

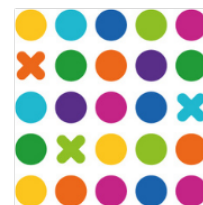


Deliverable No. D2.3: National and Comparative Job Quality and Inclusive Working Conditions Reports

German Report on Care Workers' Job Quality and Inclusive Working Conditions

Partner: European University Viadrina Frankfurt (Oder), Germany
Authors: Ziga Podgornik-Jakil, Dominic Andres, Eva Kocher

June 2024



Disclaimer

This project has received funding from the European Union. Nevertheless, the contents of the national reports and the comparative report reflect solely the views of the authors and do not necessarily represent the official position of the European Union. The European Union cannot be held responsible for any use which may be made of the information contained therein.

Please note that the data and information presented in the national reports and the comparative report are accurate only up to June 2024. Any subsequent changes have not been included and are therefore not reflected in this document.

www.care4care.net

Partners:



UNIVERSITÀ
DEGLI STUDI
FIRENZE



FACULTY
OF LAW

Universitat
de Girona



UNIVERSIDAD DE SEVILLA



EUROPA-
UNIVERSITÄT
VIADRINA
FRANKFURT
(ODER)



University of Rzeszów



Tuscan Organisation
of Universities
and Research for Europe



COMPTRESEC
Centre de droit comparé du travail
et de la sécurité sociale
UMR CNRS 5114

université
de BORDEAUX



EUROPEAN
FEDERATION
FOR FAMILY
EMPLOYMENT
& HOME CARE



European Federation
for Services to Individuals



This project has received funding from the European Union's Horizon Europe research and innovation programme under GA n° 101094603



Care4Care
WE CARE FOR
THOSE WHO CARE

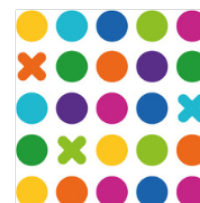
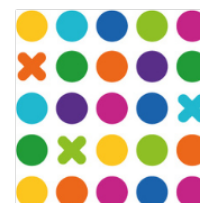
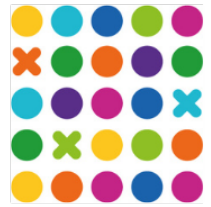


Table of Contents

ABBREVIATIONS.....	4
1. INTRODUCTION.....	8
1.1. MAIN CHARACTERISTICS OF GERMAN LABOUR LAW, INDUSTRIAL RELATIONS SYSTEM AND WELFARE STATE MODEL	8
1.1.1. <i>Labour Law System</i>	8
1.1.2. <i>Industrial Relations System: dual system of representation</i>	9
1.1.3. <i>Welfare State Model</i>	10
1.2. REMARKS ON RESEARCH METHODS	11
2. CARE WORK AND DOMESTIC WORK: OCCUPATIONS, LABOUR MARKET CHARACTERISTICS, OVERALL REGULATORY FRAMEWORK, AND CURRENT DEBATES	13
2.1. MAIN CHARACTERISTICS OF THE GERMAN CARE SECTOR.....	13
2.1.1. <i>Care providers and actors: overview</i>	13
2.1.2. <i>Care Occupations</i>	14
2.1.3. <i>“Quasi-markets”; the funding framework for social care services</i>	18
2.1.4. <i>General regulatory framework</i>	19
2.2. LABOUR MARKET CHARACTERISTICS IN THE GERMAN CARE SECTOR	20
2.2.1. <i>Composition of the work force in the care sector</i>	20
2.2.2. <i>Unemployment</i>	21
2.2.3. <i>Demographics</i>	22
2.3. DOMESTIC AND LIVE-IN WORK	22
2.3.1. <i>Market Incidence of domestic care work</i>	23
2.3.2. <i>Forms of employment in live-in-work</i>	24
2.3.3. <i>Labour Law Regulation for Live-in-Workers</i>	25
2.3.4. <i>Impact of ILO Convention No 189 on Domestic Workers</i>	26
2.4. CURRENT DEBATES	26
3. FUNDAMENTAL TRADE UNION RIGHTS, SOCIAL PARTNERS, COLLECTIVE BARGAINING, AND INDUSTRIAL RELATIONS.....	30
3.1. COLLECTIVE BARGAINING SYSTEM IN GENERAL	30
3.1.1. <i>Trade union rights and autonomy of collective bargaining</i>	30
3.1.2. <i>Mechanisms for the extension and general applicability of collective agreements</i>	31
3.2. COLLECTIVE BARGAINING SYSTEM IN THE CARE SECTOR	31
3.2.1. <i>Social partners and other actors in the care sector</i>	31
3.2.2. <i>Organisation of collective bargaining</i>	34
3.2.3. <i>Extension of sector-specific minimum standards</i>	34
3.2.4. <i>Industrial conflicts in the care sector</i>	35
3.3. WORKS CONSTITUTION, INFORMATION, AND CONSULTATION	36
3.4. REGULATION ON WHISTLEBLOWING	37
4. EMPLOYMENT STATUS, FLEXIBLE FORMS OF EMPLOYMENT, AND EMPLOYMENT PROTECTION	38
4.1. EMPLOYMENT STATUS	38
4.2. FIXED-TERM WORK.....	39
4.3. ON-CALL-WORK.....	39
4.4. TEMPORARY AGENCY WORK	40
4.5. PART-TIME WORK.....	41
4.6. OTHER ASPECTS OF FLEXIBLE, CASUAL, AND PRECARIOUS FORMS OF WORK, IN PARTICULAR “MINI-JOBS”	41



4.7.	EMPLOYMENT PROTECTION	41
5.	WAGES AND BENEFITS.....	42
5.1.	MINIMUM WAGES.....	42
5.2.	LEGAL BASES FOR WAGES	43
5.2.1.	<i>Wages (TVöD).....</i>	43
5.2.2.	<i>Inconvenience pay (TVöD).....</i>	44
5.2.3.	<i>Benefits and wage supplements (TVöD).....</i>	45
5.3.	AVERAGE WAGES	46
5.4.	PROMOTING COMPLIANCE WITH COLLECTIVE AGREEMENTS (“TARIFTREUE”)	46
5.5.	DIRECTIVE 2022/2041/EU	47
6.	WORKING TIME, HEALTH AND SAFETY, IMPLICATIONS OF THE COVID-19 PANDEMIC, AND TRAINING AND COMPETENCE DEVELOPMENT.....	48
6.1.	REGULATION OF WORKING TIME.....	48
6.2.	REGULATION OF HEALTH AND SAFETY	49
6.2.1.	<i>General rules and procedures.....</i>	49
6.2.2.	<i>Violence and harassment at work.....</i>	50
6.2.3.	<i>Care Work: Regulation of staffing levels.....</i>	50
6.3.	IMPLICATIONS OF THE COVID-19 PANDEMIC.....	51
6.4.	TRAINING AND COMPETENCE DEVELOPMENT.....	52
7.	SOCIAL SECURITY COVERAGE AND BENEFITS.....	55
7.1.	GENERAL	55
7.2.	CARE SECTOR	56
7.3.	MATERNITY PROTECTION AND PATERNITY LEAVE	56
8.	CONCLUDING DISCUSSION	58
9.	LIST OF REFERENCES	60



Abbreviations

6. PflegeArbbV – 6. Pflegearbeitsbedingungenverordnung (Fifth Nursing Working Conditions Ordinance)

AAG – Aufwendungsausgleichsgesetz (Expenditure Compensation Act)

AEntG – Arbeitnehmerentsendegesetz (Posted Workers Act)

AGVP – Arbeitgeberverband Pflege (Employers' Association for Care e.V.)

ALG II – Grundsicherung für Arbeitssuchende (Basic Benefit/Support for Jobseekers)

AnFöVO – Anerkennungs- und Förderungsverordnung in Nordrhein-Westfalen (Recognition and Promotion Ordinance in North Rhine-Westphalia)

AOK – Allgemeine Ortskrankenkasse (General Local Health Insurance Company)

ArbGG – Arbeitsgerichtsgesetz (Labour Courts Act)

ArbSchG – Arbeitsschutzgesetz (Occupational Safety and Health Act)

ArbZG – Arbeitszeitgesetz (Working Time Act)

ASiG – Arbeitssicherheitsgesetz (Occupational Safety Act)

AÜG – Arbeitnehmerüberlassungsgesetz (Temporary Employment Act)

AVB – Arbeitsvertragsbedingungen (General Conditions for Employment Contracts)

AVR – Arbeitsvertrags-Richtlinien (Guidelines for Employment Contract, church organizations)

AWO – Arbeiterwohlfahrt (Workers' Welfare organization)

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)

BbiG – Berufsbildungsgesetz (Vocational Training Act)

BDA – Bundesvereinigung der Deutschen Arbeitgeberverbände (Confederation of German Employers)

BDSG – Bundesdatenschutzgesetz (Federal Data Protection Act)

BEEG – Bundeselterngeld- und Elternzeitgesetz (Federal Parental Allowance and Parental Leave Act)

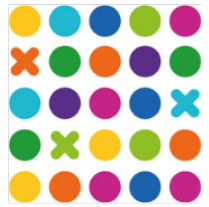
BEM – Betriebliches Eingliederungsmanagement (Occupational Integration Management)

BetrVG – Betriebsverfassungsgesetz (Works Constitution Act)

BFH – Bundesfinanzhof (The Federal Fiscal Court)

BGB – Bürgerliches Gesetzbuch (Civil Code)

BIBB – Bundesinstitut für Berufsbildung (Federal Institute for Vocational Education and Training)



BMAS – Bundesministerium für Arbeit und Soziales (Federal Ministry of Labour and Social Affairs)

BpersVG – Bundespersonalvertretungsgesetz (Federal Staff Representation Act)

BPfIV – Bundespflegegesetzverordnung (Hospital Care Rate Ordinance)

BRG – Betriebsrätegesetz (Works Councils Act)

BSG – Bundessozialgericht (Federal Labour Court)

BUrlG – Bundesurlaubsgesetz (Federal Paid Leave Act)

BVAP – Bundesvereinigung Arbeitgeber in der Pflegebranche (Association of Employers in the sector of elderly care)

BVerfG – Bundesverfassungsgericht (Federal Constitutional Court)

CEEP – European Centre of Employers and Enterprises providing Public Services

DEÜV Meldungen – Datenerfassungs- und übermittlungsverordnung (Data Collection and Transmission Ordinance Reports)

DKG – Deutsche Krankenhausgesellschaft (German Hospital Federation)

DQR – Deutscher Qualifikationsrahmen (German Qualifications Framework)

DrittelbG – Drittelbeteiligungsgesetz (One-Third Participation (Codetermination) Act)

DRK – Deutsches Rotes Kreuz (German Red Cross)

ECJ – European Court of Justice

EQF – European Qualifications Framework

ETUC – European Trade Union Confederation

EZuIV – Erschwerniszulagenverordnung (Hardship Allowance Ordinance)

GG – Grundgesetz für die Bundesrepublik Deutschland (Basic Law, German Constitution)

GKV – Gesetzliche Krankenkasse (Statutory Health Insurance)

GÖD – Gewerkschaft Öffentlicher Dienst und Dienstleistungen (Public Service and Services Union)

GPVG – Gesundheitsversorgungs- und Pflegeverbesserungsgesetz (Health and Care Improvement Act)

GWB – Gesetz gegen Wettbewerbsbeschränkungen (Act against Restraints of Competition)

HBS – Hans Böckler Stiftung (Hans Böckler Foundation)

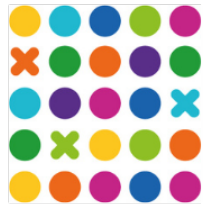
HebG – Hebammengesetz (Midwifery Act)

HebRefG – Hebammenreformgesetz (Midwifery Reform Act)

HebStPrV – Studien- und Prüfungsverordnung für Hebammen (Study and Examination Ordinance for Midwives)

HinSchG – Hinweisgeberschutzgesetz (Whistleblower Protection Act)

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



ILO – International Labour Organisation

IMK – Institut für Makroökonomie und Konjunkturforschung (Macroeconomic Policy Institute)

KHEntgG – Krankenhausentgeltgesetz (Hospital Reimbursement Act)

KHG – Krankenhausfinanzierungsgesetz (Hospital Financing Act)

KIdB 2010 – Klassifikation der Berufe 2010 (Classification of Occupations 2010)

KSchG – Kündigungsschutzgesetz (Unfair Dismissal Act)

LPartG – Lebenspartnerschaftsgesetz (Civil Partnership Act)

MAVO – Mitarbeitervertretungsordnung (Catholic Churches, the Church Employee Representation Act)

MiLoG – Mindestlohngesetz (Act Regulating a General Minimum Wage)

MitbestG – Mitbestimmungsgesetz (Co-Determination Act)

MontanMitbestG – Montanmitbestimmungsgesetz (Coal, Iron and Steel Co-determination Act)

MuSchG – Mutterschutzgesetz (Maternity Protection Act)

MVG-EKD – Mitarbeitervertretungsgesetze (Church Employee Representation Act)

PersVG Bbg – Personalvertretungsgesetz für das Land Brandenburg (Staff Representation Act for Brandenburg)

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

PfIAPrV – Ausbildungs- und Prüfungsverordnung für die Pflegeberufe (The Nursing Professions Training and Examination Ordinance)

PfIBG – Pflegeberufegesetz (Nursing Professions Act)

PfifachassAPrV – Ausbildungs- und Prüfungsverordnung Pflegefachassistenz (Training and Examination Ordinance for Nursing Assistants)

PfIStudStG – Pflegestudiumstärkungsgesetz (Nursing Studies Strengthening Act)

PpSG – Pflegepersonal-Stärkungsgesetz (Nursing Workforce Strengthening Act)

PpUGV – Pflegepersonaluntergrenzen-Verordnung (Nursing Staff Lower Limits Ordinance)

PSG II – Pflegestärkungsgesetz II (Nursing Care Strengthening Act II)

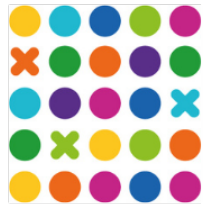
SGB III – Sozialgesetzbuch III (Social Security Code, Book III)

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)



SGB XII – Sozialgesetzbuch XII (Social Security Code, Book XII)

TV – Tarifvertrag (Collective Agreement)

TVG – Tarifvertragsgesetz (Collective Agreements Act)

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)

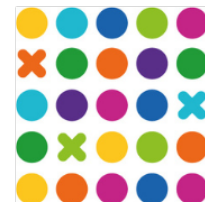
TVöD-K – Tarifvertrag für Krankenhäuser (Collective Agreement for the Public Sector, Hospitals)

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

ver.di – Vereinte Dienstleistungsgewerkschaft (United Services Union)

VermBG – Vermögensbildungsgesetz (German Capital Formation Act)

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



1. Introduction

The aim of this national report is to analyse job quality and inclusive working conditions of care workers in Germany. The report will include analysis of law and policy, labour market characteristics, and industrial relations, as well as analysis of the interplay between national law and EU/European and international law.

A socio-legal research methodology will be applied.

The outline of the national report is as follows. Section 2 discusses various aspects of care work and domestic work, including occupations, labour market characteristics, overall regulatory framework, and current debates. Section 3 addresses fundamental trade union rights, social partners, collective bargaining, and industrial relations. Section 4 presents a discussion on employment status, flexible forms of employment, and employment protection, while Section 5 presents a discussion on wages and benefits. Section 6 focuses on working time, health and safety, implications of the COVID-19 pandemic, and training and competence development. Section 7 discusses social security coverage and benefits. Section 8, finally, contains a concluding discussion.

1.1. Main characteristics of German labour law, industrial relations system and welfare state model

1.1.1. Labour Law System

With labour law, we here consider the rules applicable to the employment relationship; it is intimately linked to the industrial relations system which structures the collective bargaining system. The working conditions in an individual employment relationship are governed both by individual and collective labour law. Instruments of labour law in this sense are only applicable to relationships based on private contract, thus excluding e.g. career civil servants (Beamte), which are covered by public law.

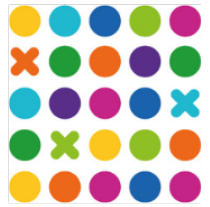
The origins of German labour law date back to the late 19th century, when the first trade unions emerged; they often organised works committees to demand the right of workers to represent their demands in their workplaces (especially factories).¹ With the founding of the Weimar Republic in November 1918, the signing of the Stinnes-Legien² Agreement between a number of employers' associations and trade unions in the same month laid the foundation for what was then called the new labour constitution (Arbeitsverfassung).³ With the agreement, the employers' associations and trade unions laid the foundation, among other things, for the regulation of working conditions through collective agreements, the regulation of which was then further implemented in December 1918 in the Ordinance on Collective Agreements, Workers' and Employees' Committees and Arbitration of Labour Disputes (Verordnung über Tarifverträge, Arbeiter- und Angestellten-Ausschüsse und Schlichtung von Arbeitsstreitigkeiten).

At the same time, the agreement created the conditions for the establishment of works councils (Betriebsräte) in companies, which was officially incorporated into legislation with the passing of the Works Councils Act

¹ Wolfgang Däubler and Michael Kittner, *Geschichte der Betriebsverfassung* (Bund-Verlag GmbH 2020)

² Named after its signatories, the industrialist Hugo Stinnes and the trade unionist Carl Rudolf Legien.

³ Term going back to Sinzheimer, cf. Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press 2017), 212 seq



(Betriebsrätegesetz, BRG) in 1920.⁴ While collective bargaining and works councils were abolished during the Nazi dictatorship (1933-1945), in the Federal Republic of Germany collective agreements have been reintroduced and ratified in the Collective Agreements Act (Tarifvertragsgesetz, TVG) since 1949; works councils are regulated in the Works Constitution Act (Betriebsverfassungsgesetz, BetrVG) since 1952 (revised, in particular, in 1972)—since 1990 expanded to the territories of the former German Democratic Republic.⁵

1.1.2. Industrial Relations System: dual system of representation

Germany has a dual system of employee representation. While trade unions are organised based on the principle of freedom of association and generally operate at the supra-company level, Works Councils are regulated by law in the BetrVG and operate on the level of undertaking.

Collective bargaining system: Unlike tripartite industrial relations system, the government in Germany is largely excluded from the collective bargaining; Art. 9 (3) German Constitution (Grundgesetz, GG) guarantees “collective bargaining autonomy” of social partners (Tarifautonomie). There are no formally regulated rules on union representativeness in Germany. However, longstanding jurisprudence establishes that in order to have the legal capacity to take part in collective bargaining (“Tariffähigkeit”), a trade union must not only meet formal conditions as to the internal statute, but also show that it can be effective and put the other side under pressure (social power, “soziale Mächtigkeit”). Courts acknowledge social power mostly according to membership and organisational strength.⁶

Industry agreements are typically negotiated at regional rather than national level. Only those collective agreements that are intended for general application on the basis of the Posted Workers Act (Arbeitnehmerentsendegesetz, AEntG) (see 2.3.3. & 3.1.2.) have to be negotiated on national level.

Works Council system: Works councils are elected in companies with normally five or more permanent employees (Sec. 1 BetrVG), and represent the interests of all employees to the employer, whether or not the workers are union members or have taken part in the election. It can conclude binding collective agreement with the employer (works agreements) (see 3.1.3.). A works council consists of a single person in small firms with up to 20 employees and grows in numbers commensurate with the size of the company (Sec. 9 BetrVG).

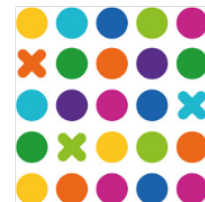
Corporate codetermination system: At the company level there is also a system of corporate codetermination (Unternehmensmitbestimmung), in which employees are involved in company decisions through representation on company supervisory boards. This system is restricted to large companies—firms with more than 500 employees must have worker representatives on their supervisory boards, alongside shareholder representatives. Employee representatives can be employees of the firm, but also external trade-union representatives.⁷ The proportion of employee representation on the supervisory board changes depends on the number of employees and on the sector:

⁴ Peter Berg, Eva Kocher and Dirk Schumann (eds), *Tarifvertragsgesetz und Arbeitskampfrecht: Kompaktcommentar* (Kompaktcommentar, 7th edn, Bund-Verlag 2021)

⁵ Däubler and Kittner (n 1)

⁶ Berg, Kocher and Schumann (eds) (n 4), Sec. 2, marg. 26-30a; 31-34b; the Federal Constitutional Court holds that this jurisprudence is in accordance with the constitution ((2019) 1 BvR 1/16 (BVerfG)).

⁷ Simon Jäger, Shakked Noy and Benjamin Schoefer, ‘The German Model of Industrial Relations: Balancing Flexibility and Collective Action.’ (August 2022). IZA DP 15500 <<https://docs.iza.org/dp15500.pdf>> accessed 10 October 2023



- For companies between 500 and 2000 employees, co-determination is regulated by the One-Third Participation Act (Drittelbeteiligungsgesetz, DrittelbG), with employee representatives occupying one third of the positions on the supervisory board
- For companies with more than 2000 employees, the Co-Determination Act of 1976 (Mitbestimmungsgesetz, MitbestG) applies. Here, employees make up for half of the members on the supervisory board, but the chairman, whose vote is decisive in the event of a deadlock, is always a shareholder representative
- For companies in the mining, coal, iron, and steel industries with more than 1000 employees, the Coal, Iron and Steel Co-determination Act (Montanmitbestimmungsgesetz, MontanMitbestG) applies. Employees and capital (shareholders) are also represented equally on the supervisory board; the vote of the chairman of the supervisory board (a further shareholder representative) is balanced by another neutral member elected by mutual agreement of both sides.

This system of corporate codetermination is important for understanding the German cooperative industrial relations system. However, it relates to company law and corporate governance, and does not come with specific rules in labour law and on working conditions; that's why it will not be covered further in this report.

1.1.3. Welfare State Model

According to Art. 20 (1) GG, Germany is a democratic and social state. Its social insurance system is based on the so-called "Bismarck model". In the era of the German Reich, Chancellor Otto von Bismarck in the 1890s, welfare policies were implemented in the form of compulsory, state-regulated insurance systems, such as health insurance, accident insurance, and pensions. These policies were at the time also intended to push back against the growing influence of social democracy and socialist movements.

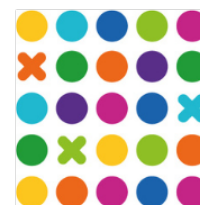
In the Bismarckian social insurance model of social security, benefits are not universal but connected to employment status or similar, with financial contributions shared between employers and employees.⁸ As a consequence, neither self-employed, non-workers nor career civil servants are included in this system. In this model, social insurance institutions (Sozialversicherungsträger) are self-governed, the Verwaltungsrat (administrative board/supervisory board) being elected in equal parts by workers/insured persons and employers. Elections (Sozialwahlen) take place every six years (see 7.1.).

There are five social insurance schemes, regulated by the Social Security Code (Sozialgesetzbuch, SGB) in several books. In 1995, Germany introduced long-term care insurance as the fifth and currently final pillar of the German social insurance system. Today, five branches are covered: Health (SGB V), long-term care (SGB XI), pension (SGB VI), unemployment (SGB III) and accident insurance (SGB VII, covering employers' liability for injuries at work). Social insurances are supplemented by numerous tax-financed state welfare programmes, such as income support (Sozialhilfe, SGB XII), but also parental allowance (Elterngeld) and other benefits.

In Esping-Andersen's (1990) typology of modern Western welfare state models, Germany is classified as belonging to what he calls the conservative welfare model, as opposed to the liberal and social democratic.⁹ The conservative

⁸ Henry E Sigerist, 'From Bismarck to Beveridge: Developments and Trends in Social Security Legislation' (1999) 20(4) Journal of Public Health Policy 474

⁹ Gøsta Esping-Andersen, 'The Three Political Economies of the Welfare State' (1990) 20(3) International Journal of Sociology 92; H Rothgang H and others, 'Migrantization of long-term care provision in Europe: A comparative analysis of Germany,



model tends to value traditional ideas of family responsibility, based on the idea of the male breadwinner and the woman as caretaker, prioritizing, for example, home-based long-term care for the elderly. According to this model, care work is largely privately organized, with women bearing the main burden of unpaid care work.¹⁰

Although labour law and in some instance social security today in many aspects also represent double earner models,¹¹ the normative regulation of long-term care still largely reflects the familiaristic conservative model. For example, Sec. 3 SGB XI states that “long-term care insurance primarily supports home care and the willingness of relatives and neighbours to provide care, so that those in need of care can remain in their home environment for as long as possible” (our translation). Short-term care and outpatient care are prioritized over stationary inpatient care (Sec. 3 SGB XI).

1.2. Remarks on Research Methods

In conducting our socio-legal analysis, we drew on a number of databases, statistics, and reports.

When providing figures, Section 2 (especially 2.2. and 2.3.) largely draws on statistics from the Federal Employment Agency (Bundesagentur für Arbeit, BA), which publishes detailed annual reports on the labour market situation in the German care sector (Arbeitsmarktsituation im Pflegebereich, BA Report).¹² These annual reports include all care workers who are regularly employed in inpatient (including hospitals) and outpatient facilities. Persons who perform nursing work as part of marginal employment, e.g. on a mini-job basis (see 4.5.), are thus excluded. Also excluded are people who are self-employed (including bogus self-employment), au pairs, and midwives (the latter due to their different occupational classification) (see 2.1.2.). The sources used in the annual reports are compiled from the Data Collection and Transmission Ordinance Reports (Datenerfassungs- und -übermittlungsverordnung, DEÜV-Meldungen)¹³ of the companies to the social insurance institutions and temporary employment agencies' reports on their employees according to the Temporary Employment Act (Arbeitnehmerüberlassungsgesetz, AÜG).

Italy, Sweden, and Poland' (2021). SFB 1342 WorkingPapers 11; Cornelius Torp C, 'International Transfers and National Path Dependencies: Pension Systems in Britain and Germany after the Second World War' in Frank Nullmeier, Delia González de Reufels and Herbert Obinger (eds), *International Impacts on Social Policy* (Global Dynamics of Social Policy. Springer International Publishing 2022)

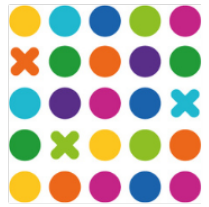
¹⁰ Kirsten Scheiwe, 'Existenzsicherung zwischen Sozial- und Familienrecht in der BRD – individualisiert, ehebezogen, familialistisch, care-orientiert? Ein Beitrag mit rechtsvergleichenden Anmerkungen.' in Kirsten Scheiwe (ed), *Soziale Sicherungsmodelle revisited – Existenzsicherung durch Sozial- und Familienrecht und ihre Geschlechterdimensionen* (Nomos 2007); Sigrid Leitner S, 'Familialismus in konservativen Wohlfahrtsstaaten: Zum Wandel des Geschlechterleitbilds in der Kinderbetreuungs- und Altenpflegepolitik.' in Diana Auth, Eva Buchholz and Stefanie Janczyk (eds), *Selektive Emanzipation. Analysen zur Gleichstellungs- und Familienpolitik*. (Verlag Barbara Budrich 2010)

¹¹ Eva Kocher and others, *Das Recht auf eine selbstbestimmte Erwerbsbiographie: Arbeits- und sozialrechtliche Regulierung für Übergänge im Lebenslauf* (Ein Beitrag zu einem Sozialen Recht der Arbeit, Nomos 2013); Bundesregierung, 'Zweiter Gleichstellungsbericht: Erwerbs- und Sorgearbeit gemeinsam neu gestalten' (BT-Drucks. 18/12840)

¹² 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> accessed 10 October 2023

¹³ Employers are legally obliged to report the data of their employees to the social insurance institutions.

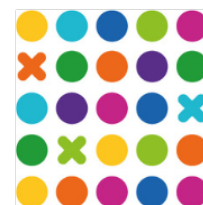


On other times, we also refer to figures made available by the Federal Statistical Office (Statistisches Bundesamt). The main difference with the BA is that the Federal Statistical Office uses additional sources, which are listed in the “health personnel account” (Gesundheitspersonalrechnung) on its website (see WP3 Report for details).¹⁴

As there is no official data on the number of “live-in” workers in Germany, we rely on estimates published in reports by public expert organisations working in this field, such as MINOR,¹⁵ and in scientific publications.

¹⁴ Statistisches Bundesamt, ‘Gesundheitspersonalrechnung’ (26 January 2023)
<https://www.destatis.de/DE/Methoden/Qualitaet/Qualitaetsberichte/Gesundheit/gesundheitspersonalrechnung.pdf?__blob=publicationFile> accessed 11 September 2023

¹⁵ ‘Minor Kontor’ <<https://minor-kontor.de/>> accessed 21 September 2023



2. Care work and domestic work: occupations, labour market characteristics, overall regulatory framework, and current debates

2.1. Main Characteristics of the German Care Sector

2.1.1. Care providers and actors: overview

The care sector in Germany is characterized by a mix of public, private non-profit (including church), and private commercial providers of inpatient (including hospitals) and outpatient care services.

Publicly owned facilities in the care sector are mainly operated by municipal bodies as well as by the federal states (Länder).

Charitable organisations of protestant (Diakonie) and catholic churches (Caritas) together with other private non-profit organisations such as Arbeiterwohlfahrt (AWO, Workers' Welfare), Deutsches Rotes Kreuz (DRK, German Red Cross), Zentralwohlfahrtsstelle der Juden in Deutschland (ZWST, Central Welfare Office of the Jews in Germany) make up the sector "Freie Wohlfahrtspflege" in Germany (represented by Bundesarbeitsgemeinschaft der Freien Wohlfahrtspflege, BAGFW (Federal Working Group of the Freie Wohlfahrtspflege). Part of this network of non-profit institutions is also „Der Paritätische Wohlfahrtsverband“, an umbrella organisation for over 10.000 independent organisations in social and health sectors, among them Volkssolidarität (East-German welfare organisation), Arbeiter-Samariter-Bund Deutschland (Workers' Samaritan Federation), Deutsche AIDS-Hilfe (Aids support), Sozialverband VdK Deutschland. In 2017, these organizations employed around 4% of all workers in Germany (2016: around 1.9 million).¹⁶

In addition, there are private commercial providers. Most of these organize care work in small-scale structures. But there are also commercial companies, such as Asklepios, Rhön, Helios und Sana, that organise large hospitals.

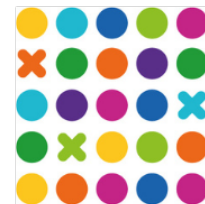
There are currently 1.887 hospitals operating in Germany, out of which 29% are publicly operated, 32% are operated by private non-profit organisations, and almost 38% are operated by private commercial providers.¹⁷ Hospitals employed around 686.000 out of almost 1.700.000 care workers in inpatient and outpatient care in 2021.¹⁸

Nationwide, there were around 16,100 fully or partially inpatient nursing homes licensed under SGB XI in December 2021. The majority of the homes (53% or 8,500) were run by non-profit organizations (e.g., Diakonie or Caritas); the share of commercial operators was 43%, with public providers having the smallest share at 5%. Of the total of 15,400 licensed outpatient nursing and care services, the majority were operated commercially (10,400

¹⁶ Karl Gabriel, 'Auf dem Weg in eine faire Dienstleistungswirtschaft: Die Mitverantwortung der kirchlichen Wohlfahrtsverbände' in Bernhard Emunds and others (eds), *Freiheit - Gleichheit - Selbstausbeutung: Zur Zukunft der Sorgearbeit in der Dienstleistungsgesellschaft* (Die Wirtschaft der Gesellschaft Jahrbuch 6. Metropolis-Verlag 2021)

¹⁷ Statistisches Bundesamt, 'Vorläufige Eckwerte der Krankenhäuser 2022 nach Trägern und Bundesländern' (13 September 2023) <<https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Gesundheit/Krankenhaeuser/Tabellen/eckzahlen-krankenhaeuser.html>> accessed 20 September 2023; similar (for 2017): Gabriel, 'Auf dem Weg in eine faire Dienstleistungswirtschaft: Die Mitverantwortung der kirchlichen Wohlfahrtsverbände' (n 16) 270

¹⁸ Bundesagentur für Arbeit, 'Arbeitsmarktsituation im Pflegebereich' (n 12)



or 68%); the share of non-profit providers was 31% and public providers of only 1%.¹⁹ Particularly important is the role of the protestant and catholic churches with their charitable organizations Diakonie and Caritas, respectively, which collectively employ around two thirds of all employees in the non-profit sector; between 1960 and 1980, their numbers more than doubled, and grew at around 50% again between 1990 and 2000.²⁰

2.1.2. Care Occupations

Paid Care work has become an important part of the labour market in Germany and a sector in its own right, mainly due to the continuing need for care resulting from demographic factors (increasing life expectancy), social factors (increased labor market participation of women, decreasing disposition of women to take on private informal care), and work-related factors (decreasing willingness to work in care due to bad working conditions), the recognition of care as an independent part of social insurance, state-regulated and recognised training programmes for care workers, and specific labour law regulations governing various forms of care work.

Care work can be analysed and categorised as part of the so called SAHGE occupations, an acronym which refers to social work, household-related services, health and care, and education (Soziale Arbeit, Haushaltsnahe Dienstleistungen, Gesundheit und Erziehung).²¹ In labour market policy, the term "person-related services" (personenbezogene Dienstleistungen) is also used for care activities.²² The SAHGE occupations can be analysed (in part) with the help of the 8th occupational domain of the Classification of Occupations (Klassifikation der Berufe KldB 2010),²³ a standardized classification system that was developed under the leadership of the Federal Employment Agency and its Institute for Employment Research (Institut für Arbeitsmarkt- und Berufsforschung, IAB) with the participation of the Federal Statistical Office and federal ministries as well as experts in occupational and empirical (social) research. It categorizes occupations according to their field of activity, realistically represents the current occupational landscape in Germany and at the same time offers a high degree of compatibility with the international occupational classification (ISCO-08, International Standard Classification of Occupations 2008). This system separates care work from academically trained health professions (such as physicians etc.).²⁴ Similarly, Germany's Federal Statistical Office categorizes care work under the heading of health care workers, but separates it from academically trained physicians.²⁵

For the purposes of this report, we divide care workers in Germany into two main groups in order to analyse their position in the labour market and the labour regulations that apply to them: nursing staff and domestic workers. The former can be employed in different care settings such as hospitals, health clinics, nursing homes, and home care services, but perform different tasks and undergo different levels of training. Live-in workers, a sub-category

¹⁹ 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> accessed 10 October 2023; similar (for 2017): Gabriel (n 16) 270

²⁰ Gabriel, 'Auf dem Weg in eine faire Dienstleistungswirtschaft: Die Mitverantwortung der kirchlichen Wohlfahrtsverbände' (n 16) 271

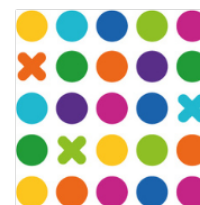
²¹ Bundesregierung, 'Zweiter Gleichstellungsbericht' (n 11)

²² Rudolph Bauer, *Personenbezogene soziale Dienstleistungen: Begriff, Qualität und Zukunft* (1. Aufl. Westdt. Verl. 2001)

²³ Bundesagentur für Arbeit, 'Klassifikation der Berufe 2010 (KldB 2010)' <https://www.arbeitsagentur.de/datei/Klassifikation-der-Berufe_ba017989.pdf> accessed 10 October 2023

²⁴ The keys for the Main Occupational Groups in the Classification of Occupations (KldB 2010) for care workers are: 8130 Health care, nursing (without specialization), 8131 Specialist nursing, 8132 Specialized pediatric nursing, 8138 Health care, nursing (other specific job specification), 8139 Supervision, leadership - nursing, emergency services, and 821 Elderly care (including leadership).

²⁵ Statistisches Bundesamt, 'Gesundheit - Pflege' <https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Gesundheit/Pflege/_inhalt.html> accessed 20 September 2023



of domestic workers, perform work exclusively in domestic households.

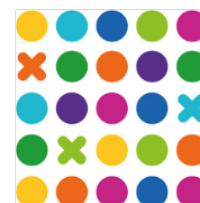
In the table below, we break down the two main groups of care workers into occupational categories (nursing assistants, nursing professionals, and health care professionals in nursing, domestic workers). These occupational categories partially correspond to the categories mentioned in the European Commission's Communication on the European Care Strategy (home-based personal care workers, nursing associate professionals, and nursing professionals).²⁶ We further divide them based on their function and level of training. We align these categories with the ones used by the report of the German Federal Employment Agency to better analyse the labour market characteristics in the German care sector later (see Section 2.1.4. for more details). For the sake of comparison with other EU countries, we use the European Qualifications Framework (EQF)²⁷ to which the German Qualifications Framework (Deutscher Qualifikationsrahmen, DQR) is adapted.²⁸

The columns A1-A3 refer to functions: care/assistance to people with disability (physical and mental) (A1), elderly people (A2) and/or sick people (A3).

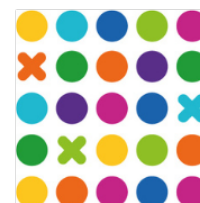
²⁶ European Commission, 'European care strategy: Communication from the Commission' (COM(2022)440 7 September 2022) <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022DC0440>> accessed 10 October 2023

²⁷ Council of the European Union, 'Recommendation of 22 May 2017 on the European Qualifications Framework for lifelong learning and repealing the recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning: 2017/C 189/03 OJ C 189' (2017)

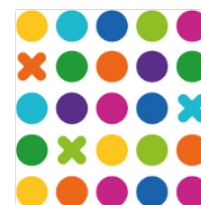
²⁸ Bundesministerium für Bildung und Forschung, 'Deutscher Qualifikationsrahmen (DQR)' <https://www.dqr.de/dqr/de/der-dqr/der-dqr_node.html> accessed 20 September 2023



Occupations	A1	A2	A3
Nursing Assistants: Care workers with no or low professional qualifications - up to two years. They take care of people who need support because of their age, a disability, or an illness. They take on nursing tasks such as helping with personal hygiene, preparing meals, walking exercises, and ensure order and hygiene in the living environment of those in need of care. They also report the care-recipients condition to nursing specialists. They can work in inpatient (senior homes, day-care facilities, and hospitals) and outpatient care. Professions: a) <u>Nursing assistants/helpers</u> (Pflegeassistenz/Pflegehilfskraft) must complete one to two years of vocational training, which is regulated by the individual federal states and ends with a state final examination (<i>staatliche Abschlussprüfung</i> – not an academic degree). Their educational level corresponds to level 4 of the European Qualifications Framework (EQF). b) <u>Elderly care nurse assistants</u> (Altenpflegehelfer) specialize in elderly care. They require one to two years (depending on the federal state) of specialized training in elderly care at vocational schools, which ends with a state final examination. Their educational level corresponds to level 4 of the EQF. c) <u>Curative education nurse assistants</u> (Heilerziehungspflegehelfer) work with people with disabilities. Depending on the federal state, they undergo one to two years of specialized training in curative education at vocational schools, which concludes with a state final examination. Their educational level corresponds to level 4 of the EQF.	X	X	X
Nursing Professionals: care workers with professional training. They take on nursing tasks, but are also allowed to take on more demanding tasks than nursing assistants. Professions: <u>Nursing Specialists</u> (Pflegefachkräfte) care for people of all ages in the areas of nursing, paediatric care, care for the disabled, and care for the elderly. They perform similar tasks to nursing assistants, but because of their professional training, they may also administer prescribed medications and perform other medical tasks in coordination with physicians (e.g., wound care, blood collection, punctures). They also take on administrative and organizational tasks, such as planning and documenting nursing measures. They work in residential care (hospitals, health centers, nursing homes, etc.) and home care and can be responsible for day care, night care, preventive care, full-time care, short-term care, intensive care, and hospice care. Their professional training is federally regulated and lasts three years in nursing schools, hospitals, and care facilities. It takes the form of generalist training to become a nursing specialist, but in the third year it is possible to opt for specialisation as a <u>paediatric nurse</u> or <u>elderly care nurse</u>. The training ends with a state final examination (<i>staatliche Abschlussprüfung</i> – not an academic degree). Their educational level corresponds to level 4 of the EQF.	X	X	X



Health Professionals in Nursing a) <u>Nursing specialists with a bachelor's degree</u> generally perform the same activities as nursing specialists with vocational training, but additionally incorporate scientific knowledge to improve nursing work. The academic degree for nursing specialists has been available since 2020 and takes three years to complete at a university that offers the program. Their educational level corresponds to level 6 of the EQF. b) <u>Nursing specialists with a master's or PhD degree</u> assume leadership, instruction, supervisory, and managerial roles and are responsible for challenging and specialized clinical tasks. In doing so, they utilize an expanded range of tasks and responsibilities to promote needs-based and evidence-informed long-term care. They may also engage in research or teaching. Their educational level corresponds to level 7 (MA) and 8 (PhD) of the EQF. c) <u>Specialized nurses</u> work for specialized healthcare professionals, such as anaesthesiologists, psychiatrists, etc. Their training takes place as professional development education (berufliche Weiterbildung/Fortbildung) and corresponds to level 6 of the EQF. d) <u>Curative education nurses</u> (Heilerziehungspfleger) perform educational and nursing tasks for people with disabilities. Their training is regulated by individual federal states and is composed of an additional vocational training at trade and technical schools (Fachschule) and takes place for 2 to 3 years, followed by state final examination. Their educational level corresponds to level 6 of the EQF.	x	x	x
Domestic Workers: care workers with no or basic professional qualifications. Their main task is to support the person in need of care in their everyday life and to ensure their participation in social life. This mainly includes helping with everyday tasks (housework, shopping, preparing meals, etc.) and offer leisure activities that promote exercise and creativity. Professions: a) <u>Care Assistants</u> (Betreuungsassistent) (also called daily companions (Alltagsbegleiter) can work in residential care (nursing homes, day care facilities, etc.) and in home care with people with physical or mental disabilities or the elderly. Their training is regulated at the level of the individual course providers – however, care assistants usually complete at least 3 to 4 months of vocational training. b) <u>Live-in workers</u> provide "24-hour care" in Germany and are mainly women from Central and Eastern Europe. They usually stay in a private household of the person in need of care for between four and twelve weeks and have similar tasks to care assistants. A large proportion of live-in workers are employed through agencies and suffer from low wages and poor working conditions, as this type of work is the least regulated in the German care sector.	x	x	



2.1.3. “Quasi-markets”; the funding framework for social care services

The German care sector is framed by social policy and, at least in part, financed by social insurance institutions (Sozialversicherungsträger) in accordance with the Social Security Code (SGB). Services are carried out by care service providers (Leistungsträger) who are employers of care workers. Patients (as insured persons) are entitled to benefits from insurance institutions, but (as customers) conclude contracts with the care service providers they choose. Thereby, a trilateral/triangular contractual structure is at the basis of care services. This design leads to the establishment of “quasi-markets”.²⁹ In this triangular contractual structure, the risks are often shifted to customers and/or employees.

Long-term care insurance only establishes partial financing of care costs (Teilleistungsversicherung). Social security law places informal and formal care as well as non-profit and private service providers on an equal footing and into competition with each other (e.g. Sec. 3 SGB XI). Since working conditions in care are also decisively influenced by the scope of the legally regulated financing systems and personnel costs account for a high proportion of total costs, they are used in quasi-market economy systems as almost the only way to reduce costs.

The funding system can be explained with the example of long-term care: In order to be eligible for long-term care coverage, an individual has to be in need of care for at least six months (Sec. 14 (1) SGB XI) and have a degree of severity (“Pflegegrad”) specified in a legally defined five-point scale (Sec. 15 of the SGB XI).

In Germany, around 5 million people are beneficiaries of long-term care coverage, out of which 4.2 million are taken care of at home, mainly only by their relatives (2.553.000), followed by relatives assisted by outpatient care services (1.046.000), and 793.000 in full-inpatient care facilities.³⁰ The familiaristic, “conservative” features of the German long-term care system is reflected in the way private care by family members or other persons is being promoted and partially financed by care insurance. Insured persons in need of care are entitled to the so-called “care allowance” (Pflegegeld, Sec. 37 SGB XI), the amount of which depends on the degree of severity of the condition of the person in need of care (“Pflegegrad”, from 316 Euro monthly in degree 2 to 901 Euro monthly in degree 5) (Sec. 37 (1) SGB XI). This allowance can but need not be used to employ care workers.³¹ Persons who are cared for at home can also use the additional benefits provided by Secs. 45a and 45b SGB XI for professional support in daily life (between 290 Euro (degree 2) to 800 Euro (degree 5), plus 125 Euro monthly). However, only the federal state Nordrhein-Westfalen has so far established criteria for the quality assurance of such services via the “Anerkennungs- und Förderungsverordnung” (AnFöVO (NRW) 2019).³²

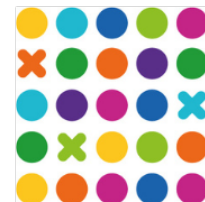
Another example is the funding of sick care in hospitals. Different laws regulate the funding of inpatient care: Nursing Workforce Strengthening Act (Pflegepersonal-Stärkungsgesetz, PpSG), Hospital Financing Act (Krankenhausfinanzierungsgesetz, KHG), Hospital Reimbursement Act (Krankenhausentgeltgesetz, KHEntgG), and Hospital Rate Ordinance (Bundespflugesatzverordnung, BPfIV). Hospital reimbursement is based on a combination of per-case flat rates and a nursing staff cost allowance. Secs. 137i-k SGB V now set sublimits to improve nursing staffing, for example via the Nursing Staff Lower Limits Ordinance (Pflegepersonaluntergrenzen-

²⁹ Georg Cremer, Roland Fritz and Nils Goldschmidt, ‘Soziale Dienstleistungen und Quasi-Märkte in der Sozialen Marktwirtschaft’ (2018) 65(3) Zeitschrift für Politik 335 <https://www.nomos-elibrary.de/10.5771/0044-3360-2018-3-335.pdf?download_full_pdf=1>

³⁰ Statistisches Bundesamt, ‘Pflegebedürftige nach Versorgungsart, Geschlecht und Pflegegrade’ (31 December 2022) <<https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Gesundheit/Pflege/Tabellen/pflegebeduerftige-pflegestufe.html>>

³¹ Bernhard Emunds and others (eds), *Pflegearbeit im Privathaushalt: Sozialethische Analysen* (Lea Quaing, Brill Ferdinand Schöningh 2021)

³² *ibid*



Verordnung, PpUGV) which regulates the establishment of nursing staff sublimits in nursing-sensitive areas in hospitals. A government commission (Regierungskommission für eine moderne und bedarfsgerechte Krankenhausversorgung) proposed in December 2022³³ to change the system and reimburse hospitals based on criteria of retention services, levels of care, and service groups. The system of per-case flat rates would then be abolished. At the moment (summer 2023), the federal government is implementing these proposals in agreement with federal states and actors of the health sector.³⁴ According to the Federal Health Ministry's plans, 60% of clinics' costs would in the future be covered by retention fees.

For the Nursing Professions Act (Pflegeberufegesetz, PflBG) see below 6.4.

2.1.4. General regulatory framework

Germany does not have a comprehensive Labour Code. Instead, labour law is regulated by the Civil Code (Bürgerliches Gesetzbuch, BGB) which regulates the employment contract (secs. 611a BGB), and numerous special acts, such as the Minimum Wage Act (Mindestlohngesetz – MiLoG), Federal Paid Leave Act (Bundesurlaubsgesetz – BUrlG), etc. (see 4.-6.). At the top of the hierarchy of labour law sources are the German Constitution and European Union law. Collective agreements as well as works agreements have binding effect and are therefore also sources of labour law. There is a special jurisdiction for labour law disputes, regulated by the Labour Courts Act (Arbeitsgerichtsgesetz, ArbGG).

There is hardly any specific statutory labour law regulation for the care sector. (Specific rules on working time are discussed under 6.1., specific rules for live-in-workers are discussed under 2.3.3.) Otherwise, specific rules are established by collective bargaining: While statutory laws serve as the base for minimum standards of all employees, further collectively established legal frameworks exist for care workers who work in the public sector or for church organisations. For instance, care workers who work in facilities operated by municipalities or other public-law institutions such as public hospitals are covered by the collective agreements for the public sector (see 3.2.2.).

As for church institutions, including Caritas and Diakonie, the constitution (Art. 140 GG, referring to Art. 137 (3) of the Weimar Constitution) is largely understood as granting rights of self-determination to the Christian churches, including the freedom to regulate employment relationships. In other words, the protestant and catholic (regionally organised) churches have established their own labour law in Germany (for care see below 3.2.2.). Due to the important role of these employers in the care sector, a specific mechanism for the general applicability of collectively established minimum standards has been regulated (see 3.2.3.).

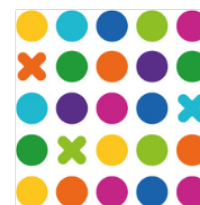
After the attempt of using this mechanism for extending a collective agreement for minimum conditions in care failed in 2021 (see 3.2.3.), the legislator opted for an indirect regulation of working conditions in long-term care, via incentives in social security law. In particular, since September 2022, service contracts funded by social insurance institutions can only be concluded with providers who guarantee the minimum standards of a collective agreement (or a respective church regulation, see 3.2.2.) (Sec. 72 Abs. 3 Satz 1 Nr. 2, Abs. 3a, Abs. 3b SGB XI, so-

³³ Regierungskommission für eine moderne und bedarfsgerechte Krankenhausversorgung, 'Dritte Stellungnahme und Empfehlung' (2022)

<https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3_Downloads/K/Krankenhausreform/3te_Stellungnahme_Regierungskommission_Grundlegende_Reform_KH-Verguetung_6_Dez_2022_mit_Tab-anhang.pdf>

³⁴ Bundesministerium für Gesundheit, 'Eckpunktepapier Krankenhausreform' (10 July 2023)

<https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3_Downloads/K/Krankenhausreform/Eckpunktepapier_Krankenhausreform.pdf>



called compliance with collective agreements (Tariftreue)).³⁵ According to Sec. 82c Abs. 1 und 2 SGB XI, social insurance institutions are now no longer allowed to decline funding for the economic consequences of collective bargaining.

2.2. Labour Market Characteristics in the German Care Sector

2.2.1. Composition of the work force in the care sector

According to the 2021 report of the German Federal Statistical Office,³⁶ which also includes marginally employed care workers, more than 1.2 million people were employed in inpatient (excluding hospitals) and outpatient care. Inpatient care employed 814.042 people, with nearly two-thirds (63%) or 577.144 working part-time and less than one-third (27%) or 236.898 working full-time. 82% of the employed were women. The most common age group is 50-60 years old (28.9%), followed by 40-50 years old (20.4%), 30-40 years old (18.7%), 20-30 years old (14.9%), 60-65 years old (11.2%), 65+ years old (3%), and under 20 years old (2.8%). Outpatient care, on the other hand, employed 443,000 people, most of them part-time (279.090 or 68%) and 124,040 (28%) full-time. 85% of the employees were women. The most common age group is 50-60 (27.8%), followed by 40-50 (23%), 30-40 (22.4%), 20-30 (12.4%), 60-65 (9.7%), 65+ (3.5%) and under 20 (1.2%).

On the other hand, the recent report of the Federal Employment Agency (BA Report) offers the most comprehensive analysis of the labour market situation in the German care sector to date.³⁷ It distinguishes nursing staff according to their professional training: health professionals in nursing, nursing professionals, and nursing assistants, and their workplace (hospitals, inpatient care, and outpatient care). These categories are equivalent to the units of analysis outlined in 2.1.2.

The BA report shows that in 2021 there were 1.7 million employees³⁸ working in inpatient (including hospitals) and outpatient care, which corresponds to 23% of the total 6 million employees in the German health sector. Out of 1.7 million employees in nursing occupations, nursing professionals are most represented with 1.1 million employees (63%), followed by nursing assistants with 448.000 employees (29%); the remaining 8% (about 20.000) are health professionals in nursing.

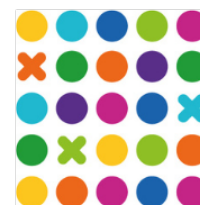
In terms of workplace setting, 686.000 (40%) care workers were employed in hospitals, 506.000 (30%) in inpatient care (including full and partial inpatient care), and 280.000 (17%) in outpatient care, totalling 1.500.000. The rest of 200.000 are most likely employed through agencies and not directly by care providers. Out of the 1.5 million employed in the three workplace settings, nursing professionals are most prevalent, with 79% (541.940 out of 686.000) working in hospitals, 49% (247.940 out of 506.000) in inpatient care, and 55% in outpatient care (154.000 out of 280.000). In the same order, nursing assistants make up 11% (hospitals) (75.460), 47% (inpatient care) (237.820), and 39% (outpatient care) (109.200) of the nursing workforce, while health professionals in nursing make up only 10% (68.600), 4% (20.240), and 6% (16.800) of the nursing workforce, respectively.

³⁵ Felix Hartmann, 'Tariftreue in der Pflegebranche.: Unions- und verfassungsrechtliche Bedenken gegen §§ 72, 82c SGB XI nF' [2023] RdA 90; Michaela Evans, "'Tariftreue" in der Altenpflege: Neue Governance zwischen Tarifpolitik und Sozialstaat' (2023) 76(3) WSI-Mitteilungen 221; Wolfgang Schroeder, Lukas Kiepe and Saara Inkinen, 'Die Grenzen selbstorganisierten Handelns: attraktive Pflegeberufe durch Tarifautonomie?' [2022] WSI-Mitteilungen 355; on the implementation in the region of North Rhine Westphalia, see in detail Lenzen and Evans-Borchers (2023).

³⁶ Statistisches Bundesamt, 'Pflegestatistik - Pflege im Rahmen der Pflegeversicherung - Deutschlandergebnisse - 2021' (n 19)

³⁷ Bundesagentur für Arbeit, 'Arbeitsmarktsituation im Pflegebereich' (n 12)

³⁸ For an explanation of the different numbers of care workers, see 1.2.



2.2.2. Unemployment

According to the BA report,³⁹ the number of unemployed nursing staff has been declining over the longer term, and the Corona pandemic-related increase in unemployment has been below average. The unemployment rate in nursing occupations (2.6%) in 2021 was significantly lower than the rate across all occupations (about 5.5%). On average, 46.000 nursing staff were registered as unemployed in Germany in 2021, compared to 42.000 in 2017, 40.000 in 2018, 40.000 in 2019, and 42.000 in 2020.

Unemployment particularly affects nurses who are looking for a job at the assistant level. For instance, in 2021 out of 46.000 registered unemployed nursing staff, 37.000 (81%) were nursing assistants against an average of 7.000 (16%) nursing professionals and 1.000 (3%) of health professionals in nursing. This ratio has not significantly changed in the past ten years. Two-thirds of unemployed nursing assistants do not have any completed vocational training (25.000), 8.000 have training outside their field, and only 4.000 have completed training in nursing.

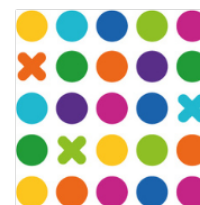
Considering long-term unemployment among nursing staff, in 2016 the share of long-term unemployed among all unemployed nursing staff was 30% (37% in the whole labour market); it fell to 25% in 2020 (30% in the whole labour market). Of the unemployed nursing professionals, only 15% were long-term unemployed. Over the course of the Corona pandemic, however, there was a marked increase in long-term unemployment – as across all occupations. After an increase of seven percentage points, the share of long-term unemployed nursing staff averaged 32% in 2021, still seven percentage points lower than across all occupations (39%). The reason for this is likely to be the Corona pandemic-related restricted job filling processes that affected other professions more.

In 2021, nursing staff were unemployed for an average of 202 days, 68 days less than all unemployed persons (270 days) in the overall German labour market. The unemployment period for nursing professionals was on average 128 days, while for nursing assistants it was 226 days. Unemployment thus primarily affects nursing assistants without a finished nursing qualification. By contrast, nursing professionals and nursing assistants who have completed nursing assistant training are generally much less likely to be affected by unemployment or can end it within a short period of time.

Against the backdrop of growing demand for nursing staff in recent years, an average of 36.000 vacancies for nursing staff were registered at the Federal Employment Agency in 2021. The number and proportion of unemployed persons for jobs in this area (46.000) considerably exceeded the number of vacancies reported (36.000 or 80%). The clear majority of job offers were directed at nursing professionals (24.000). Only a good quarter of the job offers were directed at unemployed persons with an assistant (9.000) and 7% to the health professionals in nursing (3.000). There are only 31 unemployed nursing professionals compared with 100 registered vacancies for nursing professionals. In the case of nursing assistants, on the other hand, the picture is quite different: Here, the number of unemployed nursing assistants outweighs the number of jobs, and there are 405 unemployed compared to 100 registered jobs.

Half of the nursing vacancies registered at the Federal Employment Agency in 2021 were offered by inpatient (25%) and outpatient care facilities (25%). 12% of all nursing jobs reported as vacant to the Federal Employment Agency were available in hospitals. The proportion of vacancies reported by temporary employment agencies was at 24%.

³⁹ Bundesagentur für Arbeit, 'Arbeitsmarktsituation im Pflegebereich' (n 12)



2.2.3. Demographics

According to the BA report, nursing occupations are predominantly carried out by women. While there were more men (54%) than women (46%) in the German labour market as a whole, 83% of employees in the care sector were women, with only 17% men. Given that more women (83%) than men take nursing professions, the unemployment rate is higher among women in these professions. While in 2016, women composed 80% (45% in the entire labour market) of all registered unemployed nursing staff, their percentage slightly fell to 78% in 2021 (44% in the entire labour market).

The BA report further indicates that around 66% of nursing staff is younger than 50, and the average for all employees in the German labour market as a whole is only slightly lower (64%). Even beyond 50, there is no difference in the age distribution, and the share of employees who have passed the age of 60 is at about the same amount of 9% in the care sector and in employment in general. There is only a noticeable difference in the proportion of nurses under 25, which at 13% in 2021 was significantly higher than across all occupations (10%). The proportion of employees with dual vocational training is above average in nursing, while that of university graduates is below average—the BA report does not provide any figures. Unemployed nurses are younger on average than the unemployed in the whole labour market. In 2021, the proportion of unemployed nurses younger than 50 was 78%, compared with only 66% across all occupations.

To alleviate the shortage of skilled workers, the care sector is increasingly relying on foreign workers, even though the language barrier and professional recognition are major hurdles in some cases. All of this is reflected in a growing proportion of employees without German citizenship. While the proportion of foreigners among employed care workers was still a good 7% in 2016, it rose to a good 13% by 2021 (+108.000 employees to 218.000) and to 16% (270.460) by March 2023.⁴⁰ This means that the proportion of foreigners in the care sector is roughly on a par with the German labour market as a whole (for live-in workers, see 2.3.1.).

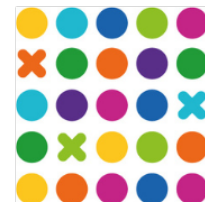
By residency status, third-country nationals make up the majority of foreigners working as nursing staff with 120.000, followed by EU citizens with 88.000, and asylum seekers with about 16.000. The number of asylum seekers in the care sector increased significantly after 2015 (when only 2.000 asylum seekers were employed in the care sector); in this year the number of asylum seekers increased sharply (so-called “refugee crises”) (in 2015 there were only). The top five countries of origin of foreign nursing staff employed in Germany have not changed between 2016 and 2021: Most foreign care workers came from Poland, Bosnia and Herzegovina, Turkey, Romania, and Croatia. Foreigners constituted 20% registered as unemployed nursing staff in 2016 and rose to 28% in 2021 (13.000; 33.000 unemployed German nationals)—one third (around 4.333) came from one of the eight main countries of origin of the refugees.

There is a difference between Germans and foreigners in the level of their professional training working in the care sector: while almost two-thirds of employed Germans are nursing professionals, the figure for foreign employees is half.

2.3. Domestic and Live-in Work

In this report, we refer to domestic care work provided by workers who temporarily live in a private household where they work as “live-in-work.” The term refers to the coincidence of place of work and place of residence, which often results in the central problem of live-in work: the excessive working hours. Although live-in workers

⁴⁰ The figures come from the requested statistical evaluation of the BA.



(live-ins) are often expected to be available almost 24 hours a day, seven days a week, their contracts as well as the law limit their working time, which makes the term “24-hours-care” misleading.⁴¹

It can be assumed that the majority of live-ins work in elderly care. Live-in usually take on domestic (e.g. housekeeping) and basic care activities in private households. In addition to on-call services, their tasks range from physical and psychosocial support in everyday life to occupation and cognitive activation as well as household management to basic and (contrary to legal regulations) sometimes even treatment care.

Due to the prevalence of the home-based long-term care in Germany (80%)⁴² and the resulting need for home care workers, live-ins came to form, unintentionally, what the research and consulting organisation Minor calls a fourth pillar⁴³ of the German care system, as the current supply of outpatient care does not meet the demand.⁴⁴

2.3.1. Market Incidence of domestic care work

The exact number of live-in workers in Germany is hard to determine. On the one hand, because home care is not financed (directly) from long-term care insurance benefits (see 2.1.4.), and on the other hand, because of the high number of undeclared and irregular employment of live-in workers, most of whom commute from abroad. Estimates range from about 160.000 German households employing migrant caregivers to about 500.000 migrant caregivers.⁴⁵ Similarly, estimates from non-governmental organizations suggest that between 300.000 and 700.000 live-in workers were working in Germany in 2020/2021.⁴⁶

Slightly more than 90% are supposed to be female. Their average age is around 50 years old.⁴⁷ As a rule, they do not have their own household in Germany. They usually work for two to three months in a private household in

⁴¹ Bernhard Emunds and Eva Kocher, ‘Modelle von Live-in Care: Rechtswissenschaftliche und sozioethische Vorschläge zur Weiterentwicklung einer personenbezogenen Dienstleistung’ [2022] WSI-Mitteilungen 407; Bernhard Emunds B and others, ‘Gute Arbeit für Live-In-Care: Gestaltungsoptionen für Praxis und Politik’ (Frankfurt a. M. Frankfurt (Oder) 2021). NBI-Positionen 2021/2 <<https://nbi.sankt-georgen.de/blog/2021/policy-paper-zur-weiterentwicklung-von-live-in-care-gute-arbeit-fuer-live-in-care-gestaltungsoptionen-fuer-praxis-und-politik>> accessed 9 October 2023

⁴² Statistisches Bundesamt, ‘Bevölkerung - Mehr Pflegebedürftige’ (2023)

<<https://www.destatis.de/DE/Themen/Querschnitt/Demografischer-Wandel/Hintergruende-Auswirkungen/demografie-pflege.html>>

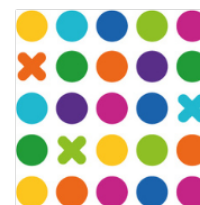
⁴³ First pillar are family members, followed by outpatient (second pillar) and inpatient care (third pillar) (Minor – Projektkontor für Bildung und Forschung, ‘Die „vierte Säule“ der Pflege: Aktuelle Bedarfe und Erwartungen von 24-Stunden-Betreuungskräften (Live- Ins) in Bezug auf ihre Arbeit in Deutschland’ (2023) <<https://minor-kontor.de/die-vierte-saeule-der-pflege/>>

⁴⁴ 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>

⁴⁵ 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

⁴⁶ Greta Schabram and Nora Freitag, ‘Harte Arbeit, wenig Schutz: Osteuropäische Arbeitskräfte in der häuslichen Betreuung in Deutschland’ (Berlin 2022)

⁴⁷ ibid



Germany and then return to their country of origin for several weeks (commuter/pendulum/circular migration).⁴⁸ The majority commute from Central and Eastern EU countries, especially Poland (almost 50%),⁴⁹ and about 133.000 come from non-EU countries, mainly from Southern and Eastern European countries (Serbia, Ukraine, etc.).⁵⁰

Most of the live-in-workers are posted by agencies from other EU countries.⁵¹ According to research by Minor, in 2007, there were 28 agencies in "24-hour care" employment in Germany; in 2017, there were already around 400 agencies, and in February 2022, the online comparison portal "24h-Pflege-Check" listed 784 German providers working together with providers from other EU countries who do the posting.⁵²

2.3.2. Forms of employment in live-in-work

It used to be common to summarize the possible contractual forms for live-in work as employment, self-employment, and posting of workers.⁵³ This categorising is however slightly misleading. Employment contracts and civil-law contracts (self-employment) are the only contractual forms available for this kind of work (see 4.1.). Agencies who are in most cases involved as intermediaries between household and live-in worker and which often post live-in workers to Germany from other EU-countries conclude or broker employment contracts or civil-law contracts (self-employment).⁵⁴ For data on the incidence of employment/self-employment, see Kocher and Potocka-Sionek 2022⁵⁵ and Związkowa Alternatywa (n 48) 2021.⁵⁶

Scholars who have assessed the typical live-in situation in employment law terms usually conclude that the typical live-in work relationship is one of employment or bogus self-employment.⁵⁷

⁴⁸ *ibid*; Związkowa Alternatywa, 'Badanie o polskich pracownikach opieki w Niemczech – niepokojące dane' (2021) <<https://www.za.org.pl/badanie-o-polskich-pracownikach-opieki-w-niemczech-niepokojace-dane/>> accessed 9 October 2023; Kocher E and Potocka-Sionek N, '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

⁴⁹ Aranka V Benazha and others, 'Live-in-Care im Ländervergleich' in Brigitte Aulenbacher, Helma Lutz and Karin Schwiter (eds), *Gute Sorge ohne gute Arbeit?: Live-in-Care in Deutschland, Österreich und der Schweiz* (Beltz Juventa 2021), 50

⁵⁰ Schabram and Freitag (n 46) 24

⁵¹ Simone Habel, 'Die neuen Akteure auf dem „grauen Markt“ff: Vermittlungsagenturen in der Live-In-Pflege' in Bernhard Emunds and others (eds), *Freiheit - Gleichheit - Selbstausbeutung: Zur Zukunft der Sorgearbeit in der Dienstleistungsgesellschaft* (Die Wirtschaft der Gesellschaft Jahrbuch 6. Metropolis-Verlag 2021)

⁵² Schabram and Freitag (n 46)

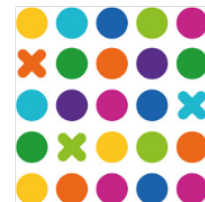
⁵³ Barbara Bucher, *Rechtliche Ausgestaltung der 24-h-Betreuung durch ausländische Pflegekräfte in deutschen Privathaushalten* (Dissertation, Nomos 2018)

⁵⁴ Benazha and others, 'Live-in-Care im Ländervergleich' (n 49); 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>>

⁵⁵ Kocher and Potocka-Sionek (n 45) 8

⁵⁶ Związkowa Alternatywa (n 48)

⁵⁷ Gregor Thüsing, 'Rechtskonforme Betreuung in den eigenen vier Wänden: Regelungen für die Betreuung in häuslicher Gemeinschaft (24-Stunden-Betreuung) de lege lata und de lege ferenda' (Gutachten auf Anfrage des Bundesministeriums für Gesundheit, Bonn 2019); Emunds B and Kocher E, 'Modelle von Live-in Care: Rechtswissenschaftliche und sozioethische Vorschläge zur Weiterentwicklung einer personenbezogenen Dienstleistung' [2022] WSI-Mitteilungen 407; Kocher and Potocka-Sionek (n 45)



The transnational character of this employment entails the question which law is applicable to the employment relationship. This concerns both labour law and social security law (EU social security coordination regulations 883/2004 and 987/2009). Many agencies rely on posting rules, although in practice the live-in worker only ever works in Germany. Agencies tend to obscure the fact that the contract is concluded for work in Germany by contractually establishing additional and minor service obligations in the host country (such as recruiting of co-workers). Closer looks show that these are mostly just on paper, leading to what one could call bogus posting.⁵⁸

2.3.3. Labour Law Regulation for Live-in-Workers

In the case of a posting, the employment relationship is generally governed by the law of the country of origin (Art. 8 Rome I Regulation). In addition, the posting of workers regulation superimposes another legal system by establishing the application of minimum standards of the host country. According to Sec. 2 AEntG (which implements the Posting of Workers Directive 96/71/EC in German law), most minimum standards under German law must be applied to the employment relationship – provided the workers can be classified as "employees" (Sec. 611a BGB) (see 4.1.).

There are no specific legal rules for this type of work in Germany. However, according to Sec. 1 (2) 1 Occupational Safety and Health Act (Arbeitsschutzgesetz, ArbSchG), domestic workers are excluded from health and safety law. Nevertheless, they are included in the Working Time Act (Arbeitszeitgesetz, ArbZG). In June 2021, the Federal Labour Court (Bundesarbeitsgericht, BAG) decided on the understanding of on-call work in these cases and held that most of the on-call time of the live-in-worker concerned had to be considered working time for which minimum wage had to be paid (BAG, decision of June 24, 2021 – 5 AZR 505/20).⁵⁹

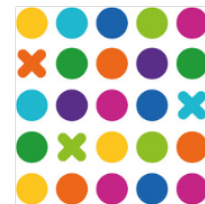
Sec. 10 (1) ArbZG allows for exceptions to the prohibition of work on Sundays in cases of "treatment, care and supervision of persons" (Sec. 10 (1) 3 ArbZG) or for activities "in the household" "insofar as the work" cannot be performed on working days" (Sec. 10 (1) 4 ArbZG). There is a doctrinal debate as to the application of Sec. 18 (1) 3 ArbZG to live-in-work.⁶⁰ According to this provision, employees who live in a household with the persons entrusted to them and who raise, care for, or look after them autonomously, do not fall within the scope of working time protection. The prevailing expert opinion is that the exemption (that was created in view of SOS children's villages) does not apply to live-in employees in private households.⁶¹ Moreover, an extension of the scope of application

⁵⁸ Kocher and Potocka-Sionek (n 45)

⁵⁹ Theresa Tschenker, '24 Stunden Arbeit - 24 Stunden Lohn: Besprechung zum Urteil des Bundesarbeitsgerichts vom 24. Juni 2021' (2021) 26(12) NZA 641; A Bulgarian live-in, sued her employer - a Bulgarian care company - for payment of outstanding wages. She had been posted to Germany by this company in 2015 to work as a live-in, on a Bulgarian employment contract, which provided for remuneration of €950 for a weekly working time of 30 hours. After termination of the employment relationship at the end of September 2016, the live-in claimed in court that she had worked around the clock or, respectively, had been on standby beyond the agreed 30 hours per week. The employees are entitled to remuneration for fulltime work and on-call duty at least in the amount of the statutory minimum wage (Schabram and Freitag (n 46) 37)

⁶⁰ Rudolf Herweck and Marianne Weg, "'24-Stunden-Pflege': Abschaffen oder neu gestalten?: Ein Beitrag zur aktuellen Diskussion' [2022] NDV 399; Eva Kocher E and Scheiwe K, 'Welche Regelungen sind für eine sozial verantwortliche Absicherung der häuslichen Betreuung erforderlich?: Eine Erwiderung auf den Beitrag von Herweck und Weg im NDV 8/2022' [2022] NDV 494

⁶¹ Kirsten Scheiwe, 'Arbeitszeitregulierung für Beschäftigte in Privathaushalten – entgrenzte Arbeit, ungenügendes Recht?' in Kirsten Scheiwe and Johanna Krawietz (eds), *(K)Eine Arbeit wie jede andere?: Die Regulierung von Arbeit im Privathaushalt* (Juristische Zeitgeschichte/ Abteilung 2 vol 20. De Gruyter 2014); Kocher E, 'Die Ungleichbehandlung von Hausangestellten in der 24-Stunden-Pflege gegenüber anderen Arbeitnehmerinnen und Arbeitnehmern – eine Frage des Verfassungsrechts' in Kirsten Scheiwe and Johanna Krawietz (eds), *(K)Eine Arbeit wie jede andere?: Die Regulierung von Arbeit im Privathaushalt* (Juristische Zeitgeschichte/ Abteilung 2 vol 20. De Gruyter 2014)



to live-in workers would be highly problematic from a constitutional point of view because the legislator has a constitutional mandate and obligation to protect health and safety even of "self-employed" persons working in strong power imbalances.⁶²

In the event of labour law violations, live-ins can assert their rights before German labour courts (for posted workers, see Sec. 15 AEntG), but they encounter numerous hurdles. The landmark case of a Bulgarian live-in worker posted to Germany, which was decided by the German Federal Labour Court in June 2021 (see above BAG, decision of June 24, 2021 – 5 AZR 505/20), was supported and represented by the trade union organisation "Faire Mobilität". However, live-ins seem to prefer to enforce their rights in Polish courts, with little success.⁶³

2.3.4. Impact of ILO Convention No 189 on Domestic Workers

Germany ratified ILO Convention No. 189 on "Decent Work for Domestic Workers" in 2013; it became effective in September 2014.⁶⁴

As a signatory to the Convention, Germany is subject to a regular review according to ILO rules which takes place every five years by the ILO's Committee of Experts for the Implementation of the Conventions and Recommendations (Sachverständigenausschuss für die Durchführung der Übereinkommen und Empfehlungen). In the first review in 2020, the committee called on Germany to outline how domestic workers are informed about their rights. In addition, the German government has to outline how domestic workers are protected from abuse, harassment, and violence in the workplace and how they are informed of the protections in place. It invites the German government to consider incorporating definitions of domestic work and domestic worker into national legislation or collective agreements that take into account the specific characteristics of domestic work and domestic workers. The Committee also called on the German government to provide information for the upcoming State Report on the fact that measures have been taken to include the workers mentioned in Sec. 18 (3) ArbZG within the scope of protection of ILO Convention No. 189. The number and nature of related complaints should be recorded and reported to the Committee (Domestic Workers Convention, 2011 (No. 189) - Germany, Direct Request' (adopted 2020, published 109th ILC session (2021)).

2.4. Current debates

Current debates in the German public concerning the care sector focus on the labour market shortages.⁶⁵ Even debates about working conditions tend to be mostly looking for the reasons for the lack of nursing staff. In 2017, the nurse-to-patient-ratio was calculated as 1:13.⁶⁶ For the future, the BA estimates that 150.000 additional nursing

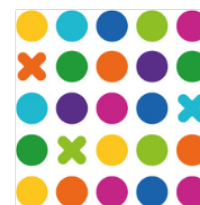
⁶² Kocher, 'Die Ungleichbehandlung von Hausangestellten in der 24-Stunden-Pflege gegenüber anderen Arbeitnehmerinnen und Arbeitnehmern – eine Frage des Verfassungsrechts' (n 61)

⁶³ Kocher and Potocka-Sionek (n 45)

⁶⁴ See Eva Kocher, 'Hausangestellte im deutschen Arbeitsrecht: Ratifikation der ILO-Konvention 189' [2013] NZA 929 on the demands the Convention makes on German labour law.

⁶⁵ Clarissa Rudolph and Katja Schmidt, 'Vergeschlechtlichung und Interessenpolitik in Care-Berufen - das Beispiel Pflege' in Ingrid Artus and others (eds), *Arbeitskonflikte sind Geschlechterkämpfe: Sozialwissenschaftliche und historische Perspektiven* (Arbeit - Demokratie - Geschlecht Band 27. Westfälisches Dampfboot 2020)

⁶⁶ Christina Schildmann and Dorothea Voss, 'Aufwertung von Sozialen Dienstleistungen: Warum sie notwendig ist und welche Stolpersteine noch auf dem Weg -liegen' (Düsseldorf 2018). Forschungsförderung Report 4 <https://www.boeckler.de/pdf/p_fofoe_report_004_2018.pdf> accessed 9 October 2023



staff will be needed in Germany by 2025;⁶⁷ the Federal Institute for Vocational Education and Training (Bundesinstitut für Berufsbildung, BIBB) estimates that there will be an additional need for up to 270.000 nursing and healthcare staff by 2035; other experts predict that approximately 500.000 more nurses will be needed by 2030.⁶⁸ After all, there seems to be a wide consensus that investment is needed in that respect. According to the representative survey commissioned by the Macroeconomic Policy Institute (Institut für Makroökonomie und Konjunkturforschung, IMK), a broad majority of people in Germany favour public investment in the coming years—a good 86% of respondents are in favour of "strongly" or "somewhat" increasing investments and staffing ratios in the health and care sector.⁶⁹

However, recognizing the social value of care work requires systemic change at many levels. For example, the Commission of Experts on the Second Report on Gender Equality presented a broad policy concept in 2018,⁷⁰ covering both the redesign of occupational profiles, of education, training, and career advancement opportunities, as well as the redesign of demand and funding structures, i.e. social care policies. Policy debates tend to focus on occupational profiles, training, actors, as well as advancements in pay and working conditions. In order to guarantee the sufficient staffing levels, some legislative and collective agreement changes have been achieved in the past years. The Nursing Care Strengthening Act II (Pflegerstärkungsgesetz II, PSG II) amended the Sec. 113 SGB XI and ordered the development of a new staffing system by 2020. In addition, strikes at the Charité University Hospital in Berlin have led to an in-house collective agreement (TV Gesundheitsfachberufe) that sets lower limits for the staffing of shifts and departments; similar collective agreements have been concluded for some other hospitals (see 6.2.3.).

As for education and training, the PflBG was a major and important reform. Its regulatory model, however, remains disputed. In particular, the difference of payments between the hospital sector and elderly care has been noted as a problem, generalistic training enabling nurses to change more easily between these professions.⁷¹ While the number of people starting nursing training has actually increased in the past years, it has fallen in 2022—50.494 in 2017, 51.879 in 2018, 56.118 in 2019, 56.259 in 2021, and 52.299 in 2022.⁷² Also, a strengthening of academic education via the Nursing Studies Strengthening Act (Pflegerstudiumstärkungsgesetz, PflStudStG) has been suggested (see 6.4.).⁷³

⁶⁷ Bundesagentur für Arbeit, 'Programm Triple Win - Pflegekräfte' <<https://www.arbeitsagentur.de/vor-ort/zav/projects-programs/health-and-care/triple-win/das-programm>> accessed 2 September 2023

⁶⁸ Heinz Rothgang, Rolf Müller and Reiner Unger, 'Themenreport „Pflege 2030“. Was ist zu erwarten – was ist zu tun?' (2012) <https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/GP_Themenreport_Pflege_2030.pdf> accessed 9 October 2023

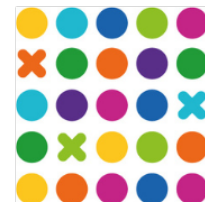
⁶⁹ Jan Behringer, Sebastian Dullien and Christoph Paetz, 'Überwältigende Mehrheit der Deutschen will kräftige Investitionsausweitung' (November 2021) IMK Policy Brief 112 <https://www.boeckler.de/fpdf/HBS-008181/p_imk_pb_112_2021.pdf> accessed 9 October 2023

⁷⁰ Bundesregierung, 'Zweiter Gleichstellungsbericht' (n 11)

⁷¹ *ibid*; ver.di, *Steigender Pflegemindestlohn löst Grundproblem in der Altenpflege nicht* (2022)

⁷² Bundesministerium für Familie, Senioren, Frauen und Jugend, 'Die Ausbildungssituation in der Pflege: Aussagen der AG Statistik zur Ausbildungssituation in der Pflege' (Zwischenbericht, September 2022) <https://www.pflegeausbildung.net/fileadmin/de.altenpflegeausbildung/content.de/user_upload/Zwischenbericht_AG_Statistik.pdf> accessed 10 October 2023

⁷³ Wissenschaftsrat, 'Empfehlungen zu hochschulischen Qualifikationen für das Gesundheitswesen' (Berlin 13 June 2021) Drs. 24 11-12 <https://www.wissenschaftsrat.de/download/archiv/2411-12.pdf?__blob=publicationFile&v=5> accessed 4 September 2023



As far as pay is considered, at least in elderly care the mainstream German employment model based on comprehensive sectorial collective agreements has never taken hold.⁷⁴ As even sectorial minimum pay relies on collective bargaining, specific models had to be developed for the care sector, due to the fragmented provider structure, and the prevalence of church institutions that won't subscribe to collective bargaining. Although an initiative to have a new collective agreement for the sector be declared generally applicable failed in 2021 (see 3.2.3), the debate is still on-going. It has been defended that the specific structure of wage bargaining in the care sector should be accepted as a reason for interpreting Sec. 5 TVG in a way that makes the declaration of general applicability possible notwithstanding the presence of several parallel relevant wage systems in the sector.⁷⁵ In this respect, in May 2021 several federal states proposed a bill⁷⁶ on changes to the TVG (Entwurf eines Gesetzes zur Änderung des Tarifvertragsgesetzes)—unsuccessfully, only the SPD-governed states Bremen, Berlin, Thüringen supported the bill, Hamburg abstaining, all other states voting against).

In any case, the United Services Union (Vereinte Dienstleistungsgewerkschaft, ver.di) questions if "considerable wage increases" will be an effective solution for the basic problems. In particular in nursing care for the elderly, more is needed to make this nursing profession attractive, or stop the migration of nursing professionals to hospitals.⁷⁷ The reasons why people abandon nursing training (according to various estimates, the dropout rate is between 20 and 30% (28% in 2021)⁷⁸ were outlined in a survey of around 3,000 nursing trainees conducted by ver.di:⁷⁹ fewer than 43% are satisfied with their training, citing high time pressure (62%), lack of work-life balance (48%) and lack of breaks (43%). More than 58% say they always or often have problems taking time off, and more than 43% of trainees report that they are rarely or never introduced to their job duties by practice supervisors. Another recent survey (2022) entitled "I will become a nurse again if...", sponsored by the trade union-affiliated Hans Böckler Foundation (Hans Böckler Stiftung, HBS) and conducted in cooperation with the Bremen's state chamber of labour (Arbeitnehmerkammer Bremen), included a survey of nearly 13,000 nurses who had left the profession or were working part-time. The study concluded that better working conditions and higher salaries would encourage a return to the nursing profession (in the case of those who had previously left the profession) or an increase in working hours (in the case of part-time workers), even more so in long-term care (elderly care) than in hospitals. It estimates that the German care sector would benefit from 300,000 additional care workers in this case.⁸⁰ On the other hand, a survey of 5,500 nurses from hospitals and long-term care conducted by the Federal Ministry of Health (Bundesministerium für Gesundheit) adds that the designing of future policies in the care sector must take into account the family situation of nurses next to their salaries and working conditions.⁸¹

⁷⁴ Diana Auth, 'Ökonomisierung der Pflege – Formalisierung und Prekarisierung von Pflegearbeit' (2013). WSI-Mitteilungen 6

⁷⁵ Thomas Beyer, 'Bestrebungen für einen allgemein-verbindlichen Tarifvertrag „Soziales“ – Ein Zwischenbericht.' in Renate Oxenkecht-Witzsch (ed), *Arbeitsverhältnisse in der Kirche - Anspruch und Wirklichkeit?: Dokumentation der Vorträge der 18. Fachtagung zum kirchlichen Arbeitsrecht* (Eichstätter Schriften zum kirchlichen Arbeitsrecht vol 1. Ketteler-Verl. 2015), 62

⁷⁶ Länder Bremen, Berlin, Thüringen, 'Entwurf eines Gesetzes zur Änderung des Tarifvertragsgesetzes' (BR-Drs. 317/21)

⁷⁷ ver.di, *Steigender Pflegemindestlohn löst Grundproblem in der Altenpflege nicht* (n 71)

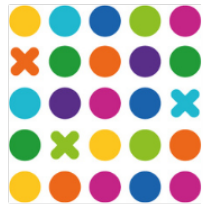
⁷⁸ Daniel Garcia González and Miriam Peters, 'Ausbildungs- und Studienabbrüche in der Pflege – ein integratives Review' (Bonn 2021)

⁷⁹ ver.di, 'Ausbildungsreport Pflegeberufe 2021' (2022) <<https://gesundheit-soziales-bildung.verdi.de/themen/reform-der-pflegeausbildung/++co++be127818-4a1a-11ed-8d35-001a4a160111>> accessed 9 October 2023

⁸⁰ Jennie Auffenberg and others, '„Ich pflege wieder, wenn ...“: Potenzialanalyse zur Berufsrückkehr und Arbeitszeitaufstockung von Pflegefachkräften' (2022)

<https://www.arbeitnehmerkammer.de/fileadmin/user_upload/Downloads/Politik/Rente_Gesundheit_Pflege/Bundesweite_Studie_Ich_pflege_wieder_wenn_Langfassung.pdf> accessed 10 October 2023

⁸¹ Bundesministerium für Gesundheit, 'Pflegearbeitsplatz mit Zukunft: Die Ergebnisse der Studie zur Arbeitsplatzsituation in der Akut- und Langzeitpflege auf einen Blick' (May 2023)



The bpa-Arbeitgeberverband (see 3.2.1.) is of the opinion that the average salaries of full-time nursing professionals are high enough compared to the average salaries in the German labour market and other framework conditions and working conditions must be addressed politically in order to increase the attractiveness of the nursing profession (e.g. making working hours more flexible to improve work-life balance).

The recruitment of migrants is another important policy issue, although only short of 5.000 care professionals have been recruited by special placement schemes so far, e.g. "Triple Win Programme" (see numbers given in WP 3 report).⁸²

At the same time, the live-in-sector has become more and more an object of public debate, as many German households rely on Eastern European short-term migrants for private elderly care, knowing the working conditions are extremely precarious. In particular, the Federal Labour Court's judgment on the need to remunerate on-call time has sparked discussions. The coalition agreement for the 2021-2025 federal government contains an explicit intention to create "legal certainty for 24-h-care".⁸³ However, while many experts call for a better funding of the care system in general and clear rules that would guarantee employment rights and decent work for live-in-workers,⁸⁴ others rather ponder following the Austrian model of "legalising" bogus self-employment⁸⁵ or enabling 24-h-work.⁸⁶

<https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3_Downloads/K/Konzertierte_Aktion_Pflege/BMG_Ergebnisse_der_zweiteiligen_Studie_Arbeitsplatzsituation_bf.pdf> accessed 10 October 2023

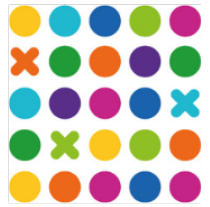
⁸² Bundesagentur für Arbeit, 'Programm Triple Win - Pflegekräfte' (n 67)

⁸³ SPD, Bündnis 90/Die Grünen und FDP, 'Koalitionsvertrag 2021-2025: Mehr Fortschritt wagen. Bündnis für Freiheit, Gerechtigkeit und Nachhaltigkeit' (2021)

⁸⁴ Emunds and others (n 41); Verena Rossow and Simone Leiber, "Mehr Fortschritt wagen' auch im Feld der Live-in-Pflege?" (Düsseldorf 2022). DIFIS Impuls 2022/1; Eva Kocher, 'Arbeitsverhältnisse für transnationale Live-in-Care: Handlungsempfehlungen aus arbeitsrechtlicher Sicht' (2022). DIFIS Impuls 12
<<https://difis.org/institut/publikationen/publikation/34>>

⁸⁵ Verband für häusliche Betreuung und Pflege, 'Betreuung in häuslicher Gemeinschaft (BihG, sog. 24-Stunden-Pflege): Professionelle Memorandum Dienstleistung für Menschen mit umfassendem Hilfebedarf' (16 October 2020)
<https://www.vhbp.de/fileadmin/user_upload/201016_VHBP_-_Memorandum_BihG_see.pdf> In contrast: Theresa Tschenker, 'Regulierungsperspektiven nach den Urteilen zur Vergütung in der Live-In-Pflege - dient Österreich als Vorbild?' [2022] AuR 155

⁸⁶ Herweck and Weg (n 60); in contrast: Kocher and Scheiwe (n 60)



3. Fundamental trade union rights, social partners, collective bargaining, and industrial relations

3.1. Collective bargaining system in general

Both the trade union system and the works council system enable the conclusion of collective agreements that regulate individual employment contracts with normative effect. As a consequence of the dual system of representation (see 1.1.2.), there are two kinds of collective agreements in German labour law: 1) agreements between trade unions and single employers, or employers' associations (TV, collective agreements in the strict sense); 2) agreements between employers and works councils (Betriebsvereinbarungen, works agreements).

3.1.1. Trade union rights and autonomy of collective bargaining

Freedom of association and collective bargaining autonomy are guaranteed in Art. 9 (3) GG. Freedom of association on the one hand establishes the individual freedom of association of workers, on the other hand it also grants rights for coalitions themselves, including both trade unions and employers' associations.⁸⁷ These rights include "collective bargaining autonomy" of social partners (Tarifautonomie) (see above 1.1.2.). It also guarantees the right to strike and collective action (without expressly mentioning it).

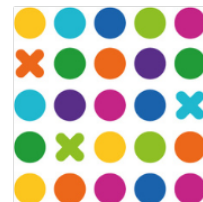
Trade unions must be formed freely and voluntarily with the purpose of improving working conditions, including engaging in labour disputes. They are independent of third parties in terms of personnel, financial, and organizational matters. In order to be able to take part in collective bargaining, they must also own some "social power" (above 1.1.2.).

The TVG regulates collective bargaining which can take place on the sectorial level between trade unions and employer associations, or on company level between trade unions and individual employers/firms. The resulting collective agreement (TV) governs the rights and obligations of the parties to the TV (Sec. 1 (1) TVG) and the employment contracts of their members. According to Sec. 4 (1) TVG, normative clauses only cover employment contracts between trade union members and an employer who is a member of the employer's association that signed the respective collective agreement (or has signed the collective agreement himself). However, each employer may individually decide to make standards of collective agreements binding on the level of the individual employment contract by means of a reference clause.

Collective agreements take precedence over employment contracts and works agreements (Secs. 77, 87 BetrVG).⁸⁸ While collective agreements are often time limited, their legal provisions continue to apply until they are replaced by another agreement (Sec. 4 (5) TVG; similarly Sec. 77 (6) BetrVG).

⁸⁷ Berg, Kocher and Schumann (eds) (n 4) Sec. 1 Rn. 69a

⁸⁸ *ibid* Sec. 1 Rn. 81



3.1.2. Mechanisms for the extension and general applicability of collective agreements

Collective bargaining standards can be made binding within their scope by a declaration of general applicability which binds employers not bound by collective agreements and their employees (so-called “outsiders”). The following instruments exist in order to extend the normative effect of a collective agreement to outsiders:

- a) Under Sec. 5 TVG the Federal Ministry of Labour and Social Affairs may declare a collective agreement to be generally binding (Allgemeinverbindlicherklärung) at the joint request of the parties to the collective agreement if the declaration of general applicability appears to be in the public interest. A committee consisting of three representatives of each of the central organizations of employers and employees on federal level (“Tarifausschuss”, collective bargaining committee) has to agree. Due to changes in the general policy of the Confederation of German Employers (Bundesvereinigung der Deutschen Arbeitgeberverbände, BDA), it used its de facto veto position in this committee since the 2000s; few agreements have been declared generally binding since.⁸⁹
- b) To compensate for the weaknesses of the veto position of social partners in the Tarifausschuss, Secs. 7, 7a AEntG enable the Federal Ministry of Labour and Social Affairs to make the legal standards of a collective agreement binding for all employers and employees within the scope of the collective agreement by means of a statutory order/Ordinance. Here, too, the prerequisite is a joint application by the parties to the collective agreement. The collective bargaining commission has to be consulted, but its agreement is not required. The collective agreement must have nationwide scope to be eligible for this instrument. This instrument only allows for the extension of “minimum standards”, in contrast to Sec. 5 TVG, which also allows for the general applicability of “adequate” standards.
- c) For trade unions and employers' associations with members who are active in the temporary employment sector and who have agreed on minimum hourly wages in the area of temporary employment that are subject to nationwide collective bargaining agreements, Sec. 3a AÜG provides for a special regulation. Procedures are similar to those of the AEntG.

3.2. Collective bargaining system in the care sector

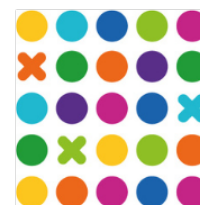
3.2.1. Social partners and other actors in the care sector

Ver.di is the largest trade union in the care sector, with a high level of collective bargaining activity and all together 1.955.080 members.⁹⁰ It is associated to the DGB (which in turn is a member of ETUC). ver.di also represents employees in the following sectors: transport, public services, retail, finance, post, telecommunications, the graphical and media sector. The trade union kombi represents employees on the municipal and regional levels and is a sectorial organisation of the association “dbb beamtenbund und tarifunion”; it is of minor importance in the care sector. The newly (2020) founded Bochumer Bund specialises in professional carer workers.⁹¹ The trade union Public Service and Services Union (Gewerkschaft Öffentlicher Dienst und Dienstleistungen, GÖD), a member

⁸⁹ ibid Sec. 5 TVG Rn. 28

⁹⁰ (2022) 1 ABR 24/21 (BAG)

⁹¹ Bochumer Bund, ‘Wer wir sind’ <<https://www.bochumerbund.de/wer-wir-sind/>> accessed 21 September 2023



of the Christian Trade Union Federation of Germany (Christlicher Gewerkschaftsbund Deutschlands, CGB), also organises workers in the care sector. Both, the dbb and the CGB, are members of the Confédération Européenne des Syndicats Indépendants (CESI), but not of the ETUC.

The unions do not publish their respective degree of organization to avoid drawing conclusions about their concrete ability to action. Only estimates are possible. Ver.di is estimated to have an organisation rate in the care sector of approx. 9-12% (2017).⁹² Ver.di is also committed to the interests of care workers through its trade union organization "Berliner Krankenhausbewegung" (Berlin Hospital Movement). The low level of organization is the main challenge of the trade unions in the care sector. For example, workers in metal industry are much more organized, with an average level of organization of 21.9%.⁹³

When ver.di concluded a collective agreement on minimum conditions with an employers' association in 2021 and requested that it be declared generally binding (see 3.2.3.), the Arbeitgeberverband Pflege e. V. (Employer association for care work) questioned whether ver.di had sufficient "social power" in the care sector to enter into a collective agreement, i.e. whether ver.di was a "trade union" at all in this sector. However, the BAG ruled that social power and thus the ability to conclude collective agreements is not sector-specific, but must be established for the union as a whole.⁹⁴ Therefore, ver.di is legally considered to be a trade union for all its members and for all the sectors it covers, including the care sector. On the other hand, the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) in 1964 recognized an organization of catholic domestic workers as a party to a collective bargaining agreement, even though the organization had expressly declared that it neither wanted nor was able to take industrial action. The decision assumed that the "natural antagonisms that otherwise exist between employers and employees" would not work in this sector.⁹⁵

Representation of employers in the care sector is highly fragmented. Details on the provider structure can be found under 2.1.1. The three largest employers' associations in the care sector are: Arbeitgeberverband Pflege e.V. (AGVP), bpa Arbeitgeberverband, and Vereinigung der kommunalen Arbeitgeberverbände (VKA). AGVP has published figures according to which it represents 955 member companies with 80,000 employees. Also bpa Arbeitgeberverband has published figures: It represents 6000 member companies with 230,000 employees. An association of providers of elderly care (Bundesvereinigung Arbeitgeber in der Pflegebranche (BVAP)) has been formed exclusively with the aim to establish a representative collective agreement in elderly care that could in the future be declared generally applicable (see 3.2.3.).

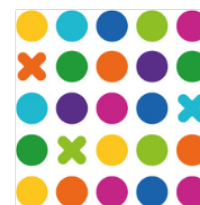
Furthermore, the interests of care workers are represented by non-governmental organisations. The following NGOs are committed to care workers:

⁹² Manfred Schroeder, 'Altenpflege zwischen Staatsorientierung, Markt und Selbstorganisation' [2017] WSI-Mitteilungen 189

⁹³ GESIS - Leibniz-Institut für Sozialwissenschaften, 'Allgemeine Bevölkerungsumfrage der Sozialwissenschaften ALLBUS 2021' (2022)

⁹⁴ (2022) 1 ABR 24/21 (BAG)

⁹⁵ (1964) 1 BvR 79/62 (BVerfG); for criticism of the decision see: Eva Kocher, 'Tariffähigkeit ohne Streikbereitschaft?: Funktionale Alternativen zur Arbeitskampfbereitschaft im Fall von Hausangestelltenvereinigungen' in Jens Schubert (ed), *Festschrift für Otto Ernst Kempfen* (Nomos 2013); Eva Kocher, Laura Krüger and Clemens Sudhof, 'Streikrecht in der Kirche im Spannungsfeld zwischen Koalitionsfreiheit und kirchlichem Selbstbestimmungsrecht: Ein goldener Mittelweg zwischen Kooperation und Konflikt?' [2014] NZA 880, 887



Official Name	Translation	Counselling	Political organising
Arbeit und Leben – Migration und gute Arbeit, Programm Faire Integration	Work and life - migration and good work, programme fair integration	x	x
Care Revolution Netzwerk	Care Revolution Network		x
Berliner Bündnis Gesundheit statt Profite	Berlin Alliance Health instead of Profits		x
Antidiskriminierungsverband Deutschland	Anti-Discrimination Association Germany	x	x
Bundesarbeitsgemeinschaft kommunalen Frauenbüros der und Gleichstellungsstellen (BAG)	Federal working group of municipal women's offices and equality bodies		x
Deutscher Pflegerat	German Nursing Council		x

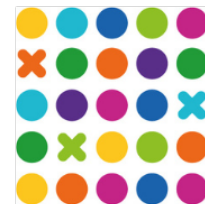
The composition of the nursing commission (Sec. 12 AEntG, 8 members) gives an idea of the importance of these organisations in the care sector (excluding hospitals). Represented are on the employees' side are one representative each of Caritas and Diakonie employees, two representatives of ver.di, and on the employers' side, one representative each of Caritas and Diakonie, one representative of bpa-Arbeitgeberverband, and one representative for a coalition of DRK, VKA, and AGVP.

Nursing chambers (Pflegekammern), public institutions with an obligatory membership of professional care workers, are other public actors that have been established in the federal states Rheinland-Pfalz (2016) and Nordrhein-Westfalen (2022); Baden-Württemberg is in the planning phase. It is an institution for the professional self-governed representation that is meant to contribute to the development and distribution of quality standards in care work. A Federal Nursing chamber which represents the existing nursing chambers on state level, exists since 2019. The nursing chambers in Schleswig-Holstein and Niedersachsen were abolished in 2021.⁹⁶ In both states a clear majority of the members voted for the dissolution of the chambers (70.6 %⁹⁷ in Niedersachsen, 91,8 %⁹⁸ in Schleswig-Holstein).

⁹⁶ Alexandra Heeser, 'Pflegekammern: Wie sich die Pflege in Deutschland organisiert' (2022) 27(10) kma 70

⁹⁷ Niedersächsische Landesregierung, 'Presseinformation: "70,6 Prozent stimmen gegen Fortbestand der Pflegekammer"' (7 September 2020) <https://www.ms.niedersachsen.de/download/158633/Pflegekammer_Presseinformation.pdf> accessed 10 October 2023

⁹⁸ Pflegeberufekammer Schleswig-Holstein, 'Jahresabschlussbericht' (2020/2021) <https://www.schleswig-holstein.de/DE/fachinhalte/P/pflege/Downloads/Pflegeberufekammer/Jahresabschlussbericht_PBK_SH_2020_2021.pdf?__blob=publicationFile&v=1> accessed 10 October 2023



3.2.2. Organisation of collective bargaining

Because of different statuses of service providers, the care sector is highly fragmented when it comes to setting collective working conditions. Accordingly, working conditions and wages are heterogeneous, both in comparisons between branches and between providers/companies.

In the public sector, mainly the TVöD applies, differentiated according to the public services on the federal and municipal levels (TVöD-B and TVöD-K) (see 5.2). Also, in public sector collective bargaining, there are still some differences between the “Western” collective agreement area (that covers former West Germany) in contrast to the “Eastern” collective agreement area (that covers former East Germany).

The sector of private non-profit organisations (“freie Wohlfahrtspflege”), with the exception of church organisations, is also mainly covered by collective agreements, such as the company agreement for the German Red Cross (TVÜ-DRK), for AWO (TV AWO), or for some hospitals (TV GS (Gesundheitsschutz und Demographie - health protection and demography). For the large number of small non-profit institutions organised in the Paritätische Wohlfahrtsverband (see 2.1.1.), the organisation proposes general conditions for employment contracts (Arbeitsvertragsbedingungen, AVB).⁹⁹ Many non-profit and private-sector organizations have long been modelling their employment contracts on the collective agreements of the public sector, mostly by means of references in their employment contracts.

As far as the Christian churches and their organizations (Diakonie and Caritas) are concerned, many of them reject the conclusion of collective agreements in the sense of the TVG (“Second Way”). Instead, with reference to the church autonomy constitutionally guaranteed (see 2.1.4.), they establish working conditions based on church law, through their own labour law commissions (Arbeitsrechtliche Kommissionen). These commissions (in which trade unions are represented) elaborate general conditions for employment contract, so-called guidelines, (Arbeitsvertragsrichtlinien, AVR) which are then included in the individual employment contracts (“Third Way”). These guidelines are modelled on the TVöD. The BAG approved the ‘third way’ in principle in 2012, stating that church institutions may replace the right to strike with their own ‘cooperative’ conflict resolution procedures if these meet certain minimum requirements as to trade union participation.¹⁰⁰

In 2022, 55 % of care workers in Germany worked in a company covered by a collective agreement, in comparison to 51 % in the German labour market as a whole. At the same time, only 28% of companies in Germany's healthcare and social services sector are bound by collective agreements, in comparison to 25 % in the German labour market as a whole.¹⁰¹ This can be explained by the fact that large companies with large workforces in particular are bound by collective agreements, both in the healthcare and social services sectors and cross-sectorial.

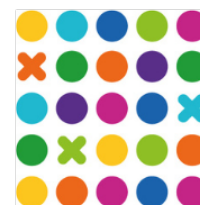
3.2.3. Extension of sector-specific minimum standards

Against the background of the fragmented structure of collective bargaining in the care sector, and the difficulties of integrating the Christian churches in collective bargaining autonomy, the statutory mechanism of AEntG for the

⁹⁹ For the legal character of these general terms and conditions, see (2023) 3 AZR 19/22 (BAG)

¹⁰⁰ (2012) 1 AZR 611/11 (BAG); (2012) 1 AZR 179/11 (BAG).; criticism: Peter Stein, *Das kirchliche Selbstbestimmungsrecht im Arbeitsrecht und seine Grenzen* (HSI-Schriftenreihe vol 47, Bund-Verlag 2023), 63; Kocher, Krüger and Sudhof (n 95) 884

¹⁰¹ IAB, ‘Tarifbindung und betriebliche Interessenvertretung. Ergebnisse aus dem Betriebspanel 2022: Aktuelle Daten und Indikatoren’ (20 July 2023) <<https://iab.de/daten/daten-zur-tarifbindung-und-betrieblichen-interessenvertretung/>> accessed 20 September 2023; see also Lenzen and Evans-Borchers (2023), 26-35 who also show the fragmentation of collective bargaining and labour standards in the sector of long-time care..



setting of minimum standards on the basis of collective agreements does not work in the care sector. Therefore, special rules were introduced for this sector.

Firstly, according to Secs. 10-13 AEntG, the Federal Ministry of Labour and Social Affairs (Bundesministerium für Arbeit und Soziales, BMAS) can declare minimum working conditions to be generally applicable, if they are recommended by a Nursing Commission (Pflegekommission) set up specifically for this purpose. This applies to care workers in outpatient, day-care or inpatient care services, but not to employees in hospitals (Sec. 10 AEntG). The Commission is composed of employee and employer representatives of non-church and church service providers as well as representatives of the employers' association and the trade union ver.di. On this basis, ordinances on mandatory working conditions for the care sector (PflegeArbbV) have been regularly issued. At the moment (spring 2024), the minimum wage in the German care sector is set via the Sixth Nursing Working Conditions Ordinance (6. Pflegearbeitsbedingungenverordnung, 6. PflegeArbbV) which will be in force until June 30, 2026.

Secondly, in the event of an extension of a collective agreement, Sec. 7a (1a) AEntG determines that in the care sector, such declaration of general applicability needs the written consent of the church organizations that have established working conditions according to the "third way" (with the help of labour law commissions, see 3.2.2.). In 2021, ver.di and BVAP concluded a collective agreement on minimum wages for the sector of elderly care.¹⁰² The attempt, however, failed in 2021, due to the rejection by Caritas' labour commission.¹⁰³

Shortly after this failed attempt, the rules on "compliance with collective agreements" in long-term-care were established by law (see 2.1.4. and 5.4.).

3.2.4. Industrial conflicts in the care sector

Although there is no specific legislation on collective labour law with regard to care workers, general rules may affect them in particular ways. However – and although demands for a more restrictive law on industrial action are regularly voiced¹⁰⁴ – there is no general proportionality principle in German strike law.¹⁰⁵ Also, no general restrictions of strikes in "essential services" or specific sectors as permitted by international law¹⁰⁶ are recognized in German law.

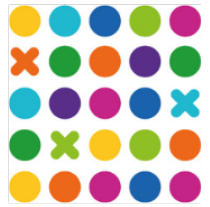
¹⁰² According to this agreement, a nursing professional would earn an hourly wage of 18.75 EUR from 1 June 2023.

¹⁰³ Caritas Deutschland, 'Tarifvertrag Altenhilfe FAQ: Der Tarifvertrag in der Altenpflege kommt nicht. Was nun?' <<https://www.caritas.de/fuerprofis/fachthemen/gesundheit/der-tarifvertrag-in-der-altenpflege-komm>> accessed 18 March 2021; Beyer (n 75)

¹⁰⁴ Martin Franzen, Gregor Thüsing and Christian Waldhoff, *Arbeitskampf in der Daseinsvorsorge: Vorschläge zur gesetzlichen Regelung von Streik und Aussperrung in Unternehmen der Daseinsvorsorge* (Mohr Siebeck 2012); Lena Rudkowski, *Der Streik in der Daseinsvorsorge* (Schriften des Instituts für Arbeits- und Wirtschaftsrecht der Universität zu Köln vol 113, C.H. Beck 2010)

¹⁰⁵ Berg, Kocher and Schumann (eds) (n 4) AKR Rn. 137; Eva Kocher, 'The Protection of the Strike in the National Legal Systems - National Report: Germany' in Carmen La Macchia (ed), *The Right to Strike in the EU. The Complexity of the Norms - Safeguarding Efficacy* (Ediesse)

¹⁰⁶ ILO, 'Compilation of decisions of the Committee on Freedom of Association: Right to strike' (2006) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO::P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3945742,3> accessed 10 October 2023; Mironi MM and Schlachter-Voll M (eds), *Regulating strikes in essential services: A comparative "law in action" perspective* (2019); Knäbe T and Carrión-Crespo C, 'The scope of essential services: Laws, Regulations and Practices' (Geneva 2019). ILO Working Paper 334 <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_737647.pdf> accessed 10 October 2023



The employer may not unilaterally order emergency work during a strike. However, the need to conclude emergency service agreements (“Notdienstvereinbarung”) that specify which workers have to work during a strike in order to carry out the necessary emergency work, may restrict the right to strike. Although emergency service agreements are not in principle a requirement for the lawfulness of collective action, in the event of disagreement over emergency services one of the two sides may apply to the labour court.¹⁰⁷ The labour court shall issue an emergency regulation if the principle of proportionality, which balances the competing fundamental rights and requires the least possible interference, so requires. Usually, employer and trade-union conclude an emergency service agreement before the strike begins. However, in the sector of elderly care, usual staffing levels are already so precarious that an emergency staffing may correspond to them and therefore make a strike run empty.¹⁰⁸

There have been several strikes by ver.di in hospitals in the last years, mostly on the question of staffing levels (see below 6.2.3.). In 2021, there was a strike in Berlin. In 2022, in the context of a strike at six university hospitals in North Rhine-Westphalia, the Regional Labour Court held that the strike was lawful.¹⁰⁹

3.3. Works Constitution, Information, and Consultation

Due to the dual system of representation (see 1.1.2.), collective agreements are not only negotiated at sector level, but also at company level (Betriebsvereinbarungen, works agreements). As there are no specific rules for care sectors in that area, the general rules apply; however, there are difference between the works constitution in private enterprises, the (federally organised) public sectors and Christian churches:

The legal framework for the negotiations on works agreements between employers and works council in the private sector is set in the BetrVG. In every undertaking with five or more employees, employees can elect a works council. Every employee of full age (18 years old) who has been employed by the company for six months is eligible for election (Sec. 8 (1) BetrVG). Trade unions can submit a list of candidates for the works councils (Sec. 14 (3) BetrVG), but may not appoint members to the works council.

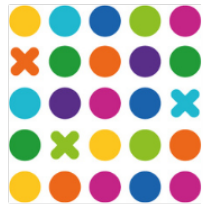
A works council serves as a representative body of employees and engages in on-going cooperative dialogue with the management (Sec. 2 (1) BetrVG). It is not a legal entity, but it has rights of codetermination that can be legally enforced. In issues subject to co-determination, the employer can only issue effective directions with the consent of the works council. These include “social matters” concerning wage supplements, working time, professional development, company pension schemes and other issues (Sec. 87 BetrVG), changes to work processes (Secs. 91 and 111/112 BetrVG), personnel assessment principles (Sec. 94 BetrVG), personnel selection guidelines (Sec. 95 I BetrVG) and in-company vocational training (Sec.s 97, 98 BetrVG). The resulting works agreements between the works council and the employer are subsidiary to collective agreements, but also have normative effect on the individual employment relationship. In addition, the works council has consultation and information rights in employer’s decisions on individual personnel matters (such as recruitment or dismissal) as well as in “economic”/managerial decisions.

The public sectors (federal level and states) have their own systems of works councils, the staff councils (Personalräte), which represent the interests of private-law employees as well as career civil servants. The service agreement (Dienstvereinbarung) is the equivalent of the works agreement. Staff councils for the federal public sector are regulated by the Federal Staff Representation Act (Bundespersönalvertretungsgesetz, BPersVG); the

¹⁰⁷ Michael Meyer, ‘Notdienstvereinbarung und Notdienst beim Streik im Gesundheitswesen’ (öAT 2023, 67)

¹⁰⁸ Theresa Tschenker, ‘Effektiver Streik und Notdienstarbeiten’ [2022] NZA-RR 337

¹⁰⁹ (2022) 10 SaGa 8/22 (LAG Köln); on the reasons see below at Fn 150



public sectors of the federal states are regulated by the respective states' Staff Representation Acts (for example Personalvertretungsgesetz für das Land Brandenburg, PersVG Bbg)).

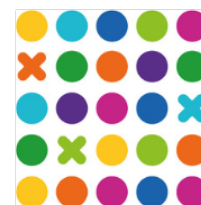
In contrast to the private sector and the public sector, the employees of the churches in Germany have their own type of representative bodies, regulated in church laws. For regional protestant churches and Diakonie, the Church Employee Representation Act (Mitarbeitervertretungsgesetze, MVG-EKD) is the relevant regulatory model. For the Catholic Churches, the Church Employee Representation Act (Mitarbeitervertretungsordnung, MAVO) is the regulatory model for regional church rules. They are designed on the model of public-sector staff councils.

3.4. Regulation on Whistleblowing

On July 2, 2023, the German Whistleblower Protection Act (Hinweisgeberschutzgesetz, HinSchG) came into force; it implements EU Directive 2019/1937/EU on the protection of persons who report breaches of Union law. The HinSchG protects against reprisals that whistleblowing workers may be exposed to. Companies are required to establish internal reporting channels and procedures (Secs. 12-18 HinSchG); the Federal Office of Justice (Bundesamt für Justiz) is one of the competent external reporting channels (Secs. 19-26 HinSchG). In a private company, the works council has a right of co-determination as regards the details in the establishment of an internal reporting office (Sec. 87 I No. 1 BetrVG).¹¹⁰

In principle, whistleblowers are protected regarding information on violations of German criminal law (Sec. 2 (1) No 1 HinSchG) or health and safety as well as rights of employees and employee representatives (Sec. 2 (1) No 2 HinSchG). Equally protected are whistleblowers who report administrative offences or violations of European Union law, as listed in Sec. 2 (1) 1-10 HinSchG. The protection applies if the whistleblower had reasonable grounds to believe that the information reported or disclosed was true and correct (Sec. 33 (1) No 2 HinSchG).

¹¹⁰ Frank Bayreuther, 'Hinweisgeberschutz und Betriebsverfassung' [2023] NZA 666



4. Employment status, flexible forms of employment, and employment protection

4.1. Employment status

The employment relationship in Germany is defined in the German Civil Code in Sec. 611a BGB which says that “through a contract of employment, an employee will be obliged to work in the service of another person, observing the instructions issued by that person and being in a position of heteronomy (*Fremdbestimmung*) and personal dependence. The power of issuing instructions may either affect the content, mode of work performance, time, or location of the activity. A person is subject to instructions if he or she is not essentially free to arrange his or her professional activities at his or her own discretion and to determine his or her working hours.” According to Sec. 611a (1) 4-6 BGB, the principle of primacy of facts applies in order to uncover situations of bogus self-employment.¹¹¹ It is irrelevant for the overall assessment if the income is treated as self-employment by the tax office.

Employees do not only have full access to labour and employment rights, but are also covered by social insurance (which in many instances also goes beyond employment). Similarly to Sec. 611a BGB, Sec. 7 (1) SGB IV requires “non-self-employed” work, in particular in an employment relationship; indications are an activity according to instructions and integration into the work organization of the person giving the instructions. However, there is no formal/legal link between the classification under labour law and under social security law.¹¹²

For self-employed care workers, the protective provisions of labour law generally do not apply. For some self-employed persons, however, German law offers partial social protection. For instance, self-employed persons are entitled to financial support through unemployment benefits under SGB II if their income does not cover their expenses;¹¹³ self-employed mothers are also entitled to daily sickness benefits insurance (*Krankentagegeldversicherung*).¹¹⁴

In addition, some employment and labour laws extend their applicability to employee-like persons (*arbeitnehmerähnliche Personen*) who are thus guaranteed rights to holiday leave (Sec. 2 BUrlG), health and safety protection (Sec. 2(2) ArbSchG), data protection (Sec. 26(8) Federal Data Protection Act (*Bundesdatenschutzgesetz*, BDSG)), access to labour courts (Sec. 5 (1 and 3) ArbGG), and collective bargaining (Sec. 12a TVG), but not to minimum wage (Sec. 22 MiLoG,) or protection against unfair dismissal (Secs. 1 and 14 Unfair Dismissal Act, *Kündigungsschutzgesetz*, KSchG).¹¹⁵ ‘Employee-like persons’ are those who are ‘economically dependent’. According to (e.g.) Sec. 12a (1) TVG, workers are economically dependent if they work for one single client or receive more than half of their income from a single client, services are rendered in person, and if the worker needs social protection ‘comparably to an employee’ due to, for instance, the lack of organisational resources and

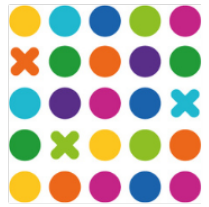
¹¹¹ Bernd Waas, ‘Comparative Overview’ in Bernd Waas and Guus H van Voss (eds), *Restatement of Labour Law in Europe: Vol I: The Concept of Employee* (Hart Publishing 2017)

¹¹² Cf. (1961) 3 RK 57/57 (BSG); (2003) V B 80/03 (BFH)

¹¹³ For the calculation of benefits and details on financial support for self-employed, see ver.di, ‘Independent Basic security in Corona times: Lifeline for solo self-employed?’ (15 January 2022) <<https://selbststaendige.verdi.de/beratung/corona-infopool/++co++c6fa490a-a3fb-11ea-824a-001a4a160100>> accessed 10 October 2023

¹¹⁴ Bundesministerium für Arbeit und Soziales, ‘Social Security at a Glance 2020’ (2020) <https://www.bmas.de/SharedDocs/Downloads/DE/Publikationen/a998-social-security-at-a-glance-total-summary.pdf?__blob=publicationFile&v=2> accessed 10 October 2023

¹¹⁵ For an overview, see Waas, ‘Germany’ (n 113) 273–74; Rebhahn, ‘Arbeitnehmerähnliche Personen’ (n 8)



means of production. Classification as an employee-like person also depends on an overall assessment of the individual case, for which the primacy of facts principle applies.

Case law shows that employers in the care sector have on several occasions used bogus self-employment until they were corrected by courts. Cases of nurses working on-demand in nursing homes as vigils/night watches have been decided both ways.¹¹⁶ In cases in which care professionals were employed, through the mediation of agencies, as caregivers for various care facilities, social courts found bogus self-employment.¹¹⁷ Other cases of self-employment in on-demand outpatient (basic or intensive) care have also been found by courts to constitute employment.¹¹⁸

A care profession which regularly works in forms of self-employment is midwifery. In 2007, the BAG held that self-employed midwives with cottage-hospital affiliation are neither to be considered employed nor employee-like persons.¹¹⁹

On bogus self-employment in the live-in sector, see 2.3.2.

4.2. Fixed-term work

Fixed-term work, including care work, in Germany is regulated in the Part-Time and Fixed-term Employment Act (Teilzeit- und Befristungsgesetz, TzBfG) which implements Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. According to Sec. 14 (1) TzBfG, in general, fixed-term employment contracts need a substantive justification. However, the first fixed-term contract with an employer can be extended three times up to a total maximum of two years without the employer having to justify it (Sec. 14 (2) TzBfG).

For employment contracts covered by collective agreements in the public sector, Sec. 30 (2) TVöD limits fix-term employment further. Even fixed-term contracts with a substantive justification may not exceed five years. Workers with fixed-term contracts are to be given preferential consideration when filling permanent positions. Fixed-term contracts without a substantive justification may not fall below twelve months (Sec. 30 (3) TVöD).

4.3. On-call-work

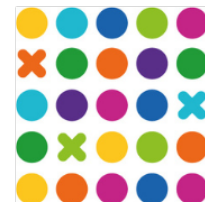
The general labour law regulation that regulates on-call-work is the Working Time Act (Arbeitszeitgesetz, ArbZG). German law still differentiates two types of on call-work: On-call duty (Arbeitsbereitschaft) requires the worker to be at a location specified by the employer or within a certain radius to be deployed immediately if needed; On-call at home (Rufbereitschaft) is when the worker determines his or her own whereabouts during the waiting period, but is required to show up for work when called. However, considering the definition of working time in the jurisprudence of the European Court of Justice (ECJ), this model is misleading, as the ECJ lately uses a range of criteria to establish if waiting time/on-call time is considered working time: Call time, work location, modalities of assignment (especially the need to wear work clothes and the availability of a company car), frequency with which assignment times occur in on-call time, and the causality of the on-call situation for the restrictions on time

¹¹⁶ Employment: (2012) L 4 R 761/11 (LSG Baden-Württemberg); self-employment: (2016) L 11 R 4602/15 (LSG Baden-Württemberg)

¹¹⁷ (2012) L 2 R 13/09 (LSG Hamburg); (2017) L 1 KR 551/16 (Hessisches LSG)

¹¹⁸ (2020) L 1 KR 358/18 (LSG Berlin-Brandenburg); (2021) B 12 R 6/20 R (BSG)

¹¹⁹ (2007) 5 AZB 52/06 (BAG)



management, all has to be taken into account.¹²⁰ As for live-in-work, the BAG has already established that the typical on-call time of live-in-workers is considered working time.¹²¹

Under German law, the concept of zero-hour contracts does not exist as a legal concept. If employer and employee agree that the employee shall perform work in accordance with the workload (work on call, Arbeit auf Abruf), the agreement must specify a certain duration of weekly and daily working time. If the duration of the weekly working time is not specified, a working time of 20 hours is deemed to be agreed (Sec. 12 (1) TzBfG); if the duration of the daily working time is not specified, the employer has to employ the worker for at least three consecutive hours. If the duration is specified, the employer may only employ the worker for an extra 25% and not less than 80% of the agreed weekly working time (Sec. 12 (2) TzBfG). The employee has to be notified of the working hours at least four days in advance (Sec. 12 (3) TzBfG).

4.4. Temporary Agency Work

Temporary agency work in Germany is regulated through the AÜG, which implements the Temporary Agency Work Directive 2008/104/EC.

According to a report of the BA,¹²² the number of employees subject to social insurance contributions who work in care via a temporary employment agency has increased in recent years. Overall, temporary employment seems to have been established in the care sector, however at a somewhat lower level than in overall employment. 2% of all employees among the nursing staff (1.7 million) were employed by a temporary employment agency in June 2021, compared to slightly more than 2% in the whole labour market at the same time. While less than 2% of all female employees in the nursing sector were employed through temporary employment agencies, the figure for male nursing staff was more than 3%. 11% of all secondary (marginal) jobholders in the care sector were employed through temporary employment agencies; across all occupations, the figure was just under 2%.

The media¹²³ and trade unions¹²⁴ report that the number of nursing staff working through temporary employment agencies has increased in recent years. Nursing staff switch to temporary employment because working hours are supposed to be more predictable, and, especially in elderly care, pay would also be higher. In fact, temporary employment agencies allow nurses to organize their working hours in a more flexible way; they also get to work in different care facilities if they are unhappy with their current workplace.¹²⁵ Nevertheless, ver.di criticizes this form of employment as devastating for the care of patients and for teamwork, with the lack of familiarization with the respective facility placing an additional burden on permanent staff. Another aspect highlighted by the union is the motive of temporary employment agencies: profit, instead of providing good care.¹²⁶

¹²⁰ (2021) C-344/19 (ECJ); (2021) C-580/19 (ECJ); see the analysis in Eva Kocher, 'Bereitschaftszeit und Rufbereitschaft: eine europarechtliche Dogmatik' [2022] RdA 50

¹²¹ (2021) 5 AZR 505/20 (BAG) (see 2.3.3.)

¹²² Bundesagentur für Arbeit, 'Arbeitsmarktsituation im Pflegebereich' (n 12)

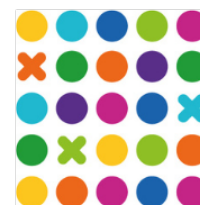
¹²³ Gottlob Schober, 'Warum Heime Pflegebetten unbesetzt lassen' *Tagesschau* (6 March 2023)

<<https://www.tagesschau.de/wirtschaft/pflege-leiharbeit-101.html>> accessed 28 August 2023; Andreas Molitor, 'Jeder kämpft für sich allein' [2023] Mitbestimmung 26

¹²⁴ ver.di, 'Leiharbeit in der Pflege' <<https://gesundheits-soziales-bildung.verdi.de/themen/leiharbeit>> accessed 28 August 2023

¹²⁵ Isabelle Riedlinger, Gabriele Fischer and Tanja Höß, 'Pflegeberufe und Arbeitskampf - ein Widerspruch?' in Ingrid Artus and others (eds), *Arbeitskonflikte sind Geschlechterkämpfe: Sozialwissenschaftliche und historische Perspektiven* (Arbeit - Demokratie - Geschlecht Band 27. Westfälisches Dampfboot 2020); Molitor (n 123)

¹²⁶ ver.di, 'Leiharbeit in der Pflege' (n 124)



4.5. Part-time work

Part-time employment is regulated by the TzBfG which implements EU Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC.

Employees may apply to their employer to change from full-time to part-time employment (and back) if they have worked in the employer's company for more than six months (Secs. 8 and 9a TzBfG). For employment contracts covered by collective agreements in the public sector, Sec. 11 TVöD gives even better rights in this respect.

The nursing professions are characterized by an above-average proportion of part-time employees.¹²⁷ In 2021, full-time employed nursing workforce (51%) only slightly outweighs those who are employed part-time (49%), while the number of full-time employees is 71% compared to 29% part-time employees in the German labour market as a whole. Around 62% of women and 40% of men work part-time as nursing staff. However, if one includes the entire number of the nursing staff employed in the inpatient and outpatient care (excluding hospitals) as reported by the Federal Statistical Office of Germany (1.2 million),¹²⁸ 65% work part-time, with 63% (512.820 out of 814 000) in stationary care, of which 82% are women, and 68% in outpatient care (301.240 out of 443 000), of which 85% are women.

4.6. Other aspects of flexible, casual, and precarious forms of work, in particular “mini-jobs”

The so called mini-job is a casual type of employment. Mini-job is a marginal employment with up to max. 70 days per year or a maximum remuneration of 520 EUR/month (10h/week on minimum wage basis) (Sec. 8 (1) 1 SGB IV, numbers for 2023). Workers on the mini-job basis enjoy the same labour and employment rights as other part-time workers,¹²⁹ but are largely exempt from paying social security contributions. As a consequence, the employee is not covered by health or other forms of social insurance through this type of employment.

Mini-jobs tend to be of minor importance in the care sector. Across all occupations, 11% of employees are mini-jobbers; in nursing, the figure is only 4%.¹³⁰

Another form of casual employment concerns live-in work, where workers are often posted by foreign agencies on a temporary basis or come to Germany as self-employed workers (see 2.3.2).

4.7. Employment protection

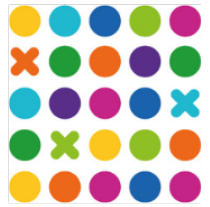
Employment protection concerns the protection of employees from unlawful dismissal. The Dismissal Protection Act (Kündigungsschutzgesetz, KSchG) protects employees from a termination of their employment relationship without social justification; it applies if the employment has existed in the same establishment or enterprise without interruption for more than six months (Sec. 1 (1) KSchG).

¹²⁷ Bundesagentur für Arbeit, 'Arbeitsmarktsituation im Pflegebereich' (n 12)

¹²⁸ Statistisches Bundesamt, 'Pflegestatistik - Pflege im Rahmen der Pflegeversicherung - Deutschlandergebnisse - 2021' (n 19)

¹²⁹ (2023) 5 AZR 108/22 (BAG)

¹³⁰ Bundesagentur für Arbeit, 'Arbeitsmarktsituation im Pflegebereich' (n 12)



In addition, Sec. 622 BGB specifies the notice periods in the event of termination - for example, if the employee has been employed for two years, the notice period is one month to the end of a calendar month (Sec. 622 (2) 1 BGB); if the employee has been employed for five years, the notice period is two months (Sec. 622 (2) 2 BGB). The notice periods are further extended for those to whom the TVöD applies — in the public sector, the notice period for employment of more than one year is six weeks (Sec. 34 (1) TVöD), and three months in the case of employment of five years (Sec. 34 (1) TVöD). Furthermore, Sec. 34 (2) TVöD protects employees who have reached the age of 40 and to whom the Western collective agreement area (see above 3.2.2.) applies, from termination after a period of employment of more than 15 years (Sec. 34 (2) TVöD).

As far as live-in-workers and other domestic workers concerned, there is a debate on the question if the private household can be considered an establishment (“Betrieb”). This is not only relevant for the application of the Works Constitution Act (BetrVG), but also for notice periods in the event of a dismissal. Sec. 622 (2) BGB provides for longer notice periods depending on the time of employment. The Federal Labour Courts has refused to apply this provision to employment in private households.¹³¹

Social Code Book IX on rehabilitation and participation of disabled persons (SGB IX) protects disabled people. They may only be dismissed with the consent of the competent authority (Integrationsamt, integration office). If an employee has been repeatedly unable to work, the employer is obliged to involve various representatives of the interests of the employee concerned in order to jointly find ways of overcoming the incapacity to work so that the job can be retained (occupational integration management, Betriebliches Eingliederungsmanagement, BEM) (Sec. 167 (1-2) SGB IX). In addition, employees who have been officially certified as being disabled are entitled, among other things, to a workplace in which they can use and develop their skills and knowledge as fully as possible (Sec. 164 (4) 1 SGB IX), as well as to a workplace suitable for disabled persons (Sec. 164 (4) 4 SGB IX).

Further protections apply to pregnant workers before and after childbirth under the Maternity Protection Act (Mutterschutzgesetz, MuSchG), see 7.3.

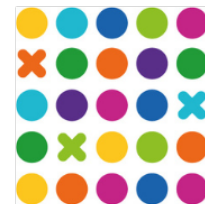
5. Wages and benefits

Wages in Germany are regulated by statutory laws and collective agreements. Legislation only regulates the national minimum wage via the Minimum Wage Act (MiLoG). Minimum wages of nursing staff employed in inpatient and outpatient facilities are additionally regulated by the 6. PflegeArbbV (see 3.2.3.).

5.1. Minimum wages

At the statutory level, the minimum wage in Germany has been implemented by the MiLoG since 2015 and applies to all employees with a few exceptions (Sec. 22 MiLoG). The minimum wage has been reset by law in 2022 at 12 EUR/hour; it is regularly adjusted by an independent Minimum Wage Commission (Mindestlohnkommission), which is appointed every five years (Secs. 4-12 MiLoG). It comprises a chairperson plus six permanent members with voting rights from trade unions and employer associations (three members each) and two members chosen from the scientific community without voting rights (Sec. 4 (2) MiLoG). The commission reviews the level of the

¹³¹ (2020) 2 AZR 660/19 (BAG); for a critical discussion: Viktoria Steinke, ‘Wie privat ist privat?: Betrachtungen zur Beschäftigung im Privathaushalt’ [2018] RdA 232; Kirsten Scheiwe, ‘Ist ein Privathaushalt, der Hausangestellte beschäftigt, ein Betrieb?: Kontroversen über den arbeitsrechtlichen Betriebsbegriff’ [2019] AuR 446; Barbara Bucher, ‘Keine Anwendbarkeit des KSchG auf Privathaushalt’ [2016] AuR 515



statutory minimum wage every two years, on the basis of the past development in collective agreements (Sec. 9 MiLoG). The commission's decision in 2023 was the first to be decided by majority vote (against the trade union representatives) instead of unanimously. According to this decision, the minimum wage will be 12.41 EUR on 1 January 2024 and 12.82 EUR on 1 January 2025.

The German care sector has, however, its own statutory minimum wage, which is set by the 6. PflegeArbbV (see 3.1.2.). Sec. 2 of 6. PflegeArbbV (see 3.2.3.), in force from February 2024 until June 2026, splits minimum wages into three minimum nursing wages. Since 1 February 2024, it is at 14.15 EUR for nursing assistants without qualifications, 15.25 EUR for nursing assistants with one year qualification, and 18.25 EUR for nursing professionals.

5.2. Legal Bases for wages

Collective agreements for the public sector (TVöD) usually regulate wages depending on the type of work and responsibility. Wages are set in pay-tables (for example: P-Table for nursing staff), which break down wages according to pay groups (Entgeltgruppe), determined mainly by level of education (Entgeltgruppe (salary group), E 1 (lowest) to E 15 (highest); for nursing staff, Entgeltgruppe Pflege, P 5–16), and the length of work experience (Entgeltstufe (pay grades) 1 (lowest) to 6 (highest)). In the care sector, these wages are set at the municipal and federal level and outlined in the pay tables 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.

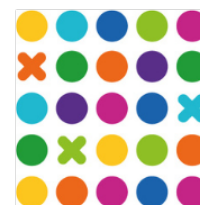
In employment relationships that are not covered by collective agreements, the individual contract specifies wages and benefits—in church institutions by reference to the AVR established by labour law commissions (see 3.2.2.)), in other cases sometimes by reference to the TVöD, sometimes by rules established by the employer. For example, AVR although generally modelled on TVöD differ in terms of definition of “Entgeltgruppe” as well as in wages and benefits.

5.2.1. Wages (TVöD)

In the following summary, we only mention examples taken from TVöD-B at the municipal and federal level as example for collective agreements in the German care sector. Annex 1, Part B Nr. XI TVöD-B regulates the Entgeltgruppen for employees in healthcare professions: Nursing assistants without a degree are classified in P 5 or P 6 (with at least one year training) (2.376 EUR – 2.473 EUR)¹³² and nursing professionals with three-year training who graduate with a state examination in P 7 or P 8 (2.932 EUR – 3.108 EUR). The Entgeltgruppen E 9b to E 12 are reserved for employees with a university degree (Sec. 1 TVöD-B, Annex 1 Part B Sec. XI; Annex E). Nurses with further specialized training are classified in P 9 up to P 16 (3.373 EUR – 4.490 EUR).

The Entgeltstufen, in turn, are based on the length of service with the employer. Relevant professional experience with other employers is taken into account. In the case of care workers, there are special provisions on the waiting time to the next Entgeltstufe in Sec. 16. Accordingly, care workers reach Entgeltstufe 2 after one year in Entgeltstufe 1, Entgeltstufe 3 after three years in Entgeltstufe 2, Entgeltstufe 4 after four years in Entgeltstufe 3,

¹³² The figures refer to the stated level of education of nursing staff with less than one year of professional experience (Entgeltstufe 1).



Entgeltstufe 5 after four years in Entgeltstufe 4 and Entgeltstufe 6 after five years in Entgeltstufe 5. In order to reach Entgeltstufe 3 and Entgeltstufe 4, care workers without state exam (P 5, P 6, P 9) must work one year longer than other employees within the scope of the TVöD-B. However, the terms of the Entgeltstufen may be shortened or extended in exceptional cases if the employees' performance is significantly above or below the average.

In 2022, compared to other employees in the public sector, the collective wage for nursing staff with three years of education and maximum work experience (3.654 EUR, P7 Entgeltstufe 6) were higher in the care sector than the average monthly gross salaries of public sector employees with three years of professional training and maximum work experience (3.421 EUR, E7 Entgeltstufe 6). However, the situation is different for nursing assistants without professional training but with maximum work experience, whose minimum salary (3.042 EUR, P5 Entgeltstufe 6) is lower than that of public sector employees with a similar level of training and maximum work experience (3.184 EUR, E5 Entgeltstufe 6). Nursing assistants with one year of vocational training and maximum work experience earn slightly more (3.392 EUR, P6 Entgeltstufe 6) than public sector employees with a similar level of training and maximum work experience (3.314 EUR, E6 Entgeltstufe 6). By way of comparison, according to the Employment Contract Guidelines for Diakonie Institutions (Arbeitsvertrags Richtlinien für Einrichtungen der Diakonie 2022, AVR, belonging to the protestant churches)¹³³ which has its own pay scale, nurses with maximum professional experience earn EUR 3.217 gross per month in Entgeltgruppe 5 (EG 5, Entgeltstufe 4) and EUR 3.845 in Entgeltgruppe 7 (EG 7, Entgeltstufe 5).

5.2.2. Inconvenience pay (TVöD)

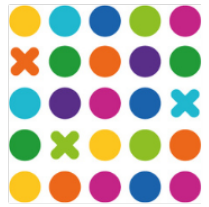
Inconvenience pay is generally regulated by collective agreements or works agreements. For the limitation of working time, see 6.1. Here are the rules of TVöD as an example:

- 1) Overtime: Sec. 7 (7) TVöD defines overtime as hours worked at the employer's request which exceed the regular working hours of full-time employees. While employees should not work beyond the working hours agreed upon in their contract with the employer, employers may include a special clause in the contract specifying a certain number of overtime hours that may already be included in the salary (for limits on overtime, see 6.1.).¹³⁴ Whether overtime is remunerated or converted into time off depends on which collective, company or individual contractual regulations apply. Overtime surcharges are regulated, for example, in Sec. 8 (1) TVöD.
- 2) Sunday and holiday rest remuneration: As compensation, employees who work on these days receive a compensatory day off (Sec. 11 (3) ArbZG), or remuneration by collective agreement (e.g. Sec. 8 (1) TVöD: 25% Sunday work; 35% for holiday work that has been compensated by days off; 135% for holiday without time compensation). Sec. 8 (1) TVöD also stipulates a benefit of 20% for work on Saturdays. On the limits on Sunday work, see 6.1.
- 3) For night work (for the definition, see 6.1.), the employer has to give the employees an appropriate number of days off or a wage supplement (Sec. 6 (5) ArbZG). A wage supplement is normally given as a surcharge on the respective gross hourly wage (usually this is 25%–30%).¹³⁵ Sec. 8 (1) TVöD provides

¹³³ Diakonie, 'Arbeitsvertragsrichtlinien für Einrichtungen, die der Diakonie Deutschland angeschlossen sind, beschlossen von der Arbeitsrechtlichen Kommission der Diakonie Deutschland' (1 October 2022) <https://www.diakonie-wissen.de/documents/4999827/13352553/958_STAND+01.+Oktober+2022+mit+Inhaltsverzeichnis.pdf/7e15c118-f99e-418f-bcd5-7da8829bfa75> accessed 10 October 2023

¹³⁴ According to a ruling by the BAG in 2010, overtime must be sufficiently clearly defined ((2010) 5 AZR 517/09 (BAG)).

¹³⁵ (2015) 10 AZR 423/14 (BAG)



for 20%.

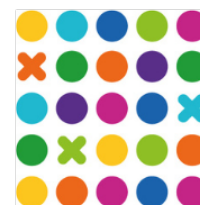
- 4) On-call work (for limits, see 6.1.): Sec. 8 (3) TVöD: A daily flat rate per pay group is paid for on-call at home (Rufbereitschaft).¹³⁶ This amounts to twice the collectively agreed hourly rate of pay for the days Monday to Friday, and four times the collectively agreed hourly rate of pay for Saturday, Sunday and public holidays. If the on-call at home is interrupted in less than twelve hours, then 12.5% of the collectively agreed hourly pay is paid for each hour of on-call at home in accordance with the pay scale. Moreover, for employees whose work regularly and to a not insignificant extent includes on-call time (Arbeitsbereitschaft), half of the on-call time shall be counted as working time (Sec. 9 (1) TVöD).
- 5) Shift work: Employees who constantly perform alternating shift work receive an alternating shift allowance of 105 EUR per month. Employees who do not constantly perform alternating shift work receive an alternating shift allowance of 0.63 EUR per hour (Sec. 8 (5) TVöD). In addition, Employees who constantly perform shift work receive a shift allowance of 40 EUR per month. Employees who do not perform shift work continuously receive a shift allowance of 0.24 EUR per hour.
- 6) Hardship allowances: Nursing staff can benefit from special hardship allowances due to the nature of their work. These allowances are usually regulated in collective agreements are paid as surcharges insofar as the exceptional hardship is not adequately taken into account by suitable precautions, in particular with regard to occupational health and safety. As a rule, the surcharges amount to 5% (121 EUR) to 15% (365 EUR) of the hourly portion of the monthly table remuneration of Entgeltstufe 2 of Entgeltgruppe 2 (Sec. 19 (4) TVöD). For nursing staff employed as civil servants (if that still exists), allowances are regulated in the Sec. 21 Hardship Allowance Ordinance (Erschwerniszulagenverordnung, EZuIV).

5.2.3. Benefits and wage supplements (TVöD)

Other wage supplement and bonuses or other additional payments are generally set out in individual employment contracts or regulated by collective agreements and works agreements. As an example, here are the rules of TVöD:

- 1) Special Annual Payment (Jahressonderzahlung) (Sec. 20 TVöD): employees who are in an employment relationship on December 1 are entitled to an annual special payment. For employees covered by the Western collective agreement area, this amounts to 90% of the basic salary in Entgeltgruppen 1 to 8, 80% in Entgeltgruppen 9 to 12, and 60% in Entgeltgruppen 13 to 15. For employees to whom the regulations of the Eastern collective agreement area apply, the annual special payment amounts to 75% of the percentages specified for the Western collective agreement area.
- 2) Other special payments (Besondere Zahlungen) (Sec. 23 TVöD): (1) In accordance with the German Capital Formation Act (Vermögensbildungsgesetz, VermBG), as amended, employees whose employment is expected to last at least six months are entitled to capital-forming benefits. For full-time employees, the capital-forming benefit amounts to 6.65 EUR for each full calendar month (Sec. 23 (1) TVöD). According to Sec. 23 (2) TVöD, employees receive an anniversary bonus (Jubiläumsgeld) upon completion of a period of employment: for 25 years the amount of 350 EUR, and for 40 years the amount of 500 EUR. Part-time employees receive the anniversary bonus in full. And Sec. 23 (3) TVöD establishes that in the event of the death of an employee, a grant is paid to the spouse or civil

¹³⁶ For these definitions, in contrast to the ECJ jurisprudence, see above 4.2.



partner within the meaning of the Civil Partnership Act (Lebenspartnerschaftsgesetz, LPartG) or to the children.

5.3. Average wages

According to the BA report,¹³⁷ the average gross monthly salary of full-time nursing staff was 2.972 EUR in 2015 and 3.392 EUR in 2020 (14% growth), compared with 3.083 EUR in 2015 and 3.427 EUR in 2020 (11% growth) for the national average. Over the course of these five years, remuneration in the nursing sector has thus risen more strongly than the national average. Whereas in 2015, pay in care occupations was still just under 4% below the average pay across all occupations, the gap had narrowed significantly by 2020 and was now only 1% below the average.

Significant wage differences were found depending on the training level of the nursing staff: The median gross salary of all full-time nursing professionals was 3.039 EUR in 2015 and 3.503 EUR in 2020 (15% growth), compared to national average of 2.843 EUR in 2015 and 3.166 EUR in 2020 (11% growth) for professionals with the same level of training. As for full-time nursing assistants, the median gross salary was 2.055 EUR in 2015 and 2.442 EUR in 2020 (19% growth), compared to national average of 2.117 EUR in 2015 and 2.357 EUR in 2020 (11% growth). Hence, as of 2020, average salaries of nursing professionals and nursing assistants became higher than the employees with the same level of training on the national level.

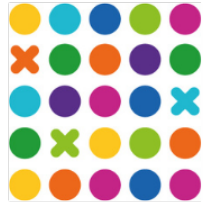
Differences also exist among nursing staff working in different workplace settings. At 3.771 EUR per month, the average pay of nursing professionals employed in hospitals was above average. In comparison, the salaries of nursing professionals in inpatient care facilities (3.200 EUR) and outpatient care services (2.885 EUR) were below nursing professionals' average. Compared to the remuneration of all assistants employed in nursing professions, nursing assistants in hospitals achieved a significantly higher remuneration. In terms of the three workplace settings, their average gross monthly pay in 2020 was 2.997 EUR in hospitals and clinics, 2.312 EUR in inpatient care facilities, and 2.158 EUR in outpatient care.

5.4. Promoting compliance with collective agreements (“Tariftreue”)

Sec. 97 (3) of the Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB) allows for social or environmental aspects to be taken into account when awarding public contracts. One such aspect is the payment of minimum wages or compliance with collective agreements (“Tariftreue”). With a declaration of compliance with collective agreements, public contracting authorities make it a requirement for contractors tendering for contracts that they pay their employees in accordance with the relevant collective agreements. Currently (June 2020), collective agreement compliance laws (Tariftreuegesetze) apply in all federal states (Länder) except Bavaria and Saxony. According to the coalition agreement of the governing parties, public procurement by the federal government shall in future also be tied to compliance with a representative collective agreement in the respective sector.

In addition, 11 federal states have procurement-specific minimum wages that stipulate a certain minimum wage for the performance of public contracts (Baden-Württemberg, Berlin, Brandenburg, Bremen, Hesse, Mecklenburg-

¹³⁷ Bundesagentur für Arbeit, ‘Arbeitsmarktsituation im Pflegebereich’ (n 12)



Western Pomerania, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Saarland and Schleswig-Holstein); in Brandenburg 13 €/hour.

For a specific compliance rule in the long-term care sector see 2.1.4.

5.5. Directive 2022/2041/EU

In Germany, the Directive has been widely considered *ultra vires*.¹³⁸

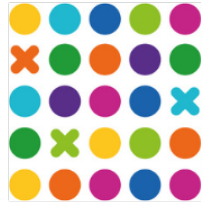
Nevertheless, there is no real policy or legal debate on its implementation, as most experts are of the opinion that the latest legislative raise of the minimum wage (12 EUR/h) complies with Art. 5 of Directive 2022/2041/EU.¹³⁹ The oppositional political party “Die Linke” in June 2023 proposed, as a consequence of the Directive, adapting the minimum wage yearly instead of every two years, and explicitly regulating 60% of the median gross wage as the standard.¹⁴⁰ The government’s plans for a federal collective agreement compliance obligation (Tariftreue, see 5.4.), have been pushed by the Federal Ministry for Labour and Social Affairs possibly with a view to Art. 4 of the Directive.¹⁴¹

¹³⁸ Felix Hartmann, ‘Der Aktionsplan zur Förderung von Tarifverhandlungen – Bloßer Papiertiger oder Gefahr für die deutsche Tarifaufonomie?’ [2023] EuZA 121; Katharina Vogt K, ‘Mindestlohn ohne Kompetenz – Die Unvereinbarkeit der Richtlinie über angemessene Mindestlöhne in der Europäischen Union mit Art. 153 Abs. 5 AEUV’ [2023] EuZA 50

¹³⁹ Hartmann, ‘Der Aktionsplan zur Förderung von Tarifverhandlungen – Bloßer Papiertiger oder Gefahr für die deutsche Tarifaufonomie?’ (n 138); Regina Viotto R, ‘Neue europäische Richtlinie zu Mindestlöhnen und Tarifbindung. Ein Beitrag zur sozialen Transformation der EU?’ (June 2023) <https://www.boeckler.de/fpdf/HBS-008644/p_fofoe_WP_292_2023.pdf> accessed 9 October 2023

¹⁴⁰ Die Linke, ‘Gesetzlichen Mindestlohn gemäß EU-Mindestlohnrichtlinie erhöhen: BT-Drs. 20/7254’ (15 June 2023) <<https://dserver.bundestag.de/btd/20/072/2007254.pdf>> accessed 9 October 2023

¹⁴¹ Hartmann, ‘Der Aktionsplan zur Förderung von Tarifverhandlungen – Bloßer Papiertiger oder Gefahr für die deutsche Tarifaufonomie?’ (n 138)



6. Working time, health and safety, implications of the COVID-19 pandemic, and training and competence development

6.1. Regulation of Working Time

Working time in Germany is regulated by statutory law and by collective agreements as well as works agreements. The ArbZG implements EU Working Time Directive 2003/88/EC and regulates working hours, rest periods, and breaks during the workday.

The allowable working time for most full-time employees is 8 hours daily, considering a statutory working week of 6 days (Sec. 3 ArbZG). However, employment contracts for full-time employees typically specify slightly less than 40 hours per week. For those bound by collective agreements in the public sector, Sec. 6 (1) TVöD states that the regular working time, excluding breaks, for federal employees is 39 hours per week. For municipal employees in the Western collective agreement area, working time is 38.5 hours per week on average, and 40 hours per week on average in the Eastern collective agreement area (The Sec. 6 (2) TVöD).

Work on Sundays (and public holidays) is generally restricted (Sec. 9 ArbZG; Art. 139 GG). There are exceptions for certain activities, including nursing staff (treatment, care and supervision of persons in hospitals and other institutions (Behandlung, Pflege und Betreuung von Personen in Krankenhäusern und anderen Einrichtungen, Sec. 10 (1) 3 ArbZG). If employees work on statutory regulated work-free days, they are entitled to a compensatory day off (Sec. 11 (3) ArbZG). At least 15 Sundays per year must remain free (Sec. 11 ArbZG).

The regular rest period of 11 hours daily may be shortened by one hour for employees working in hospitals and other facilities for the treatment, nursing, and care of persons (Sec. 5 (2) ArbZG), if this is compensated by the extension by one hour within four weeks. Interruptions of rest made during on-call at home (Rufbereitschaft)¹⁴² can be compensated for at other times if the interruption does not exceed half of the rest period (Sec. 5 (3) ArbZG).

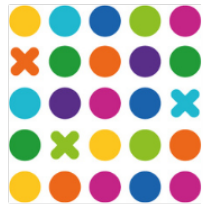
Paid leave is regulated by the BUrlG. After six months of employment (Sec. 4 BUrlG), every employee is entitled to at least 24 days of paid vacation on working days (Sec. 3 BUrlG). Usually, additional paid vacation is added by collective agreement or individual employment contract. According to Sec. 4 of 6. PflegeArbbV, nursing staff working in inpatient and outpatient care are entitled to nine additional days of paid leave in 2023 and 2024 (5 days in 2022). For employees within the TVöD, Sec. 26 entitles employees under 30 years of age to 26 days of paid leave, 29 days for employees between 30 and 40 years of age, and 30 days for employees over 40 years of age.

Furthermore, according to the Sec. 27 TVöD, (1) employees who perform shift work continuously and partially get an one extra day for: a) in the case of alternating shift work, for every two consecutive months, and b) in the case of shift work, for every four consecutive months; (2) employees who partially perform predominantly shift work: one extra day for: a) each three months in a year in which they performed predominantly alternating shift work, and b) each five months in a year in which they performed predominantly shift work.

Overtime may generally only be ordered if it has been agreed in advance; the employer's right of direction alone does not give him the authority to order overtime.¹⁴³ Overtime may only be ordered in agreement with the works

¹⁴² For the definition, see above 4.2.

¹⁴³ (2010) 5 AZR 517/09 (BAG)



council (Sec. 87 (1) BetrVG). However, employees covered by the TVöD are obliged under Sec. 6 (5) TVöD, within the framework of justified operational/service requirements, to work on Sundays, public holidays, nights, alternating shifts, shifts and (in the case of part-time employment on the basis of an employment contract or with their consent) on-call duty, standby duty, overtime and extra work.

Atypical or strenuous forms of work such as shift work and night work are defined in Sec. 6 ArbZG and Sec. 7 TVöD. Work between 11 p.m. and 6 a.m. is considered night work for employees who work alternating shifts with night work or perform night work on at least 48 days per year (Sec. 2 (3-5) ArbZG)—according to the Sec. 7 (5) TVöD, night work is between 9 p.m. and 6 a.m. The company must give the employees an appropriate number of days off or a wage supplement for night work (Sec. 6 (5) ArbZG) and employees are entitled to have occupational health examinations prior to the start of employment and at regular intervals thereafter (Sec. 6 (3) ArbZG).

(For flexible work, part-time work and on-call work see 4.2., 4.4., and 4.5.).

6.2. Regulation of Health and Safety

6.2.1. General rules and procedures

The Occupational Safety and Health Act (ArbSchG) implements EU-Directive 89/391/EEC.

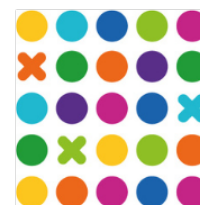
According to Sec. 3 ArbSchG, the employer is obliged to take the necessary occupational health and safety measures, taking into account the circumstances that affect the safety and health of employees at work. He must check the effectiveness of the measures and, if necessary, adapt them to changing circumstances. All measures to be taken must be based on the principles laid down in Sec. 4 ArbSchG (e.g. hazard reduction, structural measures before individual measures, consideration of scientific findings, non-discrimination, special protection needs).¹⁴⁴ Sec. 4 No. 1 ArbSchG also covers hazards to mental health.

The framework regulations of the Act are concretized by legal ordinances, which prescribe which measures the employer and other responsible persons must take and how employees must behave in order to fulfill their respective obligations arising from the Act (Sec. 18 (1) ArbSchG). Specific committees can be formed to advise the Federal Government or the competent Federal Ministry on the application of the statutory instruments, of determining rules and other established occupational science findings corresponding to the state of the art, occupational medicine and hygiene, and of determining rules on how the requirements set out in the statutory instruments can be met (Sec. 18 (2) No. 5 ArbSchG).

The works council also has a right of say and co-determination in the setting of regulations for the prevention of occupational accidents and illnesses and for health protection within the framework of statutory regulations or accident prevention regulations (Sec. 87 (1) No. 7 BetrVG). The requirements of Art. 11 OHS Framework Directive 89/391/EEC is implemented in Secs. 80 (1), 87 (1), 89 (1) BetrVG.

There is also an Occupational Safety Act (Arbeitssicherheitsgesetz, ASiG) that obliges the employer to appoint company physicians and occupational safety specialists that support him in occupational safety and accident prevention (Sec. 1 ASiG). The occupational safety specialists and the company doctors advise the works council on this (Sec. 9 (1, 2) ASiG).

¹⁴⁴ Marc Becker, Michael Holthaus and Bernhard Ulrici, *Gesamtes Arbeitsrecht* (Winfried Boecken and others eds. Beck-online Bücher, 2. Auflage, Nomos 2023), ArbSchG § 4 Rn. 1



6.2.2. Violence and harassment at work

Germany ratified ILO Convention 190 concerning the elimination of violence and harassment in the world of work in April 2023; it will come into force in July 2024.¹⁴⁵ The German government considers labour law already being in accordance with the Directive.

Apart from general health and safety protection which is supposed to cover risks of violence and harassment, Sec. 3 (3) and (4) AGG ban discrimination by sexual harassment or discriminatory harassment, implementing Directives 2000/43/EC, 2000/78/EC and 2006/54/EC.

6.2.3. Care Work: Regulation of staffing levels

Health and safety, relief in case of high workloads and the prevention of stress has been the most important subject of new collective bargaining initiatives in the care sector for the last years. Already in 2015, the employees of the Charité hospital (Berlin) went successfully on strike for relief.¹⁴⁶ They demanded regulations that would specify a certain minimum staffing level for shifts, either in the form of a specification of a minimum number of employees per shift (quantitative staffing regulation) or in the form of a specification of the minimum qualification that must be present among the employees in each shift in any case (e.g. a minimum number of registered nurses; qualitative staffing regulation).

The first collective agreement in this respect (Tarifvertrag Gesundheitsschutz und Demografie, TV GS) has been concluded between ver.di and Charité Berlin in 2016; collective agreements at other university hospitals in Germany followed.¹⁴⁷

However, such regulations are often not complied with. Trade unions' collective bargaining initiatives are therefore increasingly calling for 'consequence management' in the event of breaches of staffing regulations. The main issue here is compensation in the event of non-compliance with staffing regulations.¹⁴⁸ In this regard, the collective agreement between ver.di and Charité was amended in 2021 following a strike that year.¹⁴⁹ The resulting collective agreement "Charité Health Professions" (TV Gesundheitsfachberufe), which is valid from Jan. 1, 2022, to Dec. 31, 2024, not only regulates the staffing levels on the individual wards of the university hospital, but also individual compensation in case of non-compliance. If the staffing levels fall below the limits set by the collective agreement, the care workers concerned receive relief points. With these relief points, care workers can invest in recreational allowances, childcare allowances, partial retirement accounts and sabbaticals or receive compensatory time off. Similar strikes have spread to other public health care companies in Berlin (e.g. Vivantes hospital group) and hospitals in other German states; in particular, employees of university hospitals in North Rhine-Westphalia organized a strike in 2022, and a similar collective agreement (Tarifvertrag Entlastung) was concluded.

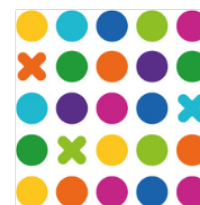
¹⁴⁵ Bundesregierung, 'Entwurf eines Gesetzes zum Übereinkommen Nr. 190 der Internationalen Arbeitsorganisation vom 21. Juni 1919 über die Beseitigung von Gewalt und Belästigung in der Arbeitswelt' (BT-Drs. 20/5652)

¹⁴⁶ Rudolph and Schmidt (n 65)

¹⁴⁷ Theresa Tschenker, 'Kollektivverträge über Personalschlüssel in der Altenpflege' (2019) 26(4) IndBez 366, 375-6

¹⁴⁸ Eva Kocher, 'Die Erstreikbarkeit eines tariflichen Belastungsausgleichs im Kontext von Mindestpersonalausstattungsregelungen' (2022) 39(12) NZA 815

¹⁴⁹ ver.di, 'Charité: Durchbruch bei Verhandlungen zur Entlastung' (7 October 2021) <<https://www.verdi.de/themen/geld-tarif/++co++bc423ef4-2768-11ec-83ea-001a4a16012a>>



Some doubted whether strikes for this kind of norms in a collective agreement would be permissible – considering existing norms on health and safety in the TVÖD and the resulting peace obligation. However, this view has not prevailed so far.¹⁵⁰

6.3. Implications of the COVID-19 pandemic

Like in most places around the world, the COVID 19 pandemic has highlighted the structural importance nurses play in German society, but at the same time has further worsened their already difficult working conditions.¹⁵¹ Above all, the pandemic increased the burden on nursing staff, who were already suffering from personnel shortages.¹⁵² According to the studies cited in the Nursing Report 2021 published by the Scientific Institute of the General Local Health Insurance Company (Allgemeine Ortskrankenkasse, AOK),¹⁵³ the increased workload in the second wave of the pandemic in 2021 is likely to contribute to higher stress levels affecting the health of nursing staff in the medium and long term.

The German government made a total of one billion EUR available to pay a one-time tax-free Corona care bonus (Corona-Pflegebonus) to nurses who were particularly burdened during the corona pandemic. Of this, 500 million EUR each was earmarked for Corona bonus payments in the long-term care sector and in the hospital sector (at different individual amounts depending on the type of work).

In order to implement the Corona bonus, the German government adopted the Act on the Payment of a Bonus for Nursing Staff in Hospitals and Care Facilities or Nursing Bonus Act (Pflegebonusgesetz) in June 2022. For hospitals, the government regulated the bonus via the KHG, which stipulates in Sec. 26e (1) KHG that hospitals that had to provide full inpatient care with ventilation to more than ten patients between January 1, 2021, and December 31, 2021, are entitled to reimbursement from federal funds. According to the Ministry of Health, 837 hospitals nationwide have been eligible for this funding.¹⁵⁴ The bonus paid out to individual nurses was calculated by the Institute for the Hospital Remuneration System on the basis of the reports submitted by the hospitals. According to the Sec. 26e (2) KHG, this includes nursing professionals who have been employed in direct patient care on bed-managing wards in the hospital for at least 185 days in 2021 and nursing professionals who have been employed as intensive care specialists for at least three months in intensive care in 2021. The latter are entitled to a bonus increased by a factor of 1.5.

The Nursing Bonus Act also applies to long-term care (Sec. 150a SGB XI). It obliges licensed care facilities to pay a corona care bonus to all care employees who have worked in or for the facility in elderly or long-term care for at least three months within the assessment period (November 1, 2020 to June 30, 2022). The amounts are outlined in the Sec. 150a (2) SGB XI: 1) 550 EUR for employees who provided long-term care or in the outpatient sick care;

¹⁵⁰ On the 2022 strike, see LAG Köln 01.07.202210 SaGa 8/22 (n 109); Eva Kocher E, 'Die Erstreikbarkeit eines tariflichen Belastungsausgleichs im Kontext von Mindestpersonalausstattungsregelungen' (2022) 39(12) NZA 815

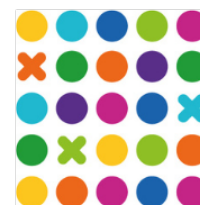
¹⁵¹ Bundesanstalt für Arbeitsschutz und Arbeitsmedizin (baua), 'Arbeit und Gesundheit in der stationären und ambulanten Pflege' [2021] Amtliche Mitteilungen der Bundesanstalt für Arbeitsschutz und Arbeitsmedizin <<https://www.baua.de/DE/Angebote/Publikationen/Aktuell/4-2021.html>>

¹⁵² Anke Begerow and Uta Gaidys, 'COVID-19 Pflege Studie. Erfahrungen von Pflegenden während der Pandemie -erste Teilergebnisse.' [2020] Pflegewissenschaft Sonderausgabe: Die Corona-Pandemie 33

¹⁵³ Michael Drupp, Markus Meyer and Werner Winder, 'Betriebliches Gesundheitsmanagement (BGM) für Pflegeeinrichtungen und Krankenhäuser unter Pandemiebedingungen' in Klaus Jacobs and others (eds), *Pflege-Report 2021 Sicherstellung der Pflege: Bedarfslagen und Angebotsstrukturen* (Springer 2021)

¹⁵⁴ Bundesministerium für Gesundheit, 'Fragen und Antworten zum Pflegebonus' (30 March 2020)

<<https://www.bundesgesundheitsministerium.de/coronavirus/faq-pflegebonus.html>> accessed 31 August 2023



2) 370 EUR for other employees who spent at least 25% of their working hours structuring, activating, assisting, or caring for people in need of care. In addition, a bonus of 330 EUR is to be paid to trainees (Sec. 150a (3) SGB XI).

In addition to legislative changes, the Statutory Health Insurance Association (Gesetzlichen Krankenkassen Verband, GKV) and the German Hospital Federation (Deutsche Krankenhausgesellschaft, DKG) agreed to stack a 100-million EUR fund by Sept. 3, 2020, and to pay tax-free single bonuses of up to 1.000 EUR by the end of the year for nurses working in inpatient (including hospitals) and outpatient care. In some federal states, an additional 500 EUR was guaranteed.¹⁵⁵

Next to one-time financial bonuses for nurses, the temporary visibility of nurses as "frontline workers" during the pandemic partly prompted the German government to address urgent problems in the nursing sector—the need to close the gap in staff shortages (see 3.2.2. and 5.4.). For example, this led to the adoption of the Health and Care Improvement Act (Gesundheitsversorgungs- und Pflegeverbesserungsgesetz, GPVG), which came into force in 2021 and which, among other things, guarantees funding for 20.000 additional jobs for nursing assistants in elderly care. Moreover, public institutions such as the Federal Institute for Occupational Safety and Health (Bundesanstalt für Arbeitsschutz und Arbeitsmedizin, BAuA) have initiated various research projects to study the effects of a pandemic on the nursing professions (especially in inpatient and outpatient care) and to develop better occupational safety for the future—for example, to prevent the social stigmatization of nursing staff working with infected patients.¹⁵⁶

6.4. Training and Competence Development

The Vocational Training Act (Berufsbildungsgesetz, BBiG) regulates in-company vocational training (dual system), vocational training preparation, further training, and vocational retraining. In particular, it establishes the German system of "dual vocational training", i.e. a systematic cooperation of in-company training and vocational training in schools. In most industries, trainees are employed in 2- or 3-year courses by an employer, receive trainee remuneration, and attend school alternately to in-company training. The Act regulates, among other issues, the trainee employment relationship (Secs. 10-26 BBiG), the recognition of training professions (Sec. 4-9 BBiG), and the requirements for training workplaces (Sec. 27-33 BBiG).

Training for nursing assistants is not federally regulated, individual states regulate (duration, scope of duties, etc.) it through their laws and ordinances—for North Rhine-Westphalia, for example, this is the Training and Examination Ordinance for Nursing Assistants (Ausbildungs- und Prüfungsverordnung Pflegefachassistenz, PflfachassAPrV).¹⁵⁷ However, the federal states have agreed, in 2012/13, to implement common minimum standards (Eckpunktepapier für die in Länderzuständigkeit liegenden Ausbildungen zu Assistenz- und Helferberufen in der Pflege) into their regulations for vocational training of nursing assistants by 2020—these include, among other things, at least one year of training at vocational schools and practical training in inpatient (including hospitals) and outpatient care.¹⁵⁸

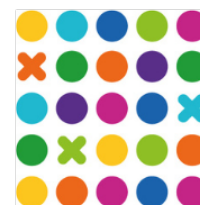
¹⁵⁵ Bundesministerium für Gesundheit, 'Pflegebonus (Corona-Prämie)' (3 September 2020)

<<https://www.bundesgesundheitsministerium.de/service/begriffe-von-a-z/p/corona-praemie.html>> accessed 31 August 2023

¹⁵⁶ Gudrun Faller and others, 'Stigmatisierungserfahrungen bei beruflich Pflegenden im Kontext von Covid-19 – eine Qualitative Studie' (2022) 84(4) Gesundheitswesen 310

¹⁵⁷ Anke Jürgensen, 'Pflegehilfe und Pflegeassistenz: Ein Überblick über die landesrechtlichen Regelungen für die Ausbildung und den Beruf' (2019) <<https://www.bibb.de/dienst/publikationen/de/10155>>

¹⁵⁸ 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



These regulations do not apply where specific federal regulations exist.¹⁵⁹ Since 2020, vocational training for nursing professionals is regulated in the PflBG. The PflBG introduced generalist vocational training primarily for nursing professionals, but also for health care professionals in nursing occupations, by gradually merging the three previously separate training programs in nursing, elderly care, and child care. The training consists of theoretical and practical training and lasts three years (or a maximum of five years in part-time form) at state, state-approved, or state-recognized nursing schools (Sec. 6 PflBG). The practical training must be completed in the facilities specified in Sec. 7 PflBG—inpatient (including hospitals) and outpatient care facilities. Two years are dedicated to general training; in the final year the trainee decides whether to continue with general training or specialize in elderly or child care. The Nursing Professions Training and Examination Ordinance (Ausbildungs- und Prüfungsverordnung für die Pflegeberufe, PflAPrV) regulates details of the training structure, training content, examinations, and the recognition of foreign professional qualifications. After completing the three years of training, the trainee must pass the state examination.

To monitor the effects of the generalist training implemented through the PflBG, the responsible federal ministries will carry out an evaluation by the end of 2025 to determine whether there is still a need for separate professional qualifications in elderly care, health care or child care (Sec. 62 PflBG).

The PflBG also introduces the possibility to become a health professional in nursing (higher education degree) (Sec. 37 (3) PflBG). The higher education study lasts three years and comprises theoretical and practical courses at state or state-recognized higher education institutions based on a modular curriculum as well as practical assignments in facilities in accordance with Sec. 7 PflBG (Sec. 38 (1) PflBG). In May 2023, the draft for a Nursing Studies Strengthening Act (PflStudStG) has been passed for the first readings, in accordance with the government's coalition agreement.¹⁶⁰ The bill outlines that higher education studies for the nursing profession should be designed as dual vocational training (leading to a higher education degree). So far, Sec. 37 (1) PflBG only states that the study program shall have a practical part, but does not outline any regulations for it. The intention of the new bill is to integrate the financing of the practical part of higher education nursing training into the existing financing system for vocational nursing training. The current bill amends the PflBG and adds new sections to regulate the practical part (Sec. 38a PflBG) and the employment relationship between student and provider (Sec. 38b PflBG), including the obligatory monthly allowance for students (Sec. 38b (2) PflBG). It also adds a new section about financing higher education studies (Sec. 39a PflBG), also to guarantee a sufficient number of health professionals in nursing with a higher education degree (Sec. 39a (1) 2 PflBG). It also intends to standardize and simplify the recognition procedures for foreign nursing professionals (Sec. 43a PflBG).¹⁶¹

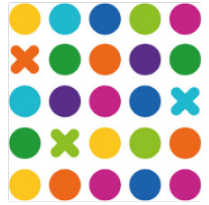
The Nursing Professions Training Financing Ordinance (Verordnung über die Finanzierung der beruflichen Ausbildung nach dem Pflegeberufegesetz, PflAFinV) regulates details, in particular of the financing (Sec. 1-20 PflAFinV) as well as the implementation of statistical surveys (Sec. 21-26 PflAFinV). The act also abolishes any tuition fees for professional training of nurses and entitles trainees to an appropriate training allowance.

der 89. Arbeits- und Sozialministerkonferenz 2012 und der 86. Gesundheitsministerkonferenz 2013' (29 January 2016) <https://www.bpa-arbeitgeberverband.de/fileadmin/user_upload/kleinedokumente/BAnz_AT_17.02.2016_B3.pdf> accessed 9 October 2023

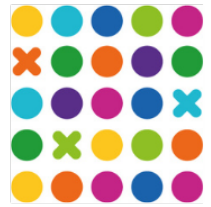
¹⁵⁹ Wohlgemuth Hermann and Georg Pepping (eds), *Berufsbildungsgesetz. Handkommentar*. (2nd edn, Nomos Verlagsgesellschaft 2020)

¹⁶⁰ SPD, Bündnis 90/Die Grünen und FDP (n 83)

¹⁶¹ Bundesregierung, 'Entwurf eines Gesetzes zur Stärkung der hochschulischen Pflegeausbildung, zu Erleichterungen bei der Anerkennung ausländischer Abschlüsse in der Pflege und zur Änderung weiterer Vorschriften (Pflegestudiumstärkungsgesetz - PflStudStG)' (BT-Drs. 20/8105)



Admission for midwives is regulated by the Midwifery Act (Hebammengesetz, HebG) and their training and final examination by the Study and Examination Ordinance for Midwives (Studien- und Prüfungsverordnung für Hebammen, HebStPrV). With the Midwifery Reform Act (Hebammenreformgesetz, HebRefG), which came into force in 2020, the midwifery profession was transformed into a dual vocational training program (Sec. 11 (2) HebG) and the trainee receives a higher education bachelor's degree after the final examination (Sec. 1 (7) HebG). Full-time midwifery studies last a minimum of six semesters and a maximum of eight semesters (Sec. 11 (1) HebG).



7. Social security coverage and benefits

7.1. General

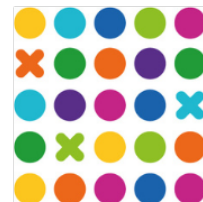
Germany is designated in its constitution not only as a democratic state, but also as a social welfare state (Art. 20 (1) GG), and social insurance plays an important part for the protection of the individual against the risks of everyday life. Sec. 1 SGB I is the legal concretization of this constitutional requirement.¹⁶² On the history and general institutional structure of social insurance in Germany, see 1.1.3.

There are five social insurance schemes, regulated by the Social Code (SGB) in several books: health (SGB V), long-term care (SGB XI), pension (SGB VI), unemployment (SGB III), and accident insurance (SGB VII, covering employers' liability for injuries at work). They are carried out by different social insurance institutions: health insurance funds (Krankenkassen) for health (Sec. 4 SGB V) and long-term care insurance (Sec. 1 SGB XI), pension insurance funds (like Deutsche Rentenversicherung Bund) (Sec. 125 SGB VI), BA for unemployment insurance (Secs. 367 and 368 SGB III), and employers' liability insurance associations (Berufsgenossenschaften) and accident insurance funds (Unfallkassen) (Sec. 114 SGB VII) for accident insurance.

Social insurance is characterized by the idea of a community of solidarity, which is characterized in particular by the (obligatory) insurance principle and the principle of self-governance. Benefits are provided by the social insurance institutions, which are corporations under public law (Sec. 29 SGB IV), and the providers of pension, health (and long-term care), and accident insurance are governed by self-governing bodies (Selbstverwaltungsorgane) (Sec. 44 SGB IV), which are composed of employer representatives and democratically elected representatives of the insured through so-called "social elections" (Sozialwahl) every six years (Sec. 45 SGB IV). The assembly of representatives (Vertreterversammlung) (Sec. 46 SGB IV) (in the case of health insurance funds, the administrative board) forms the "parliament" of a social insurance institutions. The representatives' meeting elects the board of directors and, on the proposal of the board of directors, the managing director of the insurance institution, except in the case of health insurance funds. Here, the board of directors elects the insurance fund's full-time executive board. The BA is excluded from the social elections since it is a state-affiliated social insurance provider. Its administrative board (Verwaltungsrat) is made up of appointed representatives of employees and employers, as well as, in contrast to other four social insurance institutions, representatives of the state on the "third bench".

Social benefits are mostly connected to the employment status—self-employed, non-workers, and career civil servants are largely excluded from this system. Social insurance is financed through contributions from the insured, employers and third parties, by government subsidies, and other revenues (Sec. 20 (1) SGB IV). Exceptions are accident insurance, where only employers pay the contributions (Sec. 150 SGB VII), Social insurance is financed on a pay-as-you-go basis (Umlagesystem, so-called Generationenvertrag, intergenerational social contract): the contributions paid in are paid out again directly as benefits to others. In return for their contributions, contributors acquire an entitlement to benefits. Contributions that insured persons have to pay for their insurance coverage are calculated on the amount of their salary (Secs. 157 & 161 SGB VI for pension insurance)—up to the contribution assessment ceiling (Beitragsbemessungsgrenze).

¹⁶² Steinmeyer and Heinz-Dietrich, 'Die deutsche Sozialversicherung im Überblick' in Laurenz Mülheims and others (eds), *Handbuch Sozialversicherungswissenschaft* (Springer VS 2015)



In contrast to the contribution-based social insurance, social welfare programs, such as basic security for jobseekers (Grundsicherung für Arbeitssuchende, ALG II) under SGB II, as well as income support (Sozialhilfe) under book SGB XII, mainly for persons who are unable to work due to their age or physical condition, are tax-financed. Since January 1, 2023, basic security for jobseekers and basic security for their dependants (Sozialgeld) are merged under the name Citizens Income (Bürgergeld), which is regulated in SGB II. Civil servants do not have to pay contributions. Parental allowance (Elterngeld) is also tax-funded (see 7.3.).

Social insurance or social benefits are not an object of collective bargaining. In Germany, however, the DGB trade unions in particular are campaigning for improvements in this area. In addition, occupational pensions supplementing social pension insurance can be the subject of collective bargaining.¹⁶³ The most important example is in the construction sector, where the parties to the collective agreement have established on social funds by way of collective agreements (Sozialkassentarifverträge), in order to fund different benefits (supplementary pension to the statutory pension, additional vacation pay, occupational and vocational training).. These collective agreements establish the jointly managed agencies “Urlaubs- und Lohnausgleichskasse der Bauwirtschaft” and the “Zusatzversorgungskasse des Baugewerbes AG”, jointly managed as the Joint Institution of the Collective Bargaining Partners in the Construction Industry (SOKA-BAU). In 2017, the Social Fund Procedures Security Act (Sozialkassenverfahrensicherungsgesetz, SokaSiG) and the Second Social Fund Procedures Security Act (SokaSiG 2) made collective agreements on which the social fund procedures (Sozialkassenverfahren im Baugewerbe) in the construction industry are based binding on all employers.

7.2. Care Sector

With the exception of accident insurance, the German social insurance system is not sector-specific. The only exception is midwives, who must have professional liability insurance (Berufshaftpflichtversicherung) (134a SGB V) to protect themselves against claims for damages caused in the course of their work—freelance midwives must take out professional liability insurance themselves, while the employer must take it out for employed midwives.¹⁶⁴ One policy problem with those liability insurances is the extremely high premiums that midwives who provide obstetric care have to pay in advance. Although they are reimbursed a large amount by the statutory health insurance through the so-called liability compensation, midwives can only apply for the compensation after having provided services.¹⁶⁵

7.3. Maternity protection and paternity leave

With regard to maternity leave, the pregnant employee is protected by the Maternity Protection Act (Mutterschutzgesetz, MuSchG), as the employer is prohibited from sending the pregnant employee to work during late pregnancy (six weeks before the birth) and after childbirth (eight weeks)—unless the pregnant woman expressly declares her willingness to perform work (Sec. 3 (1) MuSchG).¹⁶⁶ The employee cannot be fired during pregnancy and four months after giving childbirth (Sec. 3 MuSchG). The employer is not allowed to have the

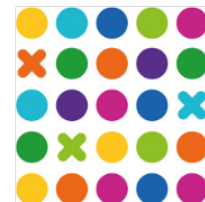
¹⁶³Rudi Müller-Glöge, Ulrich Preis and Ingrid Schmidt (eds), *Erfurter Kommentar zum Arbeitsrecht* (23rd edn, C.H. Beck 2023), BetrAVG § 19 et seq.

¹⁶⁴ Bundesministerium für Gesundheit, ‘Maßnahmen für Hebammen’

<https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/5_Publikationen/Gesundheit/Flyer_Poster_etc/BMG_A4_Flyer_Hebammen.pdf> accessed 7 September 2023

¹⁶⁵ Personal correspondence of the authors with the German Midwives Association (Deutscher Hebammenverband).

¹⁶⁶ As well as in the case of miscarriage, and until the end of their period of protection after childbirth, at least until the expiry of four months after childbirth (Sec. 17 MuSchG).



pregnant or breastfeeding employee work overtime (Sec. 4 MuSchG), nightshifts (Sec. 5 MuSchG), or on Sundays and holidays (Sec. 6 MuSchG).

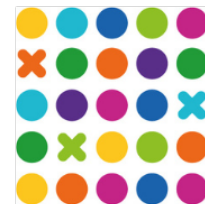
During maternity leave, the employee is entitled to continued payment of wages. The employer, in turn, is reimbursed for the wage costs by the social insurance. For this purpose, the employer pays a levy to the social insurance. The amount depends on the contributions paid to the pension insurance (Sec. 7 Aufwendungsausgleichsgesetz, AAG). The reimbursement is financed from this. This system is intended to counteract discrimination against women of childbearing age when looking for a job.¹⁶⁷ Altogether, a pregnant woman receives a maternity allowance (Mutterschaftsgeld) (max 13 EUR per day) during maternity leave (Sec. 19 MuSchG), and a maternity allowance supplement from her employer during her employment relationship for the periods of protection before and after childbirth and for the day of childbirth. The maternity allowance supplement equals the difference between 13 EUR and the average daily pay (Sec. 20 (1) MuSchG). Women are also entitled to maternity protection pay (Mutterschutzlohn) from their employer if they cannot be employed or can only be partially employed outside the maternity protection period (Sec. 18 MuSchG).

Parental leave (Elternzeit) and parental allowance (Elterngeld) are regulated by the Federal Parental Allowance and Parental Leave Act (BEEG). Parental allowance is intended to compensate for the loss of earnings; it is covered by the state and is generally calculated on the basis of 67% of the employee's income before the birth of the child (Sec. 2 BEEG). 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). Unpaid parental leave starts after 12–14 allowance months, and can last up to 3 years, during which parents are protected from dismissal (Sec. 18 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").

According to the coalition agreement of the governing parties, Germany plans to implement a partner leave of two weeks after birth with the intention of increasing both the duration of parental leave and the participation of fathers in parental leave and parental allowance.¹⁶⁸ This follows the Directive (EU) 2019/1158, which Germany implemented in 2023, but without including partner leave—this is currently debated for 2024.

¹⁶⁷ (2003) BvR 302/96 (BVerfG)

¹⁶⁸ SPD, Bündnis 90/Die Grünen und FDP, 'Koalitionsvertrag 2021-2025: Mehr Fortschritt wagen. Bündnis für Freiheit, Gerechtigkeit und Nachhaltigkeit' (2021)



8. Concluding discussion

The German care sector has developed in many contradictions; it is an example of a dramatic “care crisis”.¹⁶⁹

On the one hand, it is clear to everyone involved that the sector will much gain in importance, not least due to demographic factors. Already between 1995 and 2021, the number of people in need of care rose from around 1 million to about 4.6 million, and for 2050, a number of 6.5 million is expected.¹⁷⁰ As a consequence, there is already a need for qualified staff that the labour market has not been able to meet.¹⁷¹

On the other hand, there are structural problems that will not be easy to overcome in the future. The most important one has to do with the gendered character of care, which assigns care work as feminine work, to women.¹⁷² This fact brings with it a decades-long, even centuries-old history of low pay or no pay, low social recognition, low levels of collective organisation, and a heavy reliance on workers’ professional and personal sense of responsibility. With societal backing for the familialistic system declining, gender equality questioning the legitimacy even further, workers are less and less ready to accept the burdens put on them.

An end to the vicious circle of staff shortages, pressure on workers, accumulation of overtime, low attractiveness of care professions, is not at the horizon. While the pay in all care sectors has been significantly improved in recent years, approximating it to comparable professions in other sectors, this has not been able to bring about the changes needed, attract more workers, and make workers stay in the sector.

These contradictions are most visible in elderly care, where the German familialistic care system holds families (and in those families, women) as primarily responsible. Families often end up choosing to hire live-in workers, i.e. migrant women from Central and Eastern Europe working under precarious and mostly informal conditions. Effective political solutions would have to start from putting money into the system; at the same time, the former president of the German Federal Social Court, suggests, in view of the impending financial collapse, to go further back to the general idea of partial financing, to diminish benefits, and to incentivize networks of families and friends even more.¹⁷³

As for the hospital system, strategies of economization, most clearly represented in the system of case-based flat rate funding, has also lead into a dead end. Federal government is at the moment making an important move towards changing the funding basis.¹⁷⁴

¹⁶⁹ Margrit Brückner and others, ‘Care.Macht.Mehr: Von der Care-Krise zur Care-Gerechtigkeit’ (Manifest 2013) <https://care-macht-mehr.com/wp-content/uploads/2021/11/Care_Manifest_2013.pdf>; Emma Dowling, *The Care Crisis: What caused it and how can we end it?* (Verso 2021)

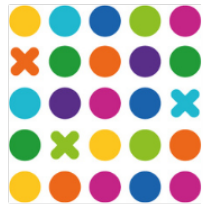
¹⁷⁰ Rainer Schlegel, ‘Zeitenwende auch im Sozialstaat?’ [2023] NJW 2093, 2099 See 2.4. on the staff needed now and in the future.

¹⁷¹ Herausgeberinnenkollektiv von Rosa Luxemburg Stiftung, ‘Schwarzbuch Krankenhaus: Das Schweigen brechen’ (2023) <https://www.rosalux.de/publikation/id/50301/schwarzbuch-krankenhaus?fbclid=IwAR21bkz4-IBG8dkEmzDY5IEGDBUogZDY1oB73lqmWHcl3Z9V1s64rXu_RSs> accessed 9 October 2023

¹⁷² Brückner and others (n 170); Nancy Fraser, ‘Contradictions of Capital and Care’ [2016] New Left Review 99; Kirsten Scheiwe, Michelle Cottier and Caroline Voithofer (eds), *Handbuch Sorgearbeit: Sorgebeziehungen und das Recht - Caring and the Law* (Springer Forthcoming)

¹⁷³ Schlegel (n 170) 2099

¹⁷⁴ See above; for the discussion Michael Simon, ‘Von der Unterbesetzung in der Krankenhauspflege zur bedarfsgerechten Personalausstattung: Eine kritische Analyse der aktuellen Reformpläne für die Personalbesetzung im Pflegedienst der Krankenhäuser und Vorstellung zweier Alternativmodelle’ (October 2018). Working Paper Forschungsförderung 96; Michael



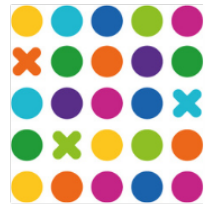
Considering the fact that personal services, in contrast to industrial products, tend to become more expensive with time,¹⁷⁵ the funding problems will probably continue to accompany discussions and developments. Workers and their representatives have been learning that moral recognition of care work may both be a resource and a trap.¹⁷⁶ Nevertheless, due to the comparably weak representation of workers in care sectors,¹⁷⁷ it is not easy for workers to make their voices be heard – an important factor for any reform that could be effective and sustainable.

Simon, 'Das DRG-Fallpauschalensystem für Krankenhäuser', Düsseldorf, 305 Seiten' (Düsseldorf 2020). Forschungsförderung Working Paper

¹⁷⁵ Hagen Krämer, 'Die Kostenkrankheit von Dienstleistungen als soziale Frage' in Bernhard Emunds and others (eds), *Freiheit - Gleichheit - Selbstausbeutung: Zur Zukunft der Sorgearbeit in der Dienstleistungsgesellschaft* (Die Wirtschaft der Gesellschaft Jahrbuch 6. Metropolis-Verlag 2021)

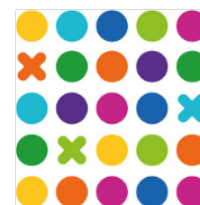
¹⁷⁶ Stephan Voswinckel, 'Die Anerkennungsfrage. Soziale Dienstleistungsarbeit zwischen moralischer Anerkennung und Statusdefizit: Das Beispiel der Pflege' in Bernhard Emunds and others (eds), *Freiheit - Gleichheit - Selbstausbeutung: Zur Zukunft der Sorgearbeit in der Dienstleistungsgesellschaft* (Die Wirtschaft der Gesellschaft Jahrbuch 6. Metropolis-Verlag 2021)

¹⁷⁷ Schroeder, Kiepe and Inkinen (n 35); Wolfgang Schroeder, 'Interessenvertretung und Demokratie in der Dienstleistungsgesellschaft: Das Feld der Altenpflege' in Bernhard Emunds and others (eds), *Freiheit - Gleichheit - Selbstausbeutung: Zur Zukunft der Sorgearbeit in der Dienstleistungsgesellschaft* (Die Wirtschaft der Gesellschaft Jahrbuch 6. Metropolis-Verlag 2021) (he partly explains this with a view to the gendered character of the sector)



9. List of References

- (1961) 3 RK 57/57 (BSG).
- (1964) 1 BvR 79/62 (BVerfG).
- (2003) V B 80/03 (BFH).
- (2003) BvR 302/96 (BVerfG).
- (2007) 5 AZB 52/06 (BAG).
- (2010) 5 AZR 517/09 (BAG).
- (2012) L 4 R 761/11 (LSG Baden-Württemberg).
- (2012) 1 AZR 611/11 (BAG).
- (2012) 1 AZR 179/11 (BAG).
- (2012) L 2 R 13/09 (LSG Hamburg).
- (2015) 10 AZR 423/14 (BAG).
- (2016) L 11 R 4602/15 (LSG Baden-Württemberg).
- (2017) L 1 KR 551/16 (Hessisches LSG).
- (2019) 1 BvR 1/16 (BVerfG).
- (2020) L 1 KR 358/18 (LSG Berlin-Brandenburg).
- (2020) 2 AZR 660/19 (BAG).
- (2021) C-580/19 (ECJ).
- (2021) C-344/19 (ECJ).
- (2021) 5 AZR 505/20 (BAG).
- (2021) B 12 R 6/20 R (BSG).
- (2022) 10 SaGa 8/22 (LAG Köln).
- (2022) 1 ABR 24/21 (BAG).
- (2023) 5 AZR 108/22 (BAG).
- (2023) 3 AZR 19/22 (BAG).
- Auffenberg J and others, '„Ich pflege wieder, wenn ...“: Potenzialanalyse zur Berufsrückkehr und Arbeitszeitaufstockung von Pflegefachkräften' (2022)
<https://www.arbeitnehmerkammer.de/fileadmin/user_upload/Downloads/Politik/Rente_Gesundheit_Pflege/Bundesweite_Studie_Ich_pflege_wieder_wenn_Langfassung.pdf> accessed 10 October 2023.
- Auth D, 'Ökonomisierung der Pflege – Formalisierung und Prekarisierung von Pflegearbeit' (2013). WSI-Mitteilungen 6.
- Bauer R, *Personenbezogene soziale Dienstleistungen: Begriff, Qualität und Zukunft* (1. Aufl. Westdt. Verl. 2001).
- Bayreuther F, 'Hinweisgeberschutz und Betriebsverfassung' [2023] NZA 666.



Becker M, Holthaus M and Ulrici B, *Gesamtes Arbeitsrecht* (Beck-online Bücher, 2. Auflage, Nomos 2023).

Begerow A and Gaidys U, 'COVID-19 Pflege Studie. Erfahrungen von Pflegenden während der Pandemie -erste Teilergebnisse.' [2020] *Pflegewissenschaft Sonderausgabe: Die Corona-Pandemie* 33.

Behringer J, Dullien S and Paetz C, 'Überwältigende Mehrheit der Deutschen will kräftige Investitionsausweitung' (November 2021). IMK Policy Brief 112 <https://www.boeckler.de/fpdf/HBS-008181/p_imk_pb_112_2021.pdf> accessed 9 October 2023.

Benazha AV and others, 'Live-in-Care im Ländervergleich' in Brigitte Aulenbacher, Helma Lutz and Karin Schwiter (eds), *Gute Sorge ohne gute Arbeit?: Live-in-Care in Deutschland, Österreich und der Schweiz* (Beltz Juventa 2021).

Berg P, Kocher E and Schumann D (eds), *Tarifvertragsgesetz und Arbeitskampfrecht: Kompaktcommentar* (KompaktCommentar, 7th edn, Bund-Verlag 2021).

Beyer T, 'Bestrebungen für einen allgemein-verbindlichen Tarifvertrag „Soziales“ – Ein Zwischenbericht.' in Renate Oxenknecht-Witzsch (ed), *Arbeitsverhältnisse in der Kirche - Anspruch und Wirklichkeit?: Dokumentation der Vorträge der 18. Fachtagung zum kirchlichen Arbeitsrecht* (Eichstätter Schriften zum kirchlichen Arbeitsrecht vol 1. Ketteler-Verl. 2015).

Brückner M and others, 'Care.Macht.Mehr: Von der Care-Krise zur Care-Gerechtigkeit' (Manifest 2013) <https://care-macht-mehr.com/wp-content/uploads/2021/11/Care_Manifest_2013.pdf>.

Bucher B, 'Keine Anwendbarkeit des KSchG auf Privathaushalt' [2016] *AuR* 515.

—— *Rechtliche Ausgestaltung der 24-h-Betreuung durch ausländische Pflegekräfte in deutschen Privathaushalten* (Dissertation, Nomos 2018).

Bundesagentur für Arbeit, 'Klassifikation der Berufe 2010 (KldB 2010)' <https://www.arbeitsagentur.de/datei/Klassifikation-der-Berufe_ba017989.pdf> accessed 10 October 2023.

—— 'Programm Triple Win - Pflegekräfte' <<https://www.arbeitsagentur.de/vor-ort/zav/projects-programs/health-and-care/triple-win/das-programm>> accessed 2 September 2023.

—— 'Arbeitsmarktsituation im Pflegebereich' (2023) <https://statistik.arbeitsagentur.de/DE/Statischer-Content/Statistiken/Themen-im-Fokus/Berufe/Generische-Publikationen/Altenpflege.pdf?__blob=publicationFile> accessed 10 October 2023.

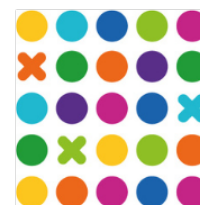
Bundesanstalt für Arbeitsschutz und Arbeitsmedizin (baua), 'Arbeit und Gesundheit in der stationären und ambulanten Pflege' [2021] *Amtliche Mitteilungen der Bundesanstalt für Arbeitsschutz und Arbeitsmedizin* <<https://www.baua.de/DE/Angebote/Publikationen/Aktuell/4-2021.html>>.

Bundesministerium für Arbeit und Soziales, 'Social Security at a Glance 2020' (2020) <https://www.bmas.de/SharedDocs/Downloads/DE/Publikationen/a998-social-security-at-a-glance-total-summary.pdf?__blob=publicationFile&v=2> accessed 10 October 2023.

Bundesministerium für Bildung und Forschung, 'Deutscher Qualifikationsrahmen (DQR)' <https://www.dqr.de/dqr/de/der-dqr/der-dqr_node.html> accessed 20 September 2023.

Bundesministerium für Familie, Senioren, Frauen und Jugend, 'Die Ausbildungssituation in der Pflege: Aussagen der AG Statistik zur Ausbildungssituation in der Pflege' (Zwischenbericht, September 2022) <https://www.pflegeausbildung.net/fileadmin/de.altenpflegeausbildung/content.de/user_upload/Zwischenbericht_AG_Statistik.pdf> accessed 10 October 2023.

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/BAnz_AT_17.02.2016_B3.pdf> accessed 9 October 2023.

Bundesministerium für Gesundheit, 'Maßnahmen für Hebammen' <https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/5_Publikationen/Gesundheit/Flyer_Poster_e tc/BMG_A4_Flyer_Hebammen.pdf> accessed 7 September 2023.

— 'Fragen und Antworten zum Pflegebonus' (30 March 2020) <<https://www.bundesgesundheitsministerium.de/coronavirus/faq-pflegebonus.html>> accessed 31 August 2023.

— 'Pflegebonus (Corona-Prämie)' (3 September 2020) <<https://www.bundesgesundheitsministerium.de/service/begriffe-von-a-z/p/corona-praemie.html>> accessed 31 August 2023.

— 'Pflegearbeitsplatz mit Zukunft: Die Ergebnisse der Studie zur Arbeitsplatzsituation in der Akut- und Langzeitpflege auf einen Blick' (May 2023) <https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3_Downloads/K/Konzertierte_Aktion_Pflege /BMG_Ergebnisse_der_zweiteiligen_Studie_Arbeitsplatzsituation_bf.pdf> accessed 10 October 2023.

— 'Eckpunktepapier Krankenhausreform' (10 July 2023) <https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3_Downloads/K/Krankenhausreform/Eckpu nktepapier_Krankenhausreform.pdf>.

Bundesregierung, 'Entwurf eines Gesetzes zum Übereinkommen Nr. 190 der Internationalen Arbeitsorganisation vom 21. Juni 2019 über die Beseitigung von Gewalt und Belästigung in der Arbeitswelt' (BT-Drs. 20/5652).

— 'Entwurf eines Gesetzes zur Stärkung der hochschulischen Pflegeausbildung, zu Erleichterungen bei der Anerkennung ausländischer Abschlüsse in der Pflege und zur Änderung weiterer Vorschriften (Pflegestudiumstärkungsgesetz - PflStudStG)' (BT-Drs. 20/8105).

— 'Zweiter Gleichstellungsbericht: Erwerbs- und Sorgearbeit gemeinsam neu gestalten' (BT-Drucks. 18/12840).

Caritas Deutschland, 'Tarifvertrag Altenhilfe FAQ: Der Tarifvertrag in der Altenpflege kommt nicht. Was nun?' <<https://www.caritas.de/fuerprofis/fachthemen/gesundheits/der-tarifvertrag-in-der-altenpflege-komm>> accessed 18 March 2021.

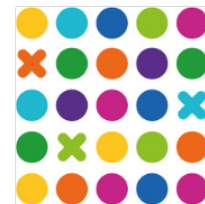
Council of the European Union, 'Recommendation of 22 May 2017 on the European Qualifications Framework for lifelong learning and repealing the recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning: 2017/C 189/03 OJ C 189' (2017).

Cremer G, Fritz R and Goldschmidt N, 'Soziale Dienstleistungen und Quasi-Märkte in der Sozialen Marktwirtschaft' (2018) 65(3) Zeitschrift für Politik 335.

Däubler W and Kittner M, *Geschichte der Betriebsverfassung* (Bund-Verlag GmbH 2020).

Diakonie, 'Arbeitsvertragsrichtlinien für Einrichtungen, die der Diakonie Deutschland angeschlossen sind, beschlossen von der Arbeitsrechtlichen Kommission der Diakonie Deutschland' (1 October 2022)

<https://www.diakonie-wissen.de/documents/4999827/13352553/958_STAND+01.+Oktober+2022+mit+Inhaltsverzeichnis.pdf/7e15c118 -f99e-418f-bcd5-7da8829bfa75> accessed 10 October 2023.



Die Linke, 'Gesetzlichen Mindestlohn gemäß EU-Mindestlohnrichtlinie erhöhen: BT-Drs. 20/7254' (15 June 2023) <<https://dserver.bundestag.de/btd/20/072/2007254.pdf>> accessed 9 October 2023.

Dowling E, *The Care Crisis: What caused it and how can we end it?* (Verso 2021).

Drupp M, Meyer M and Winder W, 'Betriebliches Gesundheitsmanagement (BGM) für Pflegeeinrichtungen und Krankenhäuser unter Pandemiebedingungen' in Klaus Jacobs and others (eds), *Pflege-Report 2021 Sicherstellung der Pflege: Bedarfslagen und Angebotsstrukturen* (Springer 2021).

Dukes R, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press 2017).

Emunds B and others, 'Gute Arbeit für Live-In-Care: Gestaltungsoptionen für Praxis und Politik' (Frankfurt a. M. Frankfurt (Oder) 2021). NBI-Positionen 2021/2 <<https://nbi.sankt-georgen.de/blog/2021/policy-paper-zur-weiterentwicklung-von-live-in-care-gute-arbeit-fuer-live-in-care-gestaltungsoptionen-fuer-praxis-und-politik>> accessed 9 October 2023.

Emunds B and others (eds), *Pflegearbeit im Privathaushalt: Sozialethische Analysen* (Lea Quaing, Brill Ferdinand Schöningh 2021).

Emunds B and Kocher E, 'Modelle von Live-in Care: Rechtswissenschaftliche und sozialethische Vorschläge zur Weiterentwicklung einer personenbezogenen Dienstleistung' [2022] WSI-Mitteilungen 407.

Esping-Andersen G, 'The Three Political Economies of the Welfare State' (1990) 20(3) *International Journal of Sociology* 92.

European Commission, 'European care strategy: Communication from the Commission' (COM(2022)440 7 September 2022) <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022DC0440>> accessed 10 October 2023.

Evans M, '"Tariftreue" in der Altenpflege: Neue Governance zwischen Tarifpolitik und Sozialstaat' (2023) 76(3) WSI-Mitteilungen 221.

Faller G and others, 'Stigmatisierungserfahrungen bei beruflich Pflegenden im Kontext von Covid-19 – eine Qualitative Studie' (2022) 84(4) *Gesundheitswesen* 310.

Franzen M, Thüsing G and Waldhoff C, *Arbeitskampf in der Daseinsvorsorge: Vorschläge zur gesetzlichen Regelung von Streik und Aussperrung in Unternehmen der Daseinsvorsorge* (Mohr Siebeck 2012).

Fraser N, 'Contradictions of Capital and Care' [2016] *New Left Review* 99.

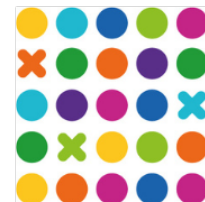
Gabriel K, 'Auf dem Weg in eine faire Dienstleistungswirtschaft: Die Mitverantwortung der kirchlichen Wohlfahrtsverbände' in Bernhard Emunds and others (eds), *Freiheit - Gleichheit - Selbstausbeutung: Zur Zukunft der Sorgearbeit in der Dienstleistungsgesellschaft* (Die Wirtschaft der Gesellschaft Jahrbuch 6. Metropolis-Verlag 2021).

Garcia González D and Peters M, 'Ausbildungs- und Studienabbrüche in der Pflege – ein integratives Review' (Bonn 2021).

GESIS - Leibniz-Institut für Sozialwissenschaften, 'Allgemeine Bevölkerungsumfrage der Sozialwissenschaften ALLBUS 2021' (2022).

Habel S, 'Die neuen Akteure auf dem „grauen Markt“ff: Vermittlungsagenturen in der Live-In-Pflege' in Bernhard Emunds and others (eds), *Freiheit - Gleichheit - Selbstausbeutung: Zur Zukunft der Sorgearbeit in der Dienstleistungsgesellschaft* (Die Wirtschaft der Gesellschaft Jahrbuch 6. Metropolis-Verlag 2021).

Hartmann F, 'Der Aktionsplan zur Förderung von Tarifverhandlungen – Bloßer Papiertiger oder Gefahr für die deutsche Tarifautonomie?' [2023] *EuZA* 121.



—— 'Tariftreue in der Pflegebranche.: Unions- und verfassungsrechtliche Bedenken gegen §§ 72, 82c SGB XI nF' [2023] RdA 90.

Heeser A, 'Pflegekammern: Wie sich die Pflege in Deutschland organisiert' (2022) 27(10) kma 70.

Herausgeberinnenkollektiv von Rosa Luxemburg Stiftung, 'Schwarzbuch Krankenhaus: Das Schweigen brechen' (2023) <https://www.rosalux.de/publikation/id/50301/schwarzbuch-krankenhaus?fbclid=IwAR21bkz4-IBG8dkEmzDY5IEGDBUogZDY1oB73lqmWHcl3Z9V1s64rXu_RSs> accessed 9 October 2023.

Hermann W and Pepping G (eds), *Berufsbildungsgesetz. Handkommentar*. (2nd edn, Nomos Verlagsgesellschaft 2020).

Herweck R and Weg M, "'24-Stunden-Pflege": Abschaffen oder neu gestalten?: Ein Beitrag zur aktuellen Diskussion' [2022] NDV 399.

IAB, 'Tarifbindung und betriebliche Interessenvertretung. Ergebnisse aus dem Betriebspanel 2022: Aktuelle Daten und Indikatoren' (20 July 2023) <<https://iab.de/daten/daten-zur-tarifbindung-und-betrieblichen-interessenvertretung/>> accessed 20 September 2023.

ILO, 'Compilation of decisions of the Committee on Freedom of Association: Right to strike' (2006) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO::P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3945742,3> accessed 10 October 2023.

Jäger S, Noy S and Schoefer B, 'The German Model of Industrial Relations: Balancing Flexibility and Collective Action.' (August 2022). IZA DP 15500 <<https://docs.iza.org/dp15500.pdf>>.

Jürgensen A, 'Pflegehilfe und Pflegeassistenz: Ein Überblick über die landesrechtlichen Regelungen für die Ausbildung und den Beruf' (2019) <<https://www.bibb.de/dienst/publikationen/de/10155>>.

Knäbe T and Carrión-Crespo C, 'The scope of essential services: Laws, Regulations and Practices' (Geneva 2019). ILO Working Paper 334 <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_737647.pdf> accessed 10 October 2023.

Kocher E, 'The Protection of the Strike in the National Legal Systems - National Report: Germany' in Carmen La Macchia (ed), *The Right to Strike in the EU. The Complexity of the Norms – Safeguarding Efficacy* (Ediesse).

Kocher E and others, *Das Recht auf eine selbstbestimmte Erwerbsbiographie: Arbeits- und sozialrechtliche Regulierung für Übergänge im Lebenslauf* (Ein Beitrag zu einem Sozialen Recht der Arbeit, Nomos 2013).

Kocher E, 'Hausangestellte im deutschen Arbeitsrecht: Ratifikation der ILO-Konvention 189' [2013] NZA 929.

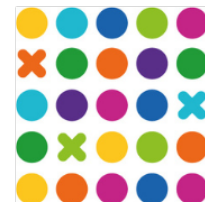
—— 'Tariffähigkeit ohne Streikbereitschaft?: Funktionale Alternativen zur Arbeitskampfbereitschaft im Fall von Hausangestelltenvereinigungen' in Jens Schubert (ed), *Festschrift für Otto Ernst Kempfen* (Nomos 2013).

—— 'Die Ungleichbehandlung von Hausangestellten in der 24-Stunden-Pflege gegenüber anderen Arbeitnehmerinnen und Arbeitnehmern – eine Frage des Verfassungsrechts' in Kirsten Scheiwe and Johanna Krawietz (eds), *(K)Eine Arbeit wie jede andere?: Die Regulierung von Arbeit im Privathaushalt* (Juristische Zeitgeschichte/ Abteilung 2 vol 20. De Gruyter 2014).

—— 'Arbeitsverhältnisse für transnationale Live-in-Care: Handlungsempfehlungen aus arbeitsrechtlicher Sicht' (2022). DIFIS Impuls 12 <<https://difis.org/institut/publikationen/publikation/34>>.

—— 'Bereitschaftszeit und Rufbereitschaft: eine europarechtliche Dogmatik' [2022] RdA 50.

—— 'Die Erstreikbarkeit eines tariflichen Belastungsausgleichs im Kontext von Mindestpersonalausstattungsregelungen' (2022) 39(12) NZA 815.



Kocher E, Krüger L and Sudhof C, 'Streikrecht in der Kirche im Spannungsfeld zwischen Koalitionsfreiheit und kirchlichem Selbstbestimmungsrecht: Ein goldener Mittelweg zwischen Kooperation und Konflikt?' [2014] NZA 880.

Kocher E and Potocka-Sionek N, '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.

— '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>>.

Kocher E and Scheiwe K, 'Welche Regelungen sind für eine sozial verantwortliche Absicherung der häuslichen Betreuung erforderlich?: Eine Erwiderung auf den Beitrag von Herweck und Weg im NDV 8/2022' [2022] NDV 494.

Krämer H, 'Die Kostenkrankheit von Dienstleistungen als soziale Frage' in Bernhard Emunds and others (eds), *Freiheit - Gleichheit - Selbstausbeutung: Zur Zukunft der Sorgearbeit in der Dienstleistungsgesellschaft* (Die Wirtschaft der Gesellschaft Jahrbuch 6. Metropolis-Verlag 2021).

Länder Bremen, Berlin, Thüringen, 'Entwurf eines Gesetzes zur Änderung des Tarifvertragsgesetzes' (BR-Drs. 317/21).

Leitner S, 'Familialismus in konservativen Wohlfahrtsstaaten: Zum Wandel des Geschlechterleitbilds in der Kinderbetreuungs- und Altenpflegepolitik.' in Diana Auth, Eva Buchholz and Stefanie Janczyk (eds), *Selektive Emanzipation. Analysen zur Gleichstellungs- und Familienpolitik*. (Verlag Barbara Budrich 2010).

Lenzen J and Evans-Borchers, Michael, 'Tarifreue in der Altenpflege: Expertise zur Umsetzung des Gesetzes zur Weiterentwicklung der Gesundheitsversorgung (GVWG) in Nordrhein-Westfalen (2023) <https://www.iat.eu/aktuell/veroeff/2024/Tariftreue_in_der_Altenpflege_Evans-Borchers_Lenzen.pdf>

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>.

— '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/>>.

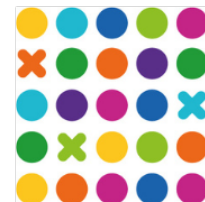
Mironi MM and Schlachter-Voll M (eds), *Regulating strikes in essential services: A comparative "law in action" perspective* (2019).

Molitor A, 'Jeder kämpft für sich allein' [2023] Mitbestimmung 26.

Müller-Glöße R, Preis U and Schmidt I (eds), *Erfurter Kommentar zum Arbeitsrecht* (23rd edn, C.H. Beck 2023).

Niedersächsische Landesregierung, 'Presseinformation: "70,6 Prozent stimmen gegen Fortbestand der Pflegekammer"' (7 September 2020)

<https://www.ms.niedersachsen.de/download/158633/Pflegekammer_Presseinformation.pdf> accessed 10 October 2023.



Pflegeberufekammer Schleswig-Holstein, 'Jahresabschlussbericht' (2020/2021) <https://www.schleswig-holstein.de/DE/fachinhalte/P/pflege/Downloads/Pflegeberufekammer/Jahresabschlussbericht_PBK_SH_2020_2021.pdf?__blob=publicationFile&v=1> accessed 10 October 2023.

Regierungskommission für eine moderne und bedarfsgerechte Krankenhausversorgung, 'Dritte Stellungnahme und Empfehlung' (2022) <https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3_Downloads/K/Krankenhausreform/3te_Stellungnahme_Regierungskommission_Grundlegende_Reform_KH-Verguetung_6_Dez_2022_mit_Tab-anhang.pdf>.

Riedlinger I, Fischer G and Höß T, 'Pflegeberufe und Arbeitskampf - ein Widerspruch?' in Ingrid Artus and others (eds), *Arbeitskonflikte sind Geschlechterkämpfe: Sozialwissenschaftliche und historische Perspektiven* (Arbeit - Demokratie - Geschlecht Band 27. Westfälisches Dampfboot 2020).

Rossow V and Leiber S, 'Mehr Fortschritt wagen' auch im Feld der Live-in-Pflege?' (Düsseldorf 2022). DIFIS Impuls 2022/1.

Rothgang H and others, 'Migrantization of long-term care provision in Europe: A comparative analysis of Germany, Italy, Sweden, and Poland' (2021). SFB 1342 WorkingPapers 11.

Rothgang H, Müller R and Unger R, 'Themenreport „Pflege 2030“. Was ist zu erwarten – was ist zu tun?' (2012) <https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/GP_Themenreport_Pflege_2030.pdf> accessed 9 October 2023.

Rudkowski L, *Der Streik in der Daseinsvorsorge* (Schriften des Instituts für Arbeits- und Wirtschaftsrecht der Universität zu Köln vol 113, C.H. Beck 2010).

Rudolph C and Schmidt K, 'Vergeschlechtlichung und Interessenpolitik in Care-Berufen - das Beispiel Pflege' in Ingrid Artus and others (eds), *Arbeitskonflikte sind Geschlechterkämpfe: Sozialwissenschaftliche und historische Perspektiven* (Arbeit - Demokratie - Geschlecht Band 27. Westfälisches Dampfboot 2020).

Schabram G and Freitag N, 'Harte Arbeit, wenig Schutz: Osteuropäische Arbeitskräfte in der häuslichen Betreuung in Deutschland' (Berlin 2022).

Scheiwe K, 'Existenzsicherung zwischen Sozial- und Familienrecht in der BRD – individualisiert, ehebezogen, familialistisch, care-orientiert? Ein Beitrag mit rechtsvergleichenden Anmerkungen.' in Kirsten Scheiwe (ed), *Soziale Sicherungsmodelle revisited – Existenzsicherung durch Sozial- und Familienrecht und ihre Geschlechterdimensionen* (Nomos 2007).

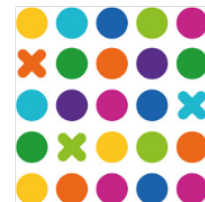
— 'Arbeitszeitregulierung für Beschäftigte in Privathaushalten – entgrenzte Arbeit, ungenügendes Recht?' in Kirsten Scheiwe and Johanna Krawietz (eds), *(K)Eine Arbeit wie jede andere?: Die Regulierung von Arbeit im Privathaushalt* (Juristische Zeitgeschichte/ Abteilung 2 vol 20. De Gruyter 2014).

— 'Ist ein Privathaushalt, der Hausangestellte beschäftigt, ein Betrieb?: Kontroversen über den arbeitsrechtlichen Betriebsbegriff' [2019] AuR 446.

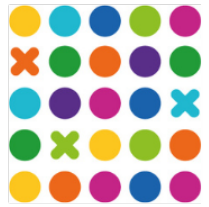
Scheiwe K, Cottier M and Voithofer C (eds), *Handbuch Sorgearbeit: Sorgebeziehungen und das Recht - Caring and the Law* (Springer Forthcoming).

Schildmann C and Voss D, 'Aufwertung von Sozialen Dienstleistungen: Warum sie notwendig ist und welche Stolpersteine noch auf dem Weg -liegen' (Düsseldorf 2018). Forschungsförderung Report 4 <https://www.boeckler.de/pdf/p_fofoe_report_004_2018.pdf> accessed 9 October 2023.

Schlegel R, 'Zeitenwende auch im Sozialstaat?' [2023] NJW 2093.



- Schober G, 'Warum Heime Pflegebetten unbesetzt lassen' *Tagesschau* (6 March 2023) <<https://www.tagesschau.de/wirtschaft/pflege-leiharbeit-101.html>> accessed 28 August 2023.
- Schroeder M, 'Altenpflege zwischen Staatsorientierung, Markt und Selbstorganisation' [2017] WSI-Mitteilungen 189.
- Schroeder W, 'Interessenvertretung und Demokratie in der Dienstleistungsgesellschaft: Das Feld der Altenpflege' in Bernhard Emunds and others (eds), *Freiheit - Gleichheit - Selbstausbeutung: Zur Zukunft der Sorgearbeit in der Dienstleistungsgesellschaft* (Die Wirtschaft der Gesellschaft Jahrbuch 6. Metropolis-Verlag 2021).
- Schroeder W, Kiepe L and Inkinen S, 'Die Grenzen selbstorganisierten Handelns: attraktive Pflegeberufe durch Tarifautonomie?' [2022] WSI-Mitteilungen 355.
- Sigerist HE, 'From Bismarck to Beveridge: Developments and Trends in Social Security Legislation' (1999) 20(4) *Journal of Public Health Policy* 474.
- Simon M, 'Von der Unterbesetzung in der Krankenhauspflege zur bedarfsgerechten Personalausstattung: Eine kritische Analyse der aktuellen Reformpläne für die Personalbesetzung im Pflegedienst der Krankenhäuser und Vorstellung zweier Alternativmodelle' (October 2018). Working Paper Forschungsförderung 96.
- 'Das DRG-Fallpauschalensystem für Krankenhäuser', Düsseldorf, 305 Seiten' (Düsseldorf 2020). Forschungsförderung Working Paper.
- SPD, Bündnis 90/Die Grünen und FDP, 'Koalitionsvertrag 2021-2025: Mehr Fortschritt wagen. Bündnis für Freiheit, Gerechtigkeit und Nachhaltigkeit' (2021).
- Statistisches Bundesamt, 'Gesundheit - Pflege' <https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Gesundheit/Pflege/_inhalt.html> accessed 20 September 2023.
- 'Pflegestatistik - Pflege im Rahmen der Pflegeversicherung - Deutschlandergebnisse - 2021' (2022) <https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Gesundheit/Pflege/Publikationen/_publikationen-innen-pflegestatistik-deutschland-ergebnisse.html> accessed 10 October 2023.
- 'Pflegebedürftige nach Versorgungsart, Geschlecht und Pflegegrade' (31 December 2022) <<https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Gesundheit/Pflege/Tabellen/pflegebeduerftige-pflegestufe.html>>.
- 'Bevölkerung - Mehr Pflegebedürftige' (2023) <<https://www.destatis.de/DE/Themen/Querschnitt/Demografischer-Wandel/Hintergruende-Auswirkungen/demografie-pflege.html>>.
- 'Gesundheitspersonalrechnung' (26 January 2023) <https://www.destatis.de/DE/Methoden/Qualitaet/Qualitaetsberichte/Gesundheit/gesundheitspersonalrechnung.pdf?__blob=publicationFile> accessed 11 September 2023.
- 'Vorläufige Eckwerte der Krankenhäuser 2022 nach Trägern und Bundesländern' (13 September 2023) <<https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Gesundheit/Krankenhaeuser/Tabellen/eckzahlen-krankenhaeuser.html>> accessed 20 September 2023.
- Stein P, *Das kirchliche Selbstbestimmungsrecht im Arbeitsrecht und seine Grenzen* (HSI-Schriftenreihe vol 47, Bund-Verlag 2023).
- Steinke V, 'Wie privat ist privat?: Betrachtungen zur Beschäftigung im Privathaushalt' [2018] RdA 232.
- Steinmeyer and Heinz-Dietrich, 'Die deutsche Sozialversicherung im Überblick' in Laurenz Mülheims and others (eds), *Handbuch Sozialversicherungswissenschaft* (Springer VS 2015).



Thüsing G, 'Rechtskonforme Betreuung in den eigenen vier Wänden: Regelungen für die Betreuung in häuslicher Gemeinschaft (24-Stunden-Betreuung) de lege lata und de lege ferenda' (Gutachten auf Anfrage des Bundesministeriums für Gesundheit, Bonn 2019).

Torp C, 'International Transfers and National Path Dependencies: Pension Systems in Britain and Germany after the Second World War' in Frank Nullmeier, Delia González de Reufels and Herbert Obinger (eds), *International Impacts on Social Policy* (Global Dynamics of Social Policy. Springer International Publishing 2022).

Tschenker T, 'Kollektivverträge über Personalschlüssel in der Altenpflege' (2019) 26(4) IndBez 366.

—— '24 Stunden Arbeit - 24 Stunden Lohn: Besprechung zum Urteil des Bundesarbeitsgerichts vom 24. Juni 2021' (2021) 26(12) NZA 641.

—— 'Effektiver Streik und Notdienstarbeiten' [2022] NZA-RR 337.

—— 'Regulierungsperspektiven nach den Urteilen zur Vergütung in der Live-In-Pflege - dient Österreich als Vorbild?' [2022] AuR 155.

ver.di, 'Charité: Durchbruch bei Verhandlungen zur Entlastung' (7 October 2021)

<<https://www.verdi.de/themen/geld-tarif/++co++bc423ef4-2768-11ec-83ea-001a4a16012a>>.

—— 'Ausbildungsreport Pflegeberufe 2021' (2022) <<https://gesundheit-soziales-bildung.verdi.de/themen/reform-der-pflegeausbildung/++co++be127818-4a1a-11ed-8d35-001a4a160111>> accessed 9 October 2023.

—— 'Independent Basic security in Corona times: Lifeline for solo self-employed?' (15 January 2022) <<https://selbststaendige.verdi.de/beratung/corona-infopool/++co++c6fa490a-a3fb-11ea-824a-001a4a160100>> accessed 10 October 2023.

ver.di, 'Leiharbeit in der Pflege' <<https://gesundheit-soziales-bildung.verdi.de/themen/leiharbeit>> accessed 28 August 2023.

—— *Steigender Pflegemindestlohn löst Grundproblem in der Altenpflege nicht* (2022).

Verband für häusliche Betreuung und Pflege, 'Betreuung in häuslicher Gemeinschaft (BihG, sog. 24-Stunden-Pflege): Professionelle Memorandum Dienstleistung für Menschen mit umfassendem Hilfebedarf' (16 October 2020) <https://www.vhbp.de/fileadmin/user_upload/201016_VHBP_-_Memorandum_BihG_see.pdf>.

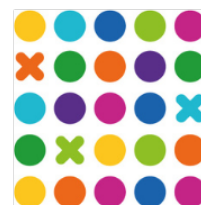
Viotto R, 'Neue europäische Richtlinie zu Mindestlöhnen und Tarifbindung. Ein Beitrag zur sozialen Transformation der EU?' (June 2023) <https://www.boeckler.de/fpdf/HBS-008644/p_fofoe_WP_292_2023.pdf> accessed 9 October 2023.

Vogt K, 'Mindestlohn ohne Kompetenz – Die Unvereinbarkeit der Richtlinie über angemessene Mindestlöhne in der Europäischen Union mit Art. 153 Abs. 5 AEUV' [2023] EuZA 50.

Voswinckel S, 'Die Anerkennungsfrage. Soziale Dienstleistungsarbeit zwischen moralischer Anerkennung und Statusdefizit: Das Beispiel der Pflege' in Bernhard Emunds and others (eds), *Freiheit - Gleichheit - Selbstausbeutung: Zur Zukunft der Sorgearbeit in der Dienstleistungsgesellschaft* (Die Wirtschaft der Gesellschaft Jahrbuch 6. Metropolis-Verlag 2021).

Waas B, 'Comparative Overview' in Bernd Waas and Guus H van Voss (eds), *Restatement of Labour Law in Europe: Vol I: The Concept of Employee* (Hart Publishing 2017).

Wissenschaftsrat, 'Empfehlungen zu hochschulischen Qualifikationen für das Gesundheitswesen' (Berlin 13 June 2021) Drs. 24 11-12 <https://www.wissenschaftsrat.de/download/archiv/2411-12.pdf?__blob=publicationFile&v=5> accessed 4 September 2023.



Związkowa Alternatywa, 'Badanie o polskich pracownikach opieki w Niemczech – niepokojące dane' (2021)
<<https://www.za.org.pl/badanie-o-polskich-pracownikach-opieki-w-niemczech-niepokojace-dane/>> accessed 9
October 2023.



Care4Care

WE CARE FOR
THOSE WHO CARE



www.care4care.net



This project has received funding from the European Union's Horizon Europe research and innovation programme under GA n° 101094603

@care4care_eu