

Labour & Employment

Contributing editors

Matthew Howse, Sabine Smith-Vidal, Walter Ahrens and Mark Zelek



2018

GETTING THE
DEAL THROUGH 

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Morgan Lewis & Bockius LLP

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Preface

Labour & Employment 2018

Thirteenth edition

Getting the Deal Through is delighted to publish the thirteenth edition of *Labour & Employment*, which is available in print, as an e-book, and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Argentina, Canada, Colombia, Costa Rica, Ireland, Hong Kong, Nigeria, Peru and the Philippines.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Matthew Howse, Sabine Smith-Vidal, Walter Ahrens and Mark Zelek of Morgan Lewis & Bockius LLP, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
May 2018

Austria

Thomas Boller

BLS Rechtsanwälte Boller Langhammer Schubert GmbH

Legislation and agencies

1 What are the main statutes and regulations relating to employment?

Austrian law on employment is regulated by a large number of statutes and regulations. The main statute setting out general rules for the relationship between employer and employee, collective employment law, etc., is the Labour Constitutional Act. The legal basis for employment contracts as well as provisions generally applicable to all employment contracts may be found in the Austrian General Civil Code (ABGB). The Salaried Employees Act contains special provisions with respect to white-collar workers. In addition, protection rules are set out, inter alia, in the Workers Protection Act, the Working Hours Act and the Austrian Act on Rest Periods. Provisions relating to the individual relations between employer and employee are also regulated in the Employment Contract Law Adaptation Act. The employment of foreign employees in Austria is regulated in the Act on the Employment of Foreign Workers, and the employees' liability towards the employer can be found in the Act on the Liability of Workers. As of 2017, the Code aimed at Combating the Dumping of Wages and Social Services (LSD-BG) was introduced, which contains provisions that regulate the formal prerequisites of the transfer of employees from abroad to Austria, among others.

Furthermore, Austrian labour law is to a large extent regulated by legally binding collective bargaining agreements concluded between employer and employee organisations for certain services or industry sectors.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The Austrian Equal Treatment Act prohibits any direct or indirect form of discrimination in connection with employment (and since 2011 also in connection with other legal relationships) due to gender, age, racial or ethnic origin, religion or belief, or sexual orientation. Discrimination based on these grounds is explicitly prohibited with respect to hiring, working conditions, compensation, fringe benefits, promotion, education and training, as well as termination. The Equal Treatment Act also prohibits sexual harassment by employers and third parties and regulates the consequences of such behaviour (including consequences upon failure of the employer to prevent sexual harassment by third parties).

In addition, the Act on the Employment of Persons with Disabilities provides for regulations protecting persons with disabilities against discrimination, which apply to both private-sector and federal institutions. Apprentices, foreign employees and persons completing a trial period in an enterprise also enjoy protection under the Equal Treatment Act.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Labour Inspectorate is the largest authority for the monitoring of employment conditions in Austria. It consists of 19 regional inspectorates and one separate inspectorate for construction works, all under the authority of the Ministry of Labour, Social Affairs and Consumer Protection. The inspectorates monitor the protection of the health of employees, compliance with the provisions on working hours and rest periods, the employment of children and young people, the protection

of pregnant women and nursing mothers, and control the enforcement of the Act on Foreign Workers.

The main judicial bodies for the enforcement of employment statutes and regulations, including employment contracts, collective bargaining agreements, illegal employment or wage and social dumping, are the labour and social courts.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

Employee representation in Austria is done through the works council. The Labour Constitutional Act requires a mandatory works council for all businesses having at least five permanent employees over 18 years of age. The works council is not directly a trade union body. The establishment of the works council is the exclusive obligation of the employees; an employer only has the duty to tolerate, but not to actively participate in, the establishment of such council. If there are more than 50 employees, one of them can be an external trade union representative, who is not employed at the workplace, but in practice this is very rare. Austrian law does not provide for any sanctions or penalties if no works council is established by employees.

5 What are their powers?

The primary role of the works council is to represent the employees with regard to the employer. The Labour Relations Act, in certain cases, provides the works council with the effective right to veto – the employer cannot act without the works council's agreement. The main rights of the works council in economic and financial issues are to be informed and consulted at least every three months as well as obtaining a copy of the annual report and accounts. In addition, the works council must be informed about any planned termination of an employee and moreover where major economic changes, that could damage the interests of the employees, are planned. Further, the works council can request that the employer negotiate termination and, in certain cases, can also challenge a termination before the court on behalf of the employee. In the area of employment rules – such as the prohibition of alcohol and smoking, the normal start and end of the working day, sickness report, among others – the employer needs the agreement of the works council, or failing that a decision of the specially constituted conciliation body, to act.

In employment and social issues the works council has a general right to oversee the actions of the employer, to ensure that the law and the collective agreements are properly observed. It can make suggestions for improving working conditions, including training arrangements and health and safety. It must be informed and consulted about the business's employment plans, including the recruitment of new staff, and individual transfers and promotions.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

Under Austrian employment law, pre-employment checks must comply with the Austrian Data Protection Act and other applicable legislation.

As a general rule, background checks are permissible provided the employer does not violate employees' rights to privacy and personal freedom. Moreover, it is common practice to use web pages or public profiles from social media networks for insight into an applicant's background, but only the publicly available information or information obtained with the consent of the employee. Sensitive or personal information that is not publicly available and which therefore is considered private cannot be used. The Austrian labour court has constantly held that during job interviews, any questions concerning pregnancy, family planning, political views (which are also considered as discriminatory under the Austrian Equal Treatment Act), previous convictions (if already deleted from the record) and financial standing, except in certain occupations (eg, cashiers in banks), are not permissible. Furthermore, an employer may contact a candidate's previous employers for references.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Certain occupations require the employer to request medical examination of the employee (eg, workers exposed to noise or certain chemicals). Apart from such statutory medical checks, an employer may only require a medical check if it is justified by the scope of work in question and in relation to diseases which may be detrimental to other employees, otherwise a request for a medical check by the potential employer as to the physical condition of an applicant constitutes an inappropriate intrusion into the employee's privacy. The employer may only refuse to hire an applicant who does not submit a requested examination if such request is justified by the scope of the work.

An explicit restriction with respect to medical examinations is set out in the Genetic Engineering Act, which prevents the employer from requesting a genetic analysis.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There are no explicit restrictions or prohibitions against drug and alcohol testing. Nevertheless, drug and alcohol testing during the application process can, in general, infringe the applicant's privacy if the employer does not obtain the employee's prior consent. An employer may require such tests in special cases and if it is justified by the scope of work to be rendered by the applicant. In certain occupations, alcohol and drug testing is mandatory (eg, pilots and professional drivers).

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

Certain statutes provide for mandatory preferential hiring of female applicants, such as in state and municipal services, and universities. According to the Act on Employment of Disabled Persons, businesses with more than 25 employees are obliged to employ at least one disabled person (with a reduction of the ability to work of at least 50 per cent) per 25 employees. Furthermore, if the employer does not comply with this obligation, a fine is due (in 2016 the payments ranged – depending on the number of employees being employed in the business – between €251 and €374 per month). Other than disabled persons, there are no other legal requirements to give preference to any particular people or groups of people when hiring or not discriminating against.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

In general, there are no formal statutory requirements for employment contracts; they may be concluded in writing, orally or through conclusive action (eg, rendering of services by employee and employer's acceptance of such). Under the Employment Law Harmonisation Act, however, the employer is obliged to issue a written service notice containing all relevant information in connection with the employment, in particular:

- name and address of employer;
- name and address of employee;
- start date of employment;
- end date of employment (for fixed-term employments);
- length of notice period, termination date;

- ordinary place of work;
- possible classification;
- intended responsibilities;
- starting salary (basic remuneration plus special payments);
- extent of annual holidays;
- stipulated daily and weekly normal working hours;
- collective bargaining agreement; and
- severance payment fund.

Service of notice is not required if the duration of employment does not exceed one month. Employers must serve employees with notice without undue delay after the beginning of the employment relationship.

11 To what extent are fixed-term employment contracts permissible?

As a general rule, the initial conclusion of fixed-term employment contracts is permissible without any restrictions under Austrian law; in particular, there is no limitation with respect to the maximum duration of such fixed-term contract. For the termination rights of employees whose fixed-term contract exceeds five years, see question 26.

However, the consecutive conclusion of fixed-term contracts with the same employee is legal only if it is justified by economic or social reasons. Failing such grounds, a chain of two or more subsequent fixed-term contracts is deemed to constitute a permanent contract of unspecified duration dating back to the start of the conclusion of the first contract. In practice, justifying economic or social reasons for consecutive fixed-term contracts are only very rarely acknowledged by the Austrian courts, for example in seasonal businesses or for the duration of a vocational training (doctors, etc). Fixed-term contracts can be terminated before the expiry of the contract or without cause only by mutual agreement between the parties, or for important reasons.

12 What is the maximum probationary period permitted by law?

The maximum probationary period permitted by law is one month, during which time both parties can terminate the contract immediately without notice. The probationary period can only be established at the beginning of employment; an extension of the probationary period is not permitted and may result in the contract being deemed a contract for an indefinite term. Collective bargaining agreements may provide for a shorter, but not a longer, probationary period. A probationary period of three months applies for contracts with apprentices.

As a general rule, the probationary period has to be explicitly agreed upon in the employment contract to be valid; however, some collective bargaining agreements provide for an automatic probationary period.

In practice, employment contracts often provide for a limitation of the contract for three or six months with the first month being a 'probationary month' (ie, probationary period), before turning into a permanent contract.

13 What are the primary factors that distinguish an independent contractor from an employee?

The ABGB requires the following characteristics for a contract to be considered an employment contract:

- contractual obligation of the employee to work for a certain time; and
- personal dependency of the employee (decisional power of the employer).

For the 'personal dependency' criteria such as incorporation in the employer's organisation, duty to carry out the work oneself, and regulation of the work by the employer, in particular with respect to work time, workplace and procedure have to be considered.

Further criteria suggesting the existence of an employment contract are:

- economic dependency (ie, use of employer's equipment, remuneration);
- success benefits the employer; and
- the employer takes the risk (eg, if product is not sold or is incorrect).

Not all of the conditions stated above must be fulfilled in each case. The decisive factor for the existence of an employment contract is whether these characteristics prevail over characteristics of other types of contract.

In contrast with an employment contract, a freelance contract (independent contractor) is characterised by the lack of (or limited) personal dependency. As a general rule, an independent contractor is not (entirely) integrated into the organisation of the ordering party, does not use the tools of the ordering party and – unlike a contract for work and services – does guarantee a certain outcome of the work. As independent contractors enjoy limited protection under labour legislation, in the absence of a specific agreement, they have no claim to statutory benefits such as periods of notice, holiday pay, etc.

14 Is there any legislation governing temporary staffing through recruitment agencies?

Temporary staffing through recruitment agencies is, in principle, regulated by the Austrian Personnel Leasing Act. The lessor and lessee typically enter into a personnel leasing contract by which the former undertakes to let a certain amount of his or her own employees to the latter for a definite or indefinite period of time. In order to legally conduct the business of personnel leasing the lessor must also obtain a trade registration in accordance with the rules set out in the Austrian Trade Act. Only a few exceptions apply.

In terms of personnel leasing contracts the lessor remains the employer of hired-out personnel. His or her duties in this context particularly encompass the payment of salaries to the hired-out employees. Moreover, the lessor will also be regarded as the employer in light of social insurance law and thus responsible for the payment of the corresponding social security contributions. The lessee, on the other hand, may exercise the employer's right to give orders and instructions to the hired personnel, incurs a general duty of care towards such personnel – for example, the protection of workplace safety – and also, by operation of the law, stands surety for the payment of salaries as well as social insurance contributions.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Short-term visas entitle foreign nationals to stay, but not to work, in Austria for a certain time. There are no numerical limitations for such visas. Foreign nationals who wish to live and work in Austria require – apart from numerous exemptions – a residence permit and a permit to work (see question 17).

As of 2014, Austrian law no longer provides for a numerical limitation on foreign nationals' access to the Austrian labour market.

Employers with a place of business in a European Economic Area (EEA) state may post employees who are EEA nationals without the requirement for a work permit; the employer only has to notify the central coordination office of the Ministry of Finance about the employee's transfer. Under certain circumstances, non-EEA nationals do not require a work permit when transferred to Austria for a temporary provision of services, but an EU posting confirmation is required. Further, certain exemptions apply for posting of employees by foreign employers not having a place of business in Austria. Such employers may post an employee in Austria for a maximum of four months without obtaining a work permit; only a posting permit is required in such case. Moreover, with the new change in employment law as of January 2017, the employees of foreign group companies may be sent to a group company in Austria if the posting does not exceed the duration of a total of two months per calendar year, and they are only used for certain activities within the group. For other transfers the general rules for employing foreign nationals apply (see question 17). Certain provisions previously forming part of the Austrian Labour Contract Law Code (AVRAG) have been moved and partly adapted to the LSD-BG. In practice, this is a highly relevant issue, in particular with regard to posted workers. The Austrian financial police and the administrative authorities have taken to strictly enforcing the law and imposing considerable fines.

16 Are spouses of authorised workers entitled to work?

Subject to several additional requirements, spouses of authorised workers are entitled to a residence permit (in particular for the purpose of reunification of family members) and – depending on the type of residence permit – simultaneously to limited or unlimited access to the

labour market. It should be noted that spouses of authorised workers are not automatically permitted to work in Austria, they are basically subject to the Act on the Employment of Foreign Workers (see question 17) if they do not hold a residence permit.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

The requirements to be fulfilled for a lawful employment of foreigners depend on the nationality of the foreign employee. There are no work restrictions for citizens of the EU, Switzerland, Iceland, Norway and Liechtenstein. If not already included in their residence permit, nationals of other countries must obtain a work permit in order to legally work in Austria. The Act on the Employment of Foreign Workers provides for several different permits, each allowing foreign employees to work to a different extent. The following permits may, inter alia, be issued.

Work permit

The work permit allows the employee to engage in a particular occupation for one year at the most (an extension is possible). A work permit may only be issued after a labour market test has been performed by the Public Employment Service.

Work authorisation and certificate of exemption

Due to an amendment of the Act on the Employment of Foreign Workers, work authorisations and certificates of exemption were abolished as of 1 January 2014 and will no longer be issued. However, work authorisations and certificates of exemption issued before 31 December 2013 will be valid until their expiry (extensions are not possible).

EU Blue Card

The EU Blue Card may be issued to third-country nationals if they have completed a tertiary education (eg, university degree) of at least three years, present a binding job offer for highly qualified employment and their gross annual salary is not less than 1.5 times the average gross annual salary as published by the Federal Agency for Statistics (Statistics Austria). Further, some of the requirements for work permits apply analogously. The EU Blue Card is limited to two years, unless the working contract is subject to a shorter limitation period. In this case the EU Blue Card is issued for a period of three months exceeding the limitation period of the working contract.

Red-white-red card and red-white-red card plus

The red-white-red card may be issued for key employees from third countries (highly skilled key employees, persons with job titles and skills included on the government-approved shortage occupation list, self-employed key employees, other employed key employees and graduates of Austrian universities). The red-white-red card is issued for one year and entitles the foreign national to engage in a particular occupation (ie, work for one specific employer). Foreign nationals with a red-white-red card who have been employed for at least 10 of the past 12 months, family members of red-white-red card holders, holders of EU Blue Cards who have been employed for at least 21 of the past 24 months, and family members of foreign citizens permanently settled in Austria may apply for the red-white-red card plus, providing them with unrestricted access to the Austrian labour market.

Certificate of exemption

Turkish nationals, who have been legally employed in Austria for a period of four years, are entitled to receive a certificate of exemption allowing them to work without restriction in Austria. The certificate of exemption is issued for five years, and an extension is possible. The sanctions for employing foreign workers without permission depend on the extent of the violation (in particular, the number of workers). The sanctions range between €150 and €50,000. The illegal concurrent employment of a large number of employees represents a criminal offence with a penalty of up to six months' imprisonment.

18 Is a labour market test required as a precursor to a short- or long-term visa?

A labour market test is required in connection with every application for a work permit (see question 17).

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

As a general rule, normal working hours amount to eight hours per day, or 40 hours per week, but numerous collective bargaining agreements provide for shorter working hours (eg, 38.5 hours per week). The Working Hours Act and many collective bargaining agreements provide for many exceptions with respect to the maximum working hours and the allocation of the working time on the respective working days (eg, the employer and employee may agree on a daily work time of nine hours, and as compensation, a 'shorter' Friday). Unless explicitly provided for in the law, the rules regarding the maximum working hours are mandatory and neither the employee nor the employer may opt out of them.

20 What categories of workers are entitled to overtime pay and how is it calculated?

In general, all employees working overtime are entitled to overtime payment or – if agreed upon – to compensatory time off (however, all-in contracts may be validly agreed upon in certain circumstances). Any overtime work exceeding the statutory normal working hours (ie, eight hours a day or 40 hours a week) is compensated with a 50 per cent surcharge. In the case of compensatory time off, any overtime hour is compensated with 1.5 hours off. Many collective bargaining agreements provide for a higher surcharge for overtime performed on Sundays or public holidays or between midnight and 7am (eg, 100 per cent). With effect from 1 January 2016, the maximum daily permitted working time can be increased from 10 to 12 hours in the case of actual travel time (eg, driving a car). Employees may be subject to working overtime only if this does not conflict with their own considerable interests (such as childcare or an urgent doctor's appointment).

21 Can employees contractually waive the right to overtime pay?

Generally, an employee is entitled to receive overtime pay for working beyond normal working hours. However, it is possible to agree that the employee receives compensatory time instead. Collective bargaining or works agreements may also provide for such choice despite a different agreement with the employee. According to a recent decision of the Austrian Supreme Court, agreements between an employer and an employee which provide that the employee waives the right to receive overtime pay for working beyond normal working hours are invalid as long as the employee is economically dependent on the employer. Equally, it is invalid to stipulate in the employment contract that the employee shall waive his or her right to be paid for overtime. Nevertheless, it is valid and not unusual to conclude 'all-in contracts' or allowances. Such contracts provide that all or a fixed extent of overtime shall be compensated by a certain lump sum, usually contained in the regular salary. As of 2016, it is no longer sufficient to only display the lump sum in employment contracts or service notices for newly hired employees. The contract or notice must now, in any event, also show the base salary. If, however, retrospectively the salary, including the allowance for overtime, does not meet the minimum payment provided for in collective bargaining agreements considering the total working hours, the employee is entitled to respective further compensation.

22 Is there any legislation establishing the right to annual vacation and holidays?

The Austrian Vacation Act mandates that every employee is entitled to paid annual holidays of five weeks (ie, 25 work days); after the completion of 25 years of service the annual vacation increases to six weeks (ie, 30 work days). This statutory vacation entitlement may not be restricted; only a provision more favourable for the employee may be validly agreed upon.

During the first six months of employment, holiday accrues in a proportional share of the annual statutory holiday (approximately two days per month). After the first six months of the first year of service, the employee is entitled to the entire amount. From the start of the second (and any subsequent) year, the entire annual holiday entitlement is due with the beginning of the new year of service.

23 Is there any legislation establishing the right to sick leave or sick pay?

According to the Salaried Employees Act (for white-collar employees) and the Continued Remuneration Act (for blue-collar workers) employees are entitled to a time-limited continued remuneration, if an illness or accident results in the inability to work, provided the illness or working accident were not caused by gross negligence or intentionally by the employee (sick pay). The employee has to immediately notify the employer of his or her inability to work and, upon request of the employer, provide the employer with a medical certificate demonstrating the beginning of the inability to work, its likely duration and its (general) cause.

The length of the sick pay is determined by the duration of that particular employment. Employees are entitled to sick pay of up to at least six weeks' full remuneration and four weeks' half remuneration. Depending on the duration of the employment the sick pay will increase as follows:

- after five years of service: eight weeks' full remuneration plus four weeks' half remuneration;
- after 15 years of service: 10 weeks' full remuneration plus four weeks' half remuneration; and
- after 25 years of service: 12 weeks' full remuneration plus four weeks' half remuneration.

After the period of sick pay by the employer, the employee is entitled to sick pay from the Health Insurance System in the amount of one half of the last salary, up to a maximum of one additional year.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

In addition to holidays and sick leave, Austrian law provides for many circumstances entitling an employee to take a leave of absence.

Most importantly, employees are entitled to maternity or parental leave until a child reaches two years of age. Employees may take a further educational leave of up to one year provided the employment has lasted for more than six months. In both cases, the employee is not entitled to receive pay during the absence of leave.

Employees also have the right to take a leave of absence due to important reasons concerning the employee, and carer's leave while receiving full pay.

Important reasons concerning the employee include family responsibilities (funerals of family members, weddings of close relatives and public responsibilities, such as summons by a public authority), as well as natural and force majeure events.

Carer's leave is limited to the following reasons:

- taking care of a close family member living in the same household as the employee (ie, spouses, registered partners, parents, grandparents, great-grandparents, children, grandchildren, etc) or taking care of a child when the person normally caring for the child is unable to do so due to death, severe illness, etc (up to one week per working year); and
- an additional week off due to the necessary care of a child under 12 years old in the event of the recurrent illness of the child.

The Labour Law Amendment Act 2013 introduced a new form of carer's leave to Austrian law. Upon written consent by the employer, employees who have been employed for more than three months (with the same employer) may take carer's leave for a period of up to three months in order to take care of close relatives who have been granted federal care allowance at level 3, according to the Federal Care Allowance Act. In the event a minor is the subject of care, the grant of federal care allowance at level 1 suffices.

In general, this form of carer's leave may only be taken once for the same person. However, in the event of a significant increase in the need for long-term care, another period of carer's leave may be taken. The employee is not entitled to receive a salary during carer's leave. However, he or she may claim a governmental carer's leave allowance.

25 What employee benefits are prescribed by law?

In addition to the agreed salary, the employer is statutorily obliged to make contributions to the social insurance fund. In general, an employer contributes to pension, medical, unemployment insurance,

corporate pension insurance funds as well as to insurance against non-payment in the case of insolvency.

The majority of collective bargaining agreements further provide for an obligation of the employer to pay bonus payments (ie, holiday pay, due in May or June, and Christmas bonus, due in November or December, each generally amounting to a month's salary). For employees, whose employment relationship begins or ends during a calendar year, those remunerations shall be paid on a pro rata basis.

Furthermore, statutory benefits on the part of the employee include paid holiday leave (see question 22), severance pay (see question 39), medical examinations (under certain circumstances), etc.

26 Are there any special rules relating to part-time or fixed-term employees?

With respect to part-time work, the Austrian Working Hours Act provides an explicit principle of non-discrimination (ie, part-time employees cannot be discriminated against compared with full-time employees due to the fact that they work part-time, unless a different treatment is justified by objective grounds). However, in contrast with full-time employees, the employer may unilaterally change the agreed working hours of a part-time employee, provided:

- this is justified by objective grounds;
- the employee is given notice of at least two weeks prior to such change;
- there are no conflicting (extenuating) circumstances on the part of the employee; and
- nothing to the contrary has been agreed by the parties.

A change of the agreed working hours requires a written form. Furthermore, as of 2016 the employer is obliged to notify his part-time employees of all full-time positions that are becoming vacant. For overtime work exceeding the agreed part-time working hours (but below the maximum statutory of eight hours per day and 40 hours per week) a surcharge of 25 per cent is due.

As a general rule, fixed-term contracts cannot be subject to a premature termination by the employer or employee as they end with the final date of employment agreed upon by the parties. The employment contract may, however, provide for a provision explicitly stipulating the right to terminate the contract; with respect to termination deadlines and notice periods, the same rules apply as for permanent contracts. Furthermore, where the duration of a fixed-term contract exceeds five years, the employee has the right to terminate the contract once five years have elapsed, upon six months' prior notice. A provision stipulating a termination right in a very short employment contract (eg, a nine-week internship) is deemed invalid.

Alongside the introduction of the aforementioned new form of carer's leave, the Labour Law Amendment Act 2013 also introduced a new carer's part-time employment to Austrian Law. With respect to eligibility, both essentially follow the same rules. Hence, upon written consent by the employer, employees who have been employed for more than three months may change to part-time employment for a period of up to three months in order to take care of close relatives who have been granted a federal care allowance (see question 24). During the period of part-time employment, the employee is also entitled to claim a governmental carer's leave allowance.

27 Must employers publish information on pay or other details about employees or the general workforce?

There are no statutory provisions under Austrian law obliging an employer to disclose information on an employee's salary. In fact, it is customary that many employment contracts contain a clause expressly barring employees from sharing information about their salary with co-workers (or outside of the employment relationship). A works council may, however, be entitled to inspect the employer's documentation on their employees' remuneration.

Post-employment restrictive covenants

28 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Non-compete clauses are in general permitted by 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. Non-compete clauses are only permissible provided the employee was older than 18 years at the date of the conclusion of the contract and that in the last months of employment, the employee was entitled to a gross remuneration exceeding a certain threshold fixed yearly by the Ministry of Labour, Social Affairs and Consumer Protection (€3,420 in 2018). The final requirement does not apply to employment contracts of white-collar employees concluded prior to 17 March 2006 and for employment contracts of blue-collar employees concluded prior to 18 March 2006.

Furthermore, a non-compete clause can generally only be validly agreed upon for a maximum period of one year after the termination of the employment contract, and the clause must be fair and reasonable considering the subject, time and geographical scope; be reasonably required for the protection of the employer's business; and not place any undue hardship on the employee with respect to his or her professional advancement, otherwise it may not be enforceable.

Further, non-compete clauses are not enforceable if the employee terminates the employment contract due to a breach of contract by the employer or if the employer unilaterally terminates the employment contract (but not in the case of a summary dismissal). In a case of unilateral termination of the contract by the employer, however, the employer may still enforce the non-compete clause by offering to pay a full salary to the employee during the restrictive period.

The parties may also agree on a penalty for a breach of the non-compete clause. In such a case, the employee may only be obliged to pay a penalty (which may be reduced by the court), but need no longer comply with the clause. Furthermore, the level of such penalties may not exceed an amount equal to six net salaries (excluding holiday pay and Christmas remuneration) of the specific employee.

29 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

No; provided that a post-employment restrictive covenant (ie, non-compete clause) has been validly agreed upon and is enforceable under Austrian law (see question 28), the employer is not obliged to continue to pay the former employee. As stated above, however, where a non-compete clause is not enforceable due to unilateral termination on part of the employer, the employer may offer to pay the employee full salary for the period of the restriction, thus rendering the non-compete clause enforceable.

Liability for acts of employees

30 In which circumstances may an employer be held liable for the acts or conduct of its employees?

In Austria, generally every individual is liable for his or her own behaviour. Relevant cases in connection with an employment relationship concern vicarious liability, in particular the auxiliary person pursuant to section 1313a of the ABGB. The employer is just as liable for any fault or negligence of an auxiliary person acting within the framework of carrying out his or her contractual duties stemming from an employment contract. In turn, the employer is entitled to take recourse against the employee. The employer is generally not responsible for any intentional or negligent conduct not related to the employment relationship on the part of an employee; however, due to the dependency created by an employment relationship, the Employee Liability Act contains special provisions partly amending the general Austrian tort law. It applies if an employee inflicts damage on an employer or on a third party in the course of carrying out the duties stipulated in the employment contract. The specificity lies in the fact that liability of the employee is reduced or even excluded depending on the gravity of the error. The employee may not be held liable for a genuine excusable error of performance or judgement; in the case of slight negligence the liability of the employee may be mitigated (by court) up to the total exclusion of any liability; in the case of gross negligence, liability may also be subject to mitigation, but a total exclusion of the liability is not possible. In the case of intentional conduct, however, the employee is liable without any limitation.

Taxation of employees
31 What employment-related taxes are prescribed by law?

An employee has to pay income tax, which is withheld by the employer and paid to the tax authorities. Mandatory contributions to the social security fund are borne by both the employer and employee.

Annual tax assessment, income tax declaration and the payment of other taxes are tied to particular deadlines.

Employee-created IP
32 Is there any legislation addressing the parties' rights with respect to employee inventions?

The Austrian Patent Act contains provisions regarding inventions made by the employee in the course of the performance of his or her work obligations. Such inventions are called 'business inventions'. In general, the inventor's legal right is given priority, but the business interests can be secured within the framework of an agreement. The agreement's validity is subject to written form, but it is also sufficient to stipulate this fact in the collective bargaining agreement. Any corresponding agreements on an individual or collective basis regarding other inventions than business inventions are not effective. According to the provisions of the Patent Act, the employee is entitled to receive adequate remuneration for the licensing or the granting of a usage right. Further to that, the Austrian Utility Models Act, the Austrian Industrial Designs Act and the Austrian Plant Breeders' Rights Act contain very similar provisions on employee-created IP.

33 Is there any legislation protecting trade secrets and other confidential business information?

Under Austrian law the protection of trade secrets and confidential information is, in principle, regulated by the Austrian Act Against Unfair Competition and the Austrian Criminal Code. As defined in section 20 of the Austrian Data Protection Act, confidentiality agreements could 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. Depending on the particular circumstances of each case, the owners of trade secrets and confidential information may therefore avail themselves of the various remedies provided for by civil law (such as compensation, rendering of accounts; injunctive relief, etc) as well as press criminal charges against a person who unjustifiably disclosed such information. However, it is important to note that the disclosure of trade secrets or confidential information does not amount to a criminal offence if such disclosure was justified by public or compelling private interests. It is therefore advisable to include non-disclosure clauses with regard to trade secrets and other confidential business information into any employment agreement or service notice.

Data protection
34 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The EU General Data Protection Regulation (GDPR) will enter into force in Austria as of 25 May 2018. The right to data privacy, which naturally must also be observed in an employment relationship, will from then on be governed by the provisions of the GDPR. The GDPR contains numerous flexibility clauses allowing member states to adopt further and potentially more detailed regulation within the GDPR's framework. To this end Austria has adopted the Austrian Data Protection Act 2018. The basic principles and the admissibility of data use as stipulated in the GDPR and the Austrian Data Protection Act 2018 must be adhered to with respect to labour law; beyond that, statutory privacy rights apply at the workplace. The employer can, however, resort to and apply certain control measures and technical systems necessary for the fulfilment of the employer's duties (eg, withholding of tax and social security contributions). Whatever the event, employees have a statutory right to be informed about the personal data collected by their employer. According to the Austrian Labour Relations Act, any measures affecting human dignity are subject to the works council's consent with respect to their legal effectiveness. This consent can only be given based on a works agreement. In a company without an existing works

council, these measures require the explicit consent of the concerned employee. Private life and any spare-time activities do not fall under this regulation and thus cannot be controlled. Against the background of the above-mentioned flexibility clauses it appears particularly noteworthy that the GDPR leaves room for 'more specific' domestic rules regarding the processing of employees' personal data in the employment context (GDPR, article 88). On this basis the Austrian Data Protection Act 2018 stipulates that provisions of the Austrian Labour Relations Act, provided they regulate the processing of personal data, qualify as such 'more specific' domestic rules within the meaning of the GDPR. This could potentially mean that the sanctions regime of the GDPR applies to a violation of these provisions of the Austrian Labour Relations Act. The GDPR provides for severe administrative fines of up to €20 million or of up to 4 per cent of the total worldwide annual turnover of the preceding financial year.

Business transfers
35 Is there any legislation to protect employees in the event of a business transfer?

The Employment Contract Law Adaptation Act regulates the rights and obligations in connection with a business transfer (ie, the transfer of an undertaking, business or part of an undertaking to another proprietor). Pursuant to section 3, all existing employment contracts are automatically transferred to the new proprietor without a change of the rights and obligations arising from those contracts. If the transfer causes an essential deterioration of the applicable collective bargaining agreement or company-level agreements, employees may terminate the contracts, as they are entitled to the same treatment as if the employer terminated the contract within one month of such transfer. Furthermore, the employee may, in some cases, object to the transfer of the employment contract, resulting in the employment contract with the former employer remaining valid. This is the case, for example, if the new proprietor neither grants protection against dismissal as specified in the relevant collective bargaining agreements nor undertakes to comply with the former company pension schemes.

Termination of employment
36 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

Austrian law distinguishes between dismissal with notice and dismissal without notice (summary notice; see question 38). A dismissal with notice does not require any grounds, but the employer (as well as the employee) must observe either the contractual notice terms or, in the absence of agreed notice terms, the minimum statutory notice terms. Under certain circumstances, employees may challenge a dismissal before the courts. Under the Austrian Trade Regulation, the employer has the possibility to terminate the employment relationship effective immediately in special cases (eg, disloyalty to the employer, persistent neglect of duties, incompetence with regard to work and falsified qualification, among others).

37 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

A dismissal with due notice (ie, regular termination) requires a prior notice of termination, which has to be received by the other party. Unless otherwise agreed upon, the notice does not require written form; oral or conclusive acts are deemed sufficient. With respect to white-collar employees, the minimum notice terms for a dismissal by the employer range from six weeks to five months depending on the number of years of service. With respect to blue-collar employees, the minimum statutory (but not mandatory) notice term amounts to 14 days. Pay in lieu of notice is only valid if agreed upon by both parties. While continuing payments, however, employers may release employees from their duties to work during the notice term.

38 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

A dismissal without notice requires substantiated grounds. A demonstrative enumeration of the causes for summary dismissal exists in the Salaried Employees Act. Among these are embezzlement and

Update and trends

The GDPR will enter into force as of 25 May 2018. To this end, Austria has adopted the Austrian Data Protection Act 2018. Both the GDPR and the Austrian Data Protection Act 2018 are currently much discussed among scholars and practitioners (see question 34).

untrustworthiness, inability to perform promised services or reasonable services with respect to the circumstances, persistent breach of the obligation to work and non-compliance with the employer's orders. With respect to blue-collar employees, the Austrian Trade Regulation provides an exhaustive enumeration of circumstances entailing summary dismissal, which includes showing false or falsified qualifications, incompetence with regard to work, indecent assault and defamation of the employer, and drunkenness at work.

If an employee gives rise to a cause of dismissal, the employer must immediately dismiss the employee, otherwise the cause of the dismissal becomes inapplicable.

39 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

With respect to severance pay, Austrian law provides for two different schemes depending on the date of the conclusion of the employment contract. For employment contracts concluded since 31 December 2002, the employer has to make contributions amounting to 1.53 per cent of the monthly remuneration into the corporate provision fund. The severance pay entitlement of an employee equals the sum of the accumulated capital and investment returns (minus administrative costs). The employee is entitled to disbursement of the severance pay provided the employment was not terminated by the employee handing in his or her notice, unless due to retirement by justified summary dismissal or by unjustified immediate resignation of the employee and payments to the corporate provision fund were made for at least three years.

Employees with contracts signed prior to 1 January 2002 are entitled to severance pay provided the employment lasted at least three years and was terminated due to, inter alia, dismissal by the employer, illegitimate summary dismissal, justified immediate resignation, expiry of a fixed-term employment contract or termination by mutual agreement or retirement. Depending on the duration of the contract, the severance pay may range between two monthly salaries (for three years of service) and 12 monthly salaries (for 25 years of service).

40 Are there any procedural requirements for dismissing an employee?

The works council, if established, must be informed a week prior to a dismissal.

Special procedures have to be observed when dismissing 'protected' employees (see question 41). Dismissal of a protected parent or member of the workforce, for example, requires prior consent from the labour court or the local authorities.

The dismissal of a registered disabled person is only valid provided the employer obtains a prior consent from the Disability Committee chaired by the Federal Office for Social Affairs and Disabled Persons.

For the procedural requirements in connection with mass terminations see question 42.

41 In what circumstances are employees protected from dismissal?

Certain groups of employees are granted protection against a dismissal. Among these are members of the works council, certain types of parent, employees carrying their compulsory military or alternative community service, apprentices, and members of the workforce who are registered disabled (with a reduction of the ability to work of at least 50 per cent). Mothers are protected from the start of the pregnancy until four weeks after the end of the maternity leave (if the mother does not take maternity leave, the protection is effective for at least four months after the delivery); fathers are protected when taking parental leave instead of the mother. The dismissal protection – in addition to special procedural requirements (see question 40) – statutorily restricts the circumstances entailing dismissal (eg, inability of the employee to render the work). In

all these cases, the employer must obtain the prior consent of the labour court or local/governmental authority.

Further, employees may under certain circumstances contest a dismissal as being taboo or socially unfair.

42 Are there special rules for mass terminations or collective dismissals?

Yes; special rules apply for mass terminations or collective dismissals. The employer has the obligation to inform and consult the works council when such dismissals are planned, and regarding changes affecting the business. Mass terminations as defined in section 45a of the Labour Market Promotion Act require prior notification of the local Employment Market Service in order to be valid. Following such notification, the employer must observe a 30-day waiting period. Dismissals declared within such period are void.

43 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Austrian law does not provide an explicit regulation regarding class actions. In general, class actions are deemed permissible provided the legal bases of the claims, as well as the factual or legal issue to be addressed in the proceeding, are essentially of the same kind. In addition, with respect to labour and employment claims, the works council may file a declaratory complaint as to whether certain employee rights exist. Such complaint requires that the asserted right concerns at least three employees. Unions have similar rights.

44 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

A mandatory retirement age leading to an end of the employment relationship requires the mutual agreement of the parties. As stated above, however, the employer may dismiss employees without cause; in general, this applies with respect to all employees, even elderly employees. Nevertheless, an employee may contest a dismissal as being taboo or socially unfair.

Dispute resolution

45 May the parties agree to private arbitration of employment disputes?

Pursuant to the Labour and Social Court Law, arbitration clauses with respect to employment disputes are not valid. An exception is made for managing directors and board members of companies. In addition, the parties may agree to private arbitration for already-existing disputes.

46 May an employee agree to waive statutory and contractual rights to potential employment claims?

Austrian law does not provide for explicit regulation with respect to an employee's waiver of employment claims. However, pursuant to Austrian case law, a waiver regarding claims arising from statutory legal regulations is not permissible during an existing employment relationship. This is even the case with respect to claims already incurred, provided the claims were waived due to economic pressure (ie, in order to keep the job – the existence of economic pressure is refutably presumed by Austrian courts). With respect to non-mandatory claims (eg, voluntary benefits provided by the employer) the employee may, without restriction, validly waive future claims; claims already incurred may be only waived if there is no economic pressure on the part of the employee involved (eg, in order to avert an impending insolvency of the employer).

A waiver of claims after the end of the employment relationship is generally valid. However, if – despite the end of the employment – the employee is still under economic pressure, a waiver is deemed invalid. This may be the case if, for example, due to the influential position of the employer the employee fears that he or she will not be able to find another job in the same industry sector.

47 What are the limitation periods for bringing employment claims?

As a general rule, claims in connection with employment (eg, salary claims) are subject to a three-year statute of limitation. The limitation period starts with the date of knowledge of the wrongdoer and of the

damage (ie, maturity of the claim). The employer and employee may agree upon a shorter limitation period, but an extension of the limitation period is not permissible.

However, Austrian law provides for numerous exemptions to the general three-year limitation period. For instance, holiday entitlement becomes time-barred within two years of the end of the respective leave year. For claims in connection with unjustified early termination by the employee or an unfair termination by the employer, a limitation period of six months applies. In addition, many collective bargaining agreements provide for 'sunset' clauses stipulating that claims on the part of an employee have to be asserted within six months, otherwise they become time-barred. If a dismissal is contested for being 'socially unfair,' the respective action must be filed within two weeks after the dismissal.



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