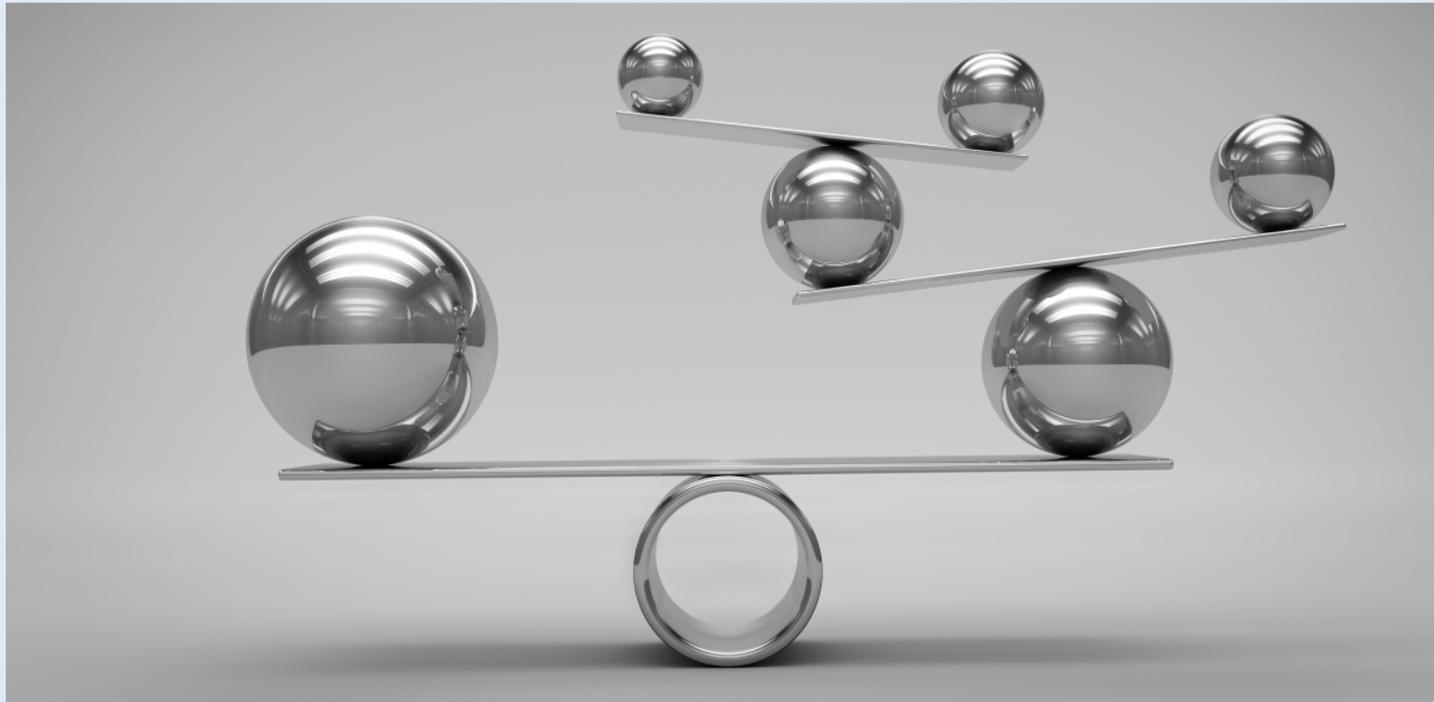


## #MeToo and beyond

### How to effectively stop and prevent workplace harassment in Germany

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# MeToo and #MeTooWhatNext: It does not appear the nightmare will end anytime soon, given that cases and allegations of harassment are as

numerous as the reasons for the discrimination in which they are rooted. Sexual harassment is only one form of harassment in the workplace, but it is most

likely the most prominent among them. Even so, there are mechanisms in place in both the US and Germany to effectively stop and prevent harassment in the

workplace, especially when it is sexual in nature.

#### Background: US and Germany

As the main authority dealing with workplace harassment in the US, the Equal Employment Opportunity Commission (EEOC) was established to remedy and prevent unlawful employment discrimination (as well as advance equal opportunities for all in the workplace). To accomplish this, the EEOC enforces US federal laws by investigating charges of discrimination and filing lawsuits, as it has the authority to do, in the interest of individuals and the public.

Since *Burlington Industries Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, it has been clear that an employer is liable for a supervisor's unlawful harassment of an employee unless the employer took reasonable measures to prevent such conduct or the employee did not seek the implementation of such measures.

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In Germany, the General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz, AGG*) came into force in 2006 and looks very similar to the anti-discrimination laws on the books in the US. The Federal Anti-discrimination Agency (*Antidiskriminierungsstelle des Bundes, FADA*) was established as the act came into force. This agency, much like the EEOC, is meant to prevent sexual harassment and discrimination in the workplace. Although the *FADA* does not have the authority to file lawsuits, the *FADA* puts resources at the disposal of individuals in need by outlining possibilities for taking legal action, referring them to counselors who can help them decide whether to file a lawsuit, and providing amicable settlements between parties if desired. Furthermore, the *FADA* conducts scientific studies on discrimination and harassment in the workplace and files extensive reports the German parliament every four years. On the basis of these reports, the *FADA* also makes recommendations as to how to stop and prevent discrimination and sexual harassment in the future.

#### How to prevent workplace harassment in Germany

The first question is: What does the employer need to do to prevent sexual

harassment and discrimination? On a universal level, the General Act on Equal Treatment merely requires an employer to take suitable measures to draw attention to the inadmissibility of workplace harassment and discrimination. The act does not name any measures in particular, thereby leaving the employer to decide how this should be achieved.

Nonetheless, if employers want to avoid liability, they should conduct mandatory, regular in-house training for all employees. This in-house training should include clear parameters delineating what constitutes discrimination, and, most importantly, what constitutes sexual harassment. In terms of content, this in-house training should assert the employer's disapproval of discrimination and sexual harassment, and it should underline the penalties and consequences associated with this kind of behavior. In addition, employers should establish a code of conduct consisting of clear rules. Training should be conducted regularly and should be documented. In this way, employers can comply with their obligation under the General Act on Equal Treatment and avoid liability should an employee or a supervisor sexually harass or otherwise discriminate against another employee.

Moreover, the General Act on Equal Treatment expressly names the right of employees to lodge a complaint, thereby requiring employers to establish opportunities for employees to make complaints.

#### How to stop workplace harassment in Germany

Notwithstanding these preventive measures, there are still instances in which harassment has already occurred. The question at that point is: What now?

The law is clear here: Under section 12 (3) of the General Act on Equal Treatment, employers have the duty to stop discrimination and must take effective measures to prevent such discrimination in the future. As a general rule, after discrimination has occurred, the necessary response from an employer can be divided into two steps. The first step is to investigate the allegations of discrimination and/or sexual harassment and analyze precisely what occurred. Only after this analysis can the employer proceed to the second step, which is to take necessary and effective measures against the misconduct.

#### The first step: investigating alleged misconduct

During the first step — the investigation — it is important to ask the right questions. These are questions that will lead to the answers the employer needs to know in order to take the second step: (a) whether the alleged sexual harassment actually occurred, (b) what the circumstances of the alleged sexual harassment were and what may have triggered it, and (c) the seriousness of the harassment.

The first question mostly impacts the employer's decision as to whether measures need to be taken — measures are, of course, unnecessary if the accused employee is innocent. The second and third questions uncover which measures should be effective in this case: whether a warning would suffice, or if the employee will need to be relocated. The answers to the questions about the circumstances of the sexual harassment and what triggered it are also crucial for the prevention of sexual harassment in the future. When asking these questions, the employer would be best advised to conduct interviews. A record should be kept of these interviews in order to precisely document all the steps taken by the employer and their results. During the process, it is best to conduct the →

investigation as quickly as possible and keep the group of individuals involved as small as possible. This protects the reputation of a possibly innocent employee.

### The second step: effective measures

After the investigation has been completed, the second step is to take effective measures. According to the German Federal Labor Court, a measure can be considered effective if the employer can reasonably expect it to both stop the harassment and prevent it in the future. This is evaluated from an ex ante perspective and is founded on the answers to the second and third questions. There are multiple measures that can be taken – a simple written note or meeting with the employee, for example, if the conduct was not serious. Alternatively, an official warning letter can be issued to the employee stating that such conduct, if repeated, will result in employment termination. There are, of course, cases in which a simple warning would not be adequate to address the harassment. In these instances, the employer can terminate the employment with notice or, as an ultima ratio, even without notice if the conduct was especially serious and/or strong indicators point to a likely repetition of the sexual harassment.

When deciding to carry out a particular measure, the employer must weigh the conflicting interests in the case at hand. In these moments, the sword of Damocles – potentially having to pay damages – will always be swinging over the employer's head. If the measure proves ineffective, the employer could be sued for damages by the injured party. If the measure proves unnecessary, the employer could be sued by the employee responsible for the conduct. In every instance, it is crucial for the employer to strike a balance between the conflicting interests. In a lawsuit resulting from a repetition of harassment, an employer will not be liable for damages if they can prove they could not reasonably expect the repetition from an ex ante perspective.

### Unclear situations

Notwithstanding an employer's efforts to thoroughly investigate alleged misconduct, there are situations in which it remains unclear what actually happened and whether the alleged harassment in fact occurred. Many employers are then faced with a dilemma as to how to proceed. In such cases, an employer is only obligated to do what is legally and concretely within their realm of possibility, given that the employer does not have

the same investigative privileges and options as the police or the state. In general, the same principles specified above for choosing an appropriate measure apply here too: The stronger the suspicion, the more serious the measure can be. As an ultima ratio, the employer can terminate the employment on the basis of suspected sexual harassment, provided that the alleged sexual harassment is serious enough to amount to a criminal offense. As a general rule, when employers can prove they did everything reasonable within their power to prevent repeated incidents of harassment, they are considered to have fulfilled their duty and cannot be held liable.

### Conclusion

We would like to say that the anti-discrimination systems in the US and Germany are quite similar. Despite these similarities, however, due to the legal characteristics of German law, it may not be sufficient to copy a US compliance system and directly implement it at a German company. Investigating the facts and taking effective steps (such as issuing warnings or even terminating employment) are crucial moves to stop and prevent workplace harassment in Germany. ←



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