The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Austria: Employment & Labour Law (3rd edition)

This country-specific Q&A provides an overview to employment laws and regulations that may occur in Austria.

This Q&A is part of the global guide to Employment & Labour Law. For a full list of jurisdictional Q&As visit http://www.inhouselawyer.co.uk/practice-areas/employment-and-labour-law-3rd-edition/

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The Legal 500

1. **Does an employer need a reason in order to lawfully terminate an employment relationship? If so, describe what reasons are lawful in your jurisdiction?**

   Under Austrian law apart from the notification requirement, an employer is legally permitted to terminate the employment contract without being required to precisely specify the reasons for the same. Nonetheless, the Austrian Trade Regulation points out several lawful reasons which give the possibility for the employer to terminate the employment relationship effective immediately, e.g. disloyalty to the employer, non-compliance with the employer's orders, persistent neglect of duties, incompetence with regard to work, falsified qualification, and/or theft.

2. **What, if any, additional considerations apply if large numbers of dismissals (redundancies) are planned?**

   There are additional rules that apply to large number of dismissals. It is the employer's

general duty to consult the works council when large number of dismissals are planned and inform them about changes affecting the business. If all or most of the employees are negatively affected by the reorganisation, the works council can request a social plan and can also call in an administrative tribunal in order to compel the employer to produce a social plan. As defined in section 45a of the Labour Market Promotion Act, the local Employment Market Service must be notified if the employer wishes to dismiss, within a 30-day period:

- At least five employees in businesses with more than 20 and less than 100 employees
- At least 5 per cent of employees in businesses with 100 to 600 employees
- At least 30 employees in businesses with more than 600 employees, and
- At least five employees aged 50 or over for businesses of any size.

Dismissals declared within a 30-day waiting period are void.

3. **What, if any, additional considerations apply if a worker's employment is terminated in the context of a business sale?**

Under Austrian law there is a statutory protection of employees when a business sale or business transfer occurs. The Employment Contract Law Adaptation Act regulates the rights and obligations in connection with a business transfer. Pursuant to section 3, all rights and obligations under the employment relationship automatically transfer by virtue of the law to the new owner. In general, dismissals are legally invalid if they are made exclusively due to the transfer. The Court assumes such reasoning if terminated within six months after a transfer has occurred. However, they can be permitted if they are carried out due to economic, technical or organisational reasons.

Furthermore, an employee can only object to a transfer if a buyer either does not grant the protection against dismissal as specified in the relevant Collective Bargaining Agreements (CBA) or does not undertake to comply with the former company pension schemes.

4. **What, if any, is the minimum notice period to terminate employment?**

   With respect to the notice period, Sec 20 of the Salaried Employees Act states that employers must provide at least a six-week notice period before they terminate an employee's contract. This notice period increases with seniority, such as:

   - Two months after the employee's second year of employment
   - Three months after the fifth year
   - Four months after the fifteenth year, and
   - Five months after the twenty-fifth year of service.

   Austrian law also distinguishes between white-collar and blue-collar employees. Regardless of their length of service and in absence of any other agreement, all white-collar employees must give one months' notice by the end of the month, whereas blue-collar employees and their employers must give 14 days' notice. If no agreement has been made stating otherwise, then the Salaried Employees Act dictates that the only permissible termination dates must fall on the last day of a calendar quarter, but also allows CBA to modify this requirement to allow termination dates to fall on the fifteenth or the last day of each month.

5. **Is it possible to pay monies out to a worker to end the employment relationship instead of giving notice?**

   Yes; Austrian law allows pay in lieu of notice, but this will only be valid if agreed upon by both parties.

6. **Can an employer require a worker to be on garden leave, that is, continue to employ and pay a worker during his notice period but require him to say at home and not participate in any work?**

Under Austrian law the employers may release employees from their duties to work during the notice term. Furthermore, the employee shall stay away from work during the entire or part of the notice period while she/he continues to be employed and to receive pay and benefits. While a worker is on garden leave, she/he is usually forbidden to contact any of his employer's customers or fellow employees and is also denied the company car, laptop, smartphone (unless private use has been permitted). During the time on garden leave, the employee must observe any restrictions in the contract such as competing or doing second job whilst an employee, and also observe possible implied duties. In practice, an employee is expected to be available to provide their employer with information and support when required while being on garden leave.

7. **Does an employer have to follow a prescribed procedure to achieve an effective termination of the employment relationship? If yes, describe the requirements of that procedure or procedures.**

If established, the works council must be informed at least a week before providing an employee with a notice of termination. After the employer has notified the works council, the council has seven days to deliberate on the termination and provide a response. This period starts the day following its information and ends upon expiry of the seventh day hereafter. This period of deliberating serves for the works council to decide whether it will explicitly approve the termination, object to the termination, or refrain from any comment. The decision taken by the works council is only relevant to post-termination matters, like a legal contest of termination.

8. **If the employer does not follow any prescribed procedure as described in response to question 7, what are the consequences for the employer?**

Any termination by notice that takes place without the works council (if established) being informed or prior to the lapse of its period of deliberation (see question 7) is null

and void.

9. **How, if at all, are collective agreements relevant to the termination of employment?**

   In Austria, collective agreements are concluded, almost without exception at multi-employer sectoral level. Collective agreements govern the employer-employee relationship, including things like wages, benefits, working hours, and other terms and conditions of employment. Collective agreements contain a specific language that addresses termination of employment for just cause. This means that the employer must have a justifiable reason for terminating the employment relationship. Often, collective agreements also provide for mandatory termination dates at the end of a calendar quarter upon five years of employment.

10. **Does the employer have to obtain the permission of or inform a third party (e.g local labour authorities or court) before being able to validly terminate the employment relationship? If yes, what are the sanctions for breach of this requirement?**

    When terminating the employment relationship with protected employees, special procedures have to be observed. Dismissal of a protected member of the workforce typically requires prior consent from a court. The dismissal of a registered disabled person is only valid provided the employer obtains a prior consent from the Disability Employees Committee chaired by the Federal Office for Social Affairs and Disabled Persons. When breaching this requirement, dismissal is null and void and the employer could be facing legal consequences, company reputation, reduced productivity, penalties, discrimination complaints and/or lawsuits.

11. **What protection from discrimination or harassment are workers**

entitled to in respect of the termination of employment?

Anti-discrimination has played an increasing role in the Austrian legal landscape. Furthermore, the core of Austrian Antidiscrimination law can be found on a federal level in the Equal Treatment Act. The Equal Treatment Act applies to discrimination in the field of private employment on the grounds of sex, sexual orientation, ethnic origin, religion and belief, and age. Moreover, it prohibits discrimination with respect to access to goods and services provided by private persons, companies and the federal state on the grounds of ethnic origin. Any direct or indirect form of discrimination in employment or occupation (and since 2011 also in connection with legal relationships) is prohibited. Besides, the Act also applies to employment-assimilated persons, apprentices, foreign-national employees or persons completing a trial period in an enterprise, home workers and persons posted to Austria by non-Austrian employers within the framework of labour subcontracting loan work, and aims at protecting employees against gender-based discrimination, irrespective of their working hours. The anti-discrimination laws apply to all employees, in both public and private sectors, and the employer cannot discriminate against an employee because of their allegation of discrimination. For this discrimination to be proved, it must be associated, in fact and in timing with the employee's allegation. There is no exact defined qualifying period for these types of claims.

12. What are the possible consequences for the employer if a worker has suffered discrimination or harassment in the context of termination of employment?

Persons affected by discrimination or harassment can involve the Equal Treatment Commission, but are also entitled to claim for compensation at court. Harassment is considered to be a form of discrimination under the Equal Protection Act 2004 and is thus prohibited. Persons who are discriminated against or harassed at work, whether men or women, whether directly or indirectly, are entitled to be compensated for the damage from the employer. If the court finds that the complainant has been discriminated against because of gender or marital status, she/he may lodge a claim for material compensation and compensation for the humiliation (immaterial compensation). A harassed employee can request adequate damages of at least € 1.000 as compensation. In addition to ordering a financial award, courts can order the

employer to withdraw or amend their discriminatory policies.

13. **Are any categories of worker (for example, fixed-term workers or workers on family leave) entitled to specific protection, other than protection from discrimination or harassment, on the termination of employment?**

Under the Labour Constitutional Act certain groups of employees are granted protection against a dismissal. Among these are employees with disabilities, pregnant employees, parents to whom the Maternity Protection Act or Paternity Leave Act applies, members of the works council, employees on compassionate leave, employees carrying their compulsory military or alternative community service. Depending on the statement by the works council, the employee or the works council can claim that a dismissal is either unfair on social grounds (e.g. the dismissal of a 55-year-old employee with custody of a child and 25 years' service, who has not interfered with the employer's operational interests), or made for inadmissible reasons (e.g. if an employee is dismissed because of union activities).

14. **Are workers who have made disclosures in the public interest (whistleblowers) entitled to any special protection from termination of employment?**

Austrian law has no special statutory protection entitled for whistleblowers. However, the employee may challenge the termination for proscribed reasons.

15. **What financial compensation is required under law or custom to terminate the employment relationship? How do employers usually decide how much compensation is to be paid?**

With respect to financial compensation, Austrian law provides for two different systems

depending on the date of the conclusion of the employment contract. The former severance pay system regulated by law only applies to employment contracts which were concluded before 1 January 2003, where the legal obligation to make severance payments in case of termination of employment is prescribed on the part of the employer. The new system regulating severance pay applies to all employees who have concluded a new contract of employment as of 1 January 2003, under which system employers must pay contributions to a staff provision fund for all employees subject to the new system, at a rate of 1.53 per cent of their gross monthly salary. The advantage of the new system is that the employee is fully entitled to severance pay even if he himself terminated the employment relationship. On termination, the employee has two options: either have this amount paid out in cash (after 3 years) or the acquired severance pay is carried over for future reimbursement. Severance payments depend on the length of continuous service, between two monthly salaries (for three years of service) and 12 monthly salaries (for 25 years of service).

Besides, a (voluntary) financial compensation may be mutually agreed upon to waive a right to contest the termination of the employment. The amount of such compensation typically varies between 1-9 months, and in certain cases may also exceed such. The amount of compensation strongly depends on the status of the granted protection and/or contestability.

16. **Can an employer reach agreement with a worker on the termination of employment in which the employee validly waives his rights in return for a payment? If yes, describe any limitations that apply.**

Please refer to the final paragraph of the answer to question 15. In addition thereto, it needs to be kept in mind that an employee could potentially challenge such a termination agreement if it turned out that pressure by the employer had been applied in order to achieve the employee’s consent.

17. Is it possible to restrict a worker from working for competitors after the termination of employment? If yes, describe any relevant requirements or limitations.

Non-compete clauses are in general permitted in Austrian law; an employment contract can include a term stating that after leaving the company, the employee cannot engage in any activity that represents competition for the previous employer. However, they are to a large extent subject to restrictions. The maximum term for such a clause is one year. Furthermore, the clause must be fair and reasonable considering the subject, time and geographical scope; and any non-compete clause that strongly restricts the employee's career advancement is ineffective.

18. Can an employer require a worker to keep information relating to the employer confidential after the termination of employment?

Confidentiality agreements can relate to certain confidential information (as agreed by the employer and the employee) gained by the employee during the course of employment. Such information may be broader than the information that would otherwise be protected under an implied term or in equity. Under Austrian law the protection of trade secrets and confidential information is, in principle, regulated by the Austrian Act against Unfair Competition, the Austrian Data Protection Act and the Austrian Criminal Code. Confidentiality clauses generally remain in force whilst the information protected remains confidential. This means that the clause may apply during employment and potentially long after the employment relationship ends.

19. Are employers obliged to provide references to new employers if these are requested?

If the employee is leaving on good terms and has had a good job performance, it is customary for the employer to provide a reference to potential future employers upon request. If so, former employers exchange information with potential future employers

regularly over the phone.

Furthermore, the employer has to issue a written reference letter to the employee if requested by the employee. The employee can enforce his right to a reference letter in court.

When drafting reference letters employers must observe the following: On the one hand, all information contained in the letter must be complete and objectively correct. The employer is obliged to issue a truthful statement. On the other hand, the employer must not issue a disfavouring reference letter. It is prohibited by law to issue a reference letter that makes it more difficult for the employee to obtain a new post. The employer must accommodate both rules. A balance must be struck on a case-by-case basis.

20. **What, in your opinion, are the most common difficulties faced by employers in your jurisdiction when terminating employment and how do you consider employers can mitigate these?**

Employers should carefully consider the legal basis on which they are terminating the employment contract and ensure that they satisfy the conditions which justify a termination. If there is no sufficient evidence in the hands of the employer to terminate the contract, it may lead to outcome of unjustified termination and the employee is granted the possibility to complain to the labour court. As the employer does not want to see an angry former employee down the road in court and in order to avoid any significant reputational or financial damage to the business, she/he will usually want to give careful consideration at the outset to the legal position and use the best strategy to adopt it. Once the employer brings the decision to terminate an employee, it alone sets in motion a number of duties of the employer to handle, such as consulting and informing the works council, and if the employer wishes to dismiss at least five employees also notifying within a 30-day period, the local Employment Market Service. Furthermore, the employer should preserve the dignity of the terminated employee and protect the employee’s interests.

To mitigate the risk of dismissals being challenged before the courts it is often advisable to achieve a mutual agreement with the employee and agree on the payment of a (voluntary) severance pay.

21. **Are any legal changes planned that are likely to impact on the way employers in your jurisdiction approach termination of employment? If so, please describe what impact you foresee from such changes and how employers can prepare for them?**

While not necessarily linked to the termination of an employment relationship, labour disputes regularly touch upon questions regarding working hours. The relevant provisions have been recently amended. Most notably, the maximum working time has been raised. The maximum daily working time now amounts to twelve hours and the maximum weekly working time to 60 hours. Consequently, it is no longer possible to agree upon "special overtime" in a works agreement. However, to address temporarily higher work needs, it is now permitted to conclude a works agreement allowing for an exception to weekend and holiday rest on four weekends or public holidays per employee and year. The regulation surrounding working time is complex and highly dependent upon the individual case. The amendments go beyond the above recital. In order to mitigate the risk of labour disputes (pre or post employment termination) and administrative fines, employers are well advised to take the new rules into account.