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The Legal 500
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Austria
EMPLOYMENT & LABOUR LAW

Contributing firm

BLS Rechtsanwälte GmbH

Dr. Thomas Boller, LL.M.

Partner | thomas.boller@bls4law.com

This country-specific Q&A provides an overview of employment & labour law laws and regulations applicable in Austria.

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AUSTRIA
EMPLOYMENT & LABOUR LAW

1. What measures have been put in place to protect employees or avoid redundancies during the coronavirus pandemic?

In order to mitigate the severe consequences of the restrictions imposed by the federal government, the Austrian legislator – in cooperation with the social partners (i.e. the Federation of Trade Unions and the Economic Chamber) – has created a special model for reducing working hours. Austria is currently in phase 5 of this model, which should basically expire on June 30, 2022. After that, an evaluation of the model takes place. Whether there will be a further extension of the deadline or a new model cannot be estimated at present. . Under this model, the working hours of all employees or certain groups of employees can be reduced to 50% over a maximum period of six months. In industries affected by the officially ordered lockdowns, a reduction below the minimum working hours is also possible. During this period, employees receive between 80% and 90% of their normal monthly net pay, depending on the level of their normal monthly gross pay. However, during this period and for one month thereafter, the employer cannot effectively terminate the employment of employees whose working hours have been reduced, unless for personal reasons or with the consent of the Labor Market Service. In addition, the employer must maintain the number of employees that existed at the time of applying for the special regulation on the reduction of working hours. The Labor Market Service may only exceptionally waive this requirement if there are important reasons that make it impossible to maintain the number of employees.

2. Following the covid-19 pandemic, have new employee rights or protections been introduced in respect of flexible or remote working arrangements?

In order to harmonize the regulations for remote working, the Austrian legislator has enacted a package of regulations concerning working from home (homeoffice). According to the regulations, homeoffice occurs, if an employee regularly performs his work from the employees own (private) apartment, secondary residences, the apartment of a close relative or life partner. Homeoffice must be agreed between the employer and the employee. There is no legal entitlement.

If homeoffice has been agreed, the employer is obligated to provide the employee with the digital work equipment required. If work equipment (e.g. laptop, internet) is provided by the employee himself, the employee has a claim against the employer for reimbursement of the costs he has incurred. The employer has also to ensure that the employees' workplace at home complies with the state of the art and the ergonomic requirements, in particular the Employee Protection Act. If the employee causes damage to the employer while performing homeoffice, the Employee Liability Act applies. Depending on the degree of fault of the employee, the liability of the employee can thereby be reduced up to zero. This regulation is also applicable to family members who live in the same household as the employee.

3. Does an employer need a reason in order to lawfully terminate an employment relationship? If so, state 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, there are regulations (e.g. the Salaried Employee Act) that point 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.

4. What, if any, additional considerations apply if large numbers of dismissals (redundancies) are planned? How many employees need to be affected for the additional considerations to apply?

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 numbers of dismissals are planned and inform it about certain changes affecting the business. If the employer and the works council do not reach an agreement, the works council can under certain circumstances call upon an arbitration body with the aim to compel the employer to produce a social plan in order to mitigate the negative effects of the redundancies.

As defined in section 45a of the Labour Market Promotion Act, the local Employment Market Service must be notified in advance 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 not in accordance with this provision are void.

5. 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 operation of law to the new owner. In general, the termination of a worker's employment exclusively due to the transfer of a business is legally invalid. The Austrian courts typically presume that this is the case if an employment relationship is terminated within six months after a transfer has occurred. However, the termination can nevertheless be valid if they are carried out due to economic, technical or organisational reasons.

Furthermore, an employee can object to a transfer if a buyer either does not grant the protection against dismissal as specified in the relevant Collective agreement or does not undertake to comply with the former company's pension schemes, if any.

6. What, if any, is the minimum notice period to terminate employment? Are there any categories of employee who typically have a contractual notice entitlement in excess of the minimum period?

The Austrian law distinguishes between white-collar and blue-collar employees. As of 1st October 2021, the notice periods to be observed on the part of blue-collar workers and their employers were aligned with those of white-collar workers and their employers.

With respect to the notice period, the employer has to observe Sec 20 of the Salaried Employees Act respectively Section 1159 of the General Civil Code, which 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 as follows:

- 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.

Regardless of their length of service and in absence of any other agreement, employees must give one month's notice by the end of the month. For blue-collar employees and their employers in seasonal establishments, the law provides the possibility of establishing a shorter notice period by collective agreement.

In the absence of an agreement to the contrary, the employer may only give notice of termination on the last day of a calendar quarter. Collective agreements can modify this requirement and allow termination dates to fall on the fifteenth or the last day of each calendar month for both, the employer and the employee.

7. 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.

8. 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 stay at home and not participate in any work?

Under Austrian law employers may release employees from their duties to work during the notice term. Furthermore, the employee can 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 use of a company car, laptop, smartphone (unless private use has been permitted). During 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.

9. 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 the works council's information and ends upon expiry of the seventh day thereafter. 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 contestation of the termination.

10. If the employer does not follow any prescribed procedure as described in response to question 8, 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 the period of deliberation (see question 9) is null and void.

11. 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 wages, benefits, working hours, and other terms and conditions of employment. Collective agreements sometimes contain regulations that address the 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.

12. 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 Disabled Employees Committee chaired by the Federal Office for Social Affairs and Disabled Persons. A breach of this requirement renders a dismissal null and void. Additional side-effects to the employer's disadvantage could include adverse legal consequences, a damaged company reputation, reduced productivity, penalties, discrimination complaints and/or lawsuits.

13. 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 the 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 gender, sexual orientation, ethnic origin, religion and belief as well as 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 is prohibited. Besides, the Act also applies to apprentices, foreign-national employees or persons completing a trial period in an enterprise, home workers and persons posted to Austria by non-Austrian employers. The anti-discrimination laws apply to all employees, in both public and private sectors. Furthermore, the employer cannot discriminate against an employee because of an allegation of discrimination raised by this employee.

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

Employees that had their employment terminated for certain discriminatory reasons, can challenge the termination in court, and, if successful, have it declared invalid. Furthermore, 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 Treatment Act and is thus prohibited. Persons who are discriminated against or harassed at work, whether men or women, whether directly or indirectly, may be entitled to compensation for the damage sustained (by 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). In addition to ordering a financial award, courts can order the employer to withdraw or amend their discriminatory policies.

15. 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.

Additionally, 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).

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

Austrian law does not offer special statutory protection for whistleblowers. However, the employee may challenge the termination for discriminatory, and thus inadmissible, reasons.

17. What financial compensation is required under law or custom to terminate the employment relationship? How is such compensation calculated?

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. The new system regulating severance pay applies to all employees who have concluded a new contract of employment as of 1 January 2003. Under this system employers must pay contributions to a staff provision fund for all employees. These contributions are tax-exempt to the extent of 1.53 per cent of the gross monthly salary. The advantage of the new system for employees is that they are fully entitled to severance pay even if they themselves terminate the employment relationship. Upon termination, the employee has several options. In particular, they can either have the accumulated contributions paid out in cash (after 3 years) or have them carried over to their new employer's fund for future payment. The sum of severance payments in the old system depend on the length of continuous service and amounts to two monthly salaries for three years of service, three monthly salaries for five years of service, four monthly salaries for ten years of service, six monthly salaries for 15 years of service and 12 monthly salaries (for 25 years of service). The monthly salary shall be understood as the average earnings taking into account all payments such as vacation pay, Christmas bonus, allowances, commissions etc..

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

18. 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, including in respect of non-disclosure or confidentiality clauses.

Please refer to the final paragraph of the answer to question 17. 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. This is irrespective of any non-disclosure of confidentiality clause.

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

Austrian law generally permits non-compete clauses; 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 severely restricts the employee's career advancement is ineffective.

20. 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 by statutory provisions. Under Austrian law the protection of trade secrets and confidential information is, in principle, regulated by the Austrian Act against Unfair Competition, as far as personal data is involved the GDPR and Austrian Data Protection Act, and the Austrian Criminal Code. Confidentiality clauses generally remain in force as long as the information protected remains confidential. This means that the clause may apply during employment and potentially long after the employment relationship ends.

21. Are employers obliged to provide references to new employers if these are requested? If so, what information must the reference include?

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. The written reference letter shall contain the beginning and the end of the employment relationship as well as the type of activity of the employee. In addition, it is permissible to include positive assessments of the employee´s qualification, work performance or personality. However, these supplementary statements cannot be asserted by the employee 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. The law prohibits providing a reference letter that stifles an employee's prospects to obtain a new post. The employer must accommodate both rules. A balance must be struck on a case-by-case basis.

22. 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 terminate the employment contract and ensure that they satisfy the conditions which justify such termination. In cases where the employer may have to justify the termination and her or she does not possess sufficient evidence, it may lead to an unjustified termination which could be successfully challenged in court by the employee. In order to avoid such scenarios as well as any significant reputational or financial damage to the business, each termination should be carefully considered. Once the employer intends to terminate an employee a number of duties of the employer emerge, such as consulting and informing the works council at least one week in advance of the termination and if the employer wishes to dismiss at least five employees notification obligations towards the local Employment Market Service may arise. In the latter case the employer might also have to observe a waiting period of 30 days, during which the employment relationship must not be terminated. 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.

23. 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?

Currently, no further legislative changes on the termination of employment are planned in Austria.

Contributors

Dr. Thomas Boller, LL.M.
Partner

thomas.boller@bls4law.com