

## Obligation to consider disabled candidates for job vacancies – Lack of involvement of the Employment Agency during the hiring process = Discrimination?

### INTRODUCTION

Under Sec. 164 (1) Social Code IX, employers are obliged to check if job vacancies can be filled by severely disabled individuals and must “contact the Employment Agency” in good time in this regard. This contact is meant to put the Agency in the position of proposing suitable handicapped candidates to fill the vacancy.

If an employer does not properly involve the Employment Agency, this alone could form the grounds for the assumption of discrimination based on the disability within the meaning of Sec. 22 General Equal Treatment Act according to the rulings of the Federal Labor Court (BAG). This idea follows the principle that a violation by the employer of procedural and/or support duties benefitting severely disabled individuals will regularly form the grounds for the assumption of discrimination within the meaning of Sec. 22 General Equal Treatment Act due to a handicapped status.

### BAG, JUDGMENT OF MARCH 23, 2025 – FILE NO. 8 AZR 123/24

The Federal Labor Court has most recently been given another opportunity to more precisely define the requirements for contacting the Employment Agency in this regard. The Court has thus clarified that the issue of a so-called agency mandate (“*Vermittlungsauftrag*”) is required, for it is this mandate alone that allows for the presentation of employment proposals by the Federal Employment Agency. Merely placing a job advertisement on the Agency’s job placement portal (“*Jobbörse*”) does not suffice.

### ANTIDISCRIMINATION LAW AND PRESUMPTIVE EVIDENCE

As is so often the case in antidiscrimination law, one must also ask here if what is deemed to be presumptive evidence of discrimination would not mostly indicate inconsequential situations in actual practice. The failure to contact the Employment Agency will most likely not be an expression of the intention to discriminate but will merely be based

on laxness or unfamiliarity with the law. However, one must probably agree with the BAG that the lack of any consequences for violations means that the regulation can hardly fulfill its purpose to fight unemployment among disabled people.

### ADVICE FOR PRACTITIONERS

Employers should take the provisions of Sec. 164 (1) Social Code IX seriously. Because of the presumptive evidence effect, laxness in making the prescribed contact to the Agency could result in having to expend time and effort later in litigation to disprove the assumption of discrimination; ultimately, there is always a risk that this will not be successful.

Violations of Sec. 164 (1) Social Code IX can also present problems in another area. The works council can refuse to approve to the hiring of a (non-disabled) candidate if the provisions of Sec. 164 (1) Social Code IX have not been complied with (BAG, Order of June 23, 2010 – 7 ABR 3/09).

Please do not hesitate to contact us if you have questions concerning this topic. If you would like to be included on our mailing list of the subscribers to our free newsletter, please send us a brief [email](#) with your request.

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