uber-uns/>> accessed 3 October 2023

<sup>94</sup> Der Antidiskriminierungsverband Deutschland (advd) <<https://www.antidiskriminierung.org/>> accessed 3 October 2023

<sup>95</sup> Gesellschaft für Freiheitsrechte, 'Wer wir sind' <<https://freiheitsrechte.org/ueber-die-gff/werwirsind>> accessed 3 October 2023

<sup>96</sup> European Centre for Constitutional and Human Rights, 'Wie wir arbeiten' <<https://www.ecchr.eu/ecchr/mit-juristischen-mitteln-menschenrechte-verteidigen/>> accessed 3 October 2023



these agencies conclude with live-ins. Often, these are service contracts instead of employment contracts; they are colloquially referred to as "garbage contracts" in Poland, because they are privileged by the law, in order to be used as an effective disguise for employment, and are characterized by uncertainty, lack of stability, and lack of protection. The office also funds the minor organisation's "MB 4.0 - Gute Arbeit in Deutschland" project, which contributed information for the report. The project has been conceptualizing and developing outreach information and counselling work in the social media for EU immigrants in twelve languages—primarily, for live-in workers from Poland, as well as other Central and Eastern European countries.<sup>98</sup> In addition, minor regularly publishes reports on the legal situation and professional experiences of live-in workers, highlighting the important role they play in the German long-term care sector.<sup>99</sup>

In addition, DIMR and minor jointly authored a report on the situation of live-ins from Eastern Europe in Germany.<sup>100</sup> The report documents the working and living conditions of live-in workers in private households—e.g. earning far below the minimum wage, working around the clock, and lack of separation between home and work.

### 30. Legislation on Harassment of Women workers in the domestic sector

*This question concerns both nationals of the country, EU nationals and EU third country nationals.*

**30. Comment whether your State has adequate legislation on harassment (including gender-based harassment and sexual harassment) of women workers in the domestic sector, especially if they are migrant workers. Comment whether the worker's employer (including migrant workers) can be held responsible for such situations.**

*To answer this issue, please consider the Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA; or Convention (Council of Europe) on preventing and combating violence against women and domestic violence, adopted on 7 April 2011 (Istanbul Convention)*

Directive 2012/29/EU establishing minimum standards on the rights, support, and protection of victims of crime was implemented through the Act to strengthen victims' rights in criminal proceedings (Gesetz zur Stärkung der Opferrechte im Strafverfahren), which introduced psychosocial assistance in legal proceedings (Sec. 406g German Code of Criminal Procedure (Strafprozeßordnung – StPO)) as well as further rights, including the notification of aggrieved persons of rights in criminal proceedings (Sec. 406i StPO).

<sup>97</sup> Eva Kocher and Nastazja Potocka-Sionek, 'Rechtsfragen beim Einsatz polnischer Betreuungskräfte (Live-ins) in Deutschland durch Vermittlung polnischer Agenturen' (Berlin 2022) <<https://www.eu-gleichbehandlungsstelle.de/eugs-de/analysen/rechtsfragen-beim-einsatz-polnischer-betreuungskraefte-live-ins-in-deutschland-durch-vermittlung-polnischer-agenturen-2124804>> accessed 10 October 2023

<sup>98</sup> Schabram and Freitag (n 52)

<sup>99</sup> Minor – Projektkontor für Bildung und Forschung, 'Die „vierte Säule“ der Pflege: Aktuelle Bedarfe und Erwartungen von 24-Stunden-Betreuungskräften (Live- Ins) in Bezug auf ihre Arbeit in Deutschland' (2023) <<https://minor-kontor.de/die-vierte-saeule-der-pflege/>> accessed 10 October 2023

<sup>100</sup> Nora Freitag, 'Arbeitsausbeutung beenden: Osteuropäische Arbeitskräfte in der häuslichen Betreuung in Deutschland' (Berlin 2020) <[https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Analyse\\_Studie/Analyse\\_Arbeitsausbeutung\\_beenden.pdf](https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Analyse_Studie/Analyse_Arbeitsausbeutung_beenden.pdf)> 10 October 2023



Germany ratified the Istanbul Convention in 2018, but initially reserved the right to establish jurisdiction for offences committed abroad by foreigners or stateless persons who have their habitual residence in Germany (Art. 44 (1.e) Istanbul Convention). It also reserved the right not to issue a renewable residence permit to victims whose stay is necessary owing to their personal situation or for the purpose of their cooperation in an investigation or criminal proceedings (Art. 59 Istanbul Convention). In February 2022, these reservations were revoked with the argument that Germany indeed already implements these requirements of the Istanbul Convention, notwithstanding some legal uncertainties. In relation to Art. 59 Istanbul Convention, the government points to Sec. 60a (2) AufenthG according to which the deportation of a foreigner is to be suspended if the public prosecutor's office or the criminal court considers his or her temporary presence to be appropriate in connection with criminal proceedings, because it would be more difficult to investigate the facts of the case without information from the foreigner.

Most importantly for the sector of employment, Sec. 3 (3) and (3) AGG regulates harassment including sexual harassment as a form of discrimination (according to EU Directives 2000/43/EC, 2000/78/EC and 2006/54/EC). Sec. 12 AGG holds the employer responsible for all these forms of discrimination. The employer has the duty to take measures necessary to ensure protection including preventive measures (1) and shall draw attention to the inadmissibility of such discrimination in a suitable manner, in particular within the context of training and further training (2). Where employees violate the prohibition of discrimination, the employer shall take suitable, necessary and appropriate measures, chosen in a given case, to put a stop to the discrimination; this may include cautioning, moving, relocating or dismissing the employee in question (3). Where employees are discriminated against in the pursuance of their profession by third persons, the employer shall also take suitable, necessary and appropriate measures to protect the employee in question (4).

The Act on Occupational Health and Safety (ArbSchG) covers every form of possible risks, including psychological risks (Sec. 4 lit. 1 ArbSchG).<sup>101</sup> However, it excludes domestic workers in private households (Sec. 1 (2), in accordance with Art. 3a) Council Directive 89/391/EEC, a rule that may however be invalid, due to indirect discrimination based on gender.<sup>102</sup>

On this background, it is important to note that Germany ratified ILO Violence and Harassment Convention 190 in June 2023; it will enter into force for Germany on 14 Jun 2024 (BT-Drs. 20/5652). Art. 6 of the Convention should promote the development of sector-specific regulation and of a special protection of vulnerable workers. Art. 8 lit. b) and c) of ILO Convention 190 oblige ratifying states to identify the sectors, occupations or work situations in which workers are most exposed to violence and harassment in order to protect them effectively. According to No. 9 of Recommendation 190, special attention should be paid to "night work, work in isolation, health, hospitality, social services, emergency services, domestic work, transport, education or entertainment". In particular, concepts are urgently needed to establish the prevention and sanction of conflicts and violence against live-in-workers.<sup>103</sup>

Also, the extent to which, for example, remedies for victims of gender-based violence and harassment in the world of work (Art. 10 lit. e) of the Convention) are already "gender-responsive, safe and effective" will

<sup>101</sup> Cf. Art. 3 lit. e) ILO Convention No. 155 (Occupational Safety and Health Convention), 1981

<sup>102</sup> (2022) C 389/20 (ECJ) CJ ./ Tesorería General de la Seguridad Social (TGSS)); Vera Pavlou, 'Domestic work in EU law: The relevance of EU employment law in challenging domestic workers' vulnerability' [2016] 41(3) European Law Review 379

<sup>103</sup> Freitag (n 100) 31; on ways to detect specific vulnerabilities in this respect, see Anna-Katharina Dietrich, Eliane Friess and Kordula Heineck, 'Zwangsarbeit und Arbeitsausbeutung verhindern: Branchenspezifische Analyse - Anzeichen erkennen & handeln: 2. Ausgabe: Landwirtschaftliche Saisonarbeit und häusliche Pflege' (Berlin 2022)



require concrete empirical studies, in order to be able to draw concrete conclusions for regulation.

## 31. Exploitation in the workplace (undocumented migrant workers)

*(This question refers third country nationals of the EU)*

31. Comment on whether there are mechanisms in the legislation against cases of exploitation in the workplace with regard to undocumented or irregular migrant workers (without residence authorisation). Comment on whether in these cases migrants in an irregular situation can denounce or have access to the courts in cases of exploitation and labour exploitation. Also, whether there are cases in the legislation in which they can obtain a residence authorisation.

*To answer this issue, please take into account the Directive 2009/52/ of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.*

Germany already had a regulatory system to combat undeclared work in the SchwArbG before Directive 2009/52/ was transposed into national law by the Second Directive Transposition Act (2. Richtlinienumsetzungsgesetz) in 2011. Sec. 98a AufenthG implemented Art. 6 Directive 2009/52/, according to which the employer is obliged to pay the remuneration for the work performed and to pay the taxes and social security contributions, regardless of the residency status and work permit of the employee. However, if an employee brings an action against his employer before the labour court, the issue arises on the basis of Sec. 87 (2) AufenthG, which obliges public bodies to transmit data to the foreigners authority if they have knowledge that the employee does not hold a required residence permit—see question 24 on migrant status.

Moreover, the provisions of Art. 13 (4) and Art. 6 (2) 2 of the Directive 2009/52/ was implemented into Sec. 25 (4b) AufenthG, which stipulates that if the employee is a third-country national who has worked under particularly exploitative working conditions, or if the employee is a minor, they are granted a temporary residence permit. It allows for the issuance of a residence permit for the duration of the criminal proceedings against the employer. Specifically, a foreigner who has been the victim of a criminal offence under Sec. 10 (1) or Secs. 11(1) (3) SchwArbG or under Sec. 15a of the Temporary Employment Act (Arbeitnehmerüberlassungsgesetz, AÜG) may be granted a residence permit for a temporary stay, even if he or she is subject to an enforceable obligation to leave the country. The same applies if the foreigner is a victim of human trafficking pursuant to Secs. 232-233a Criminal Code (Strafgesetzbuch, StGB) (Sec. 25 (4a) AufenthG). In both cases, however, the victim must be relevant for the issuance of the residence permit or be willing to cooperate in the proceedings against the employer.



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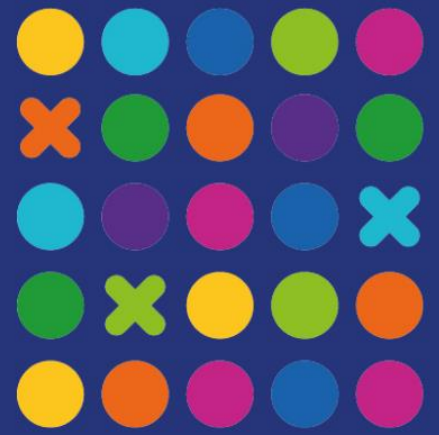
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