

International **Comparative** Legal Guides



Practical cross-border insights into employment and labour law

Employment & Labour Law **2023**

13th Edition

Contributing Editors:

Stefan Martin & Jo Broadbent
Hogan Lovells

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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

Austrian employment law is defined by numerous sources of law. Examples include the White-Collar Workers Act, the Leave Act and the Labour Constitution Act. In addition to laws and directives, collective agreements exist between employees' organisations with collective bargaining capacity on the one hand, and employers' associations on the other hand. Additionally, statutes exist at supra-company level, as well as company agreements between the owner/employer and the competent employee body, individual contracts and work instructions at company level.

1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

Labour law protects different types of employment groups. These include employees, freelancers, contract workers, apprentices, volunteers as well as compulsory trainees.

Employees are those who place their work at the disposal of an employer in a relationship of personal dependence in return for remuneration. In the case of employees, a distinction is made between blue-collar and white-collar workers. Whether they are blue-collar or white-collar workers depends on the type of work. White-collar workers are predominantly employed to perform commercial or higher, non-commercial services or office work.

Freelancers undertake to provide their services to another person in return for remuneration, without becoming personally dependent. Freelancers choose their own working hours and place of work and are not bound by instructions.

Contract workers undertake to achieve a result or to produce work. The contractor works at his own economic risk, as a rule according to his own plan, usually with his own resources.

Apprentices are trained professionally on the basis of an apprenticeship contract to learn an apprenticeship occupation and are used within the framework of this training.

Volunteers are persons who are employed in a company for a short period of time for the purpose of (supplementary) training. There is no obligation to work and no entitlement to remuneration.

Compulsory trainees are pupils who complete a compulsory internship in a company as a supplement to their school education.

1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

The conclusion of an employment contract is not bound to any

particular form. It can be in writing, verbally or conclusively. An exception exists only in certain cases.

The employer is obliged by law to issue a service note. The service note must contain certain information specified in the law.

1.4 Are any terms implied into contracts of employment?

In principle, an employment contract only has to contain the statutory minimum content of a service note. In the context of concluding an employment contract, in practice, additional provisions (beyond the statutory minimum content) are usually made regarding the employment relationship (e.g. fixed-term, revocable overtime allowance, competition clause, expiry provision).

1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

Yes. These mainly refer to maximum working hours to be observed, minimum rest requirements, employee protection regulations, etc.

1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Collective agreements stipulate, among other things, minimum basic salaries and special payments (13th/14th salary) as well as regulations regarding working hours. Collective bargaining primarily takes place between the respective employers' and employees' associations, i.e. at industry level.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so do they need to change employees' terms and conditions of employment?

Employees have no legal right to work from home. Working from home must always be agreed upon and cannot be unilaterally enforced.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

Employees have no legal right to work remotely.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

The trade unions are organised in the Austrian Trade Union Federation. They represent the political, economic and social interests of employees *vis-à-vis* employers, the state and political parties.

2.2 What rights do trade unions have?

The main tasks/rights of trade unions include:

- negotiating collective agreements;
- supra-company co-determination within the framework of the economic and social partnership; and
- legal advice to members.

2.3 Are there any rules governing a trade union's right to take industrial action?

In Austria there is a right to industrial action as well as the so-called freedom to strike.

2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

The works council must be established based on an election. It is up to the workforce, not the employer, to ensure the establishment of a works council by organising and conducting a works council election. The basic requirement for the formation of a works council is that at least five employees with voting rights and non-family members are employed.

The works council has the task of safeguarding and promoting the economic, social, health and cultural interests of the employees in the company. This includes, for example, the contesting of terminations and dismissals, participation in transfers and concluding of company agreements.

2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

Certain measures that are sensitive to employees (disciplinary rules, staff questionnaires, control measures, performance pay) may only be implemented by the employer with the consent of the works council and within the framework of a company agreement.

2.6 How do the rights of trade unions and works councils interact?

One of the essential provisions of the Labour Constitution Act is the cooperation between works councils and trade unions (Chambers of Labour). To enable effective cooperation, the trade unions (Chambers of Labour) have specific statutory rights of access.

2.7 Are employees entitled to representation at board level?

There is a statutory right to appoint employee representatives to the board.

3 Discrimination

3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Employees are protected by the Equal Treatment Act. Discrimination is prohibited when employees are directly or indirectly discriminated against on the grounds of ethnicity, gender, religion or belief, age or sexual orientation.

3.2 What types of discrimination are unlawful and in what circumstances?

Both direct and indirect discrimination are unlawful. Discrimination is prohibited, in particular:

- in the establishment of the employment relationship;
- all employment conditions (especially pay, voluntary social benefits, career advancement); and
- the termination of employment.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

In the event of sexual harassment, employees are entitled to compensation from the harasser. In addition, there is a claim for damages against the company if it has not taken reasonable steps to remedy the harassment.

3.4 Are there any defences to a discrimination claim?

A general exception to the principle of equal treatment exists if special requirements of professions make this unequal treatment necessary.

In order for an exception to the equal treatment requirement to be permissible and lawful, there must in any case be sufficient factual justification within the meaning of the Equal Treatment Act.

3.5 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Persons affected by discrimination may either immediately file a lawsuit with the Labour and Social Court or file an application with the Equal Treatment Commission.

A settlement based on an internal solution or a court settlement is possible at any time.

3.6 What remedies are available to employees in successful discrimination claims?

Persons affected by discrimination have claims for damages or elimination of discrimination and compensation for pecuniary loss and compensation for the personal impairment suffered.

3.7 Do “atypical” workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

On the basis of the Working Hours Act, part-time employees may not be disadvantaged compared to full-time employees because of part-time work, unless objective reasons justify different treatment. Employees with fixed-term employment contracts also have such legal protection.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

The “Whistleblower Protection Act” (“*HinweisgeberInnenschutzgesetz*”) is to come into force shortly and essentially provides that companies with at least 50 employees and in certain areas are obliged to set up an effective internal whistleblower protection system. In addition, procedures for handling, documenting, storing and following up on whistleblowers as well as special legal protection measures for whistleblowers and administrative penalties for certain acts are provided for. The legislative draft is not yet in force.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Under the Maternity Protection Act, mothers are entitled to maternity leave up to the notified duration, at the latest until the day before the child’s second birthday. The maternity leave must last at least two months.

4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

The employer does not pay any remuneration during the protection period as well as the maternity leave. During the protection period, there is an entitlement to maternity allowance for the last eight weeks before the expected date of birth up to eight weeks after childbirth or, in the case of multiple, premature or caesarean births, for 12 weeks after childbirth.

It is further possible to apply for childcare allowance during maternity leave. There is the possibility to choose from two systems of childcare allowance: the childcare allowance account (flat-rate system); or the income-dependent childcare allowance.

Marginal employment is possible at any time with the employer with whom the parent on maternity leave is employed or with another company. Furthermore, the employee on maternity leave may work above the marginal earnings threshold for a maximum of 13 weeks per calendar year. Employment above the low-income limit during maternity leave in another company may only take place with the consent of the employer with whom the employment relationship on maternity leave exists.

4.3 What rights does a woman have upon her return to work from maternity leave?

After the end of the respective maternity leave, the employee is entitled to return to the employment to which she was assigned at the time.

The employee is entitled to parental part-time work (reduction of normal weekly working hours) or to a change in working hours until the child’s seventh birthday or until the child starts school at a

later date, if certain requirements are met (certain length of service, company size and specific range of working hours).

4.4 Do fathers have the right to take paternity leave?

Yes. Fathers are entitled to paternity leave under the same conditions as mothers. Furthermore, fathers have a legal entitlement to one month’s leave on the occasion of the birth of a child (so-called “*Papamonat*”) under the Paternity Leave Act.

4.5 Are there any other parental leave rights that employers have to observe?

During parental leave, the employee has special protection against termination and dismissal. Termination or dismissal is only permissible in the case of certain reasons listed after court approval.

4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependants?

There is no entitlement to flexibility.

5 Business Sales

5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

A transfer of an undertaking occurs when an undertaking, business or part of a business is transferred. The prerequisite for this is that the acquirer continues an existing economic entity while maintaining its identity. A change of shareholders within the company managing the company (share sale) does not entail a change of ownership and thus also no legal transfer of undertakings.

In the event of a transfer of undertaking, the acquirer of the undertaking automatically enters into the employment relationships existing at the time of the transfer with all rights and obligations as employer.

5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

If the collective agreement or the company agreements applicable after the transfer of undertaking significantly worsen the working conditions, the employee has a privileged right of termination within one month of notification. In addition, the employee may object to the transfer of his employment relationship to the acquirer within one month of notification, if the acquirer, in the case of a change in the collective agreement, does not have certain existing protection under the previously applicable collective agreement or the previous company pension commitments do not take over.

If the acquirer is subject to the same collective agreement as the transferor, the validity of the collective agreement does not change. If a different collective agreement is applied in the acquirer’s company, there is a change of collective agreement. In the case of a change of collective agreement, there is no prohibition of deterioration in this respect, only the remuneration due to the employee for regular work performance in normal working hours under the collective agreement prior to the transfer of the business may not be reduced.

If the acquirer is not subject to a collective agreement with regard to the business due to lack of own collective agreement affiliation, the acquirer must fully maintain the conditions of the previous collective agreement. In this case, the terms and conditions can only be cancelled or limited by a disadvantageous individual employment contract one year after the transfer of the business at the earliest.

5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

The employees shall be informed in advance in writing of the time or planned time of the transfer, the reason for the transfer, the legal, economic and social consequences of the transfer for the employees and the measures envisaged with regard to the employees. If a works council exists, it must be informed instead and, if requested, this information must be consulted with the works council. In addition, the employees must be informed in writing of any changes in the service note or the employment contract without delay or within one month at the latest.

The absence of the information affects the exercise of the rights by the respective employees.

5.4 Can employees be dismissed in connection with a business sale?

If the transferor or acquirer of the business gives notice of termination due to the transfer of an undertaking, this notice of termination is legally invalid. A termination of employment by the employer in the context of a transfer of an undertaking is only legally effective if it is not based on the transfer of the undertaking but on economic, technical, organisational or behavioural grounds.

5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

No. The terms and conditions of employment shall remain in force unless otherwise provided for in the provisions on the change of affiliation to the collective agreement, the company pension commitments and the continued validity of company agreements.

6 Termination of Employment

6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

The employer must observe certain notice periods and dates when terminating the employment relationship. The notice periods for white-collar workers are based on the provisions of the White-Collar Workers Act, unless the collective agreement provides otherwise. The notice period to be observed by the employer is extended according to the length of service of the employee. This notice period can be extended to up to six months by agreement.

The notice periods for blue-collar workers are generally based on the General Civil Code and the same regulations as above apply.

If certain important reasons exist, it is possible to terminate an employment relationship without observing termination dates and notice periods.

6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

The employer can waive the employee's work during the notice period. However, the employer must continue to pay the full salary.

6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

There is general protection against termination of employment in companies. There are certain information and consultation rights of the works council to be observed, otherwise the termination is ineffective.

A termination can further be challenged in court if certain grounds are given:

- If the termination is socially unjustified under certain conditions and the employee has already been employed by the company for six months.
- If the termination was due to a reprehensible motive stated in the law (e.g. because of the employee's membership or activity in trade unions).
- If the termination was issued for other inadmissible reasons (discrimination, educational leave).

The first two options for contesting termination are only possible for companies with more than five employees. Consent is only required for employees with special protection against termination. In these cases, court approval must be obtained before termination.

6.4 Are there any categories of employees who enjoy special protection against dismissal?

Yes:

- Mothers-to-be and mothers and fathers who are taking maternity leave or parental part-time work due to the birth of the child.
- Works councils (substitute members of the works council, members of electoral boards and candidates under certain conditions).
- Representatives of disabled people and their deputies.
- Employees who are called up for military, training or community service and women in training service.
- Disabled employees.

6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so, how is compensation calculated?

Terminations do not have to be justified, unless the employee is particularly protected against termination. However, if court proceedings arise due to the employee contesting the termination before the Labour and Social court, the employer must prove that the termination was for personal or operational reasons, for example.

In the event of a termination without notice or in breach of the termination date, the employee is entitled to compensation for termination. The entitlement to compensation for termination includes both the current remuneration to which the

employee would have been entitled to the point in time at which the employment relationship would have ended if the notice had been properly given, as well as the *pro rata* special payments and other remuneration components.

6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

In companies with a works council, the employer must inform the works council of the intention to terminate the employment of an employee prior to any intended termination. Depending on the content of the works council's statement (consent, objection, silence), there are different possibilities to challenge the termination in court.

6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

The employee may either claim that the termination was ineffective and that the employment relationship is still valid, or he or she may claim compensation for termination in the case of termination without notice or in breach of a termination date.

6.8 Can employers settle claims before or after they are initiated?

A settlement between employer and employee is possible at any time, even during legal proceedings.

6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

According to the Employment Promotion Act, employers are obliged to notify the responsible regional office of the Austrian Public Employment Service in writing of any intended downsizing when certain thresholds are reached at least 30 calendar days in advance. If a works council has been set up in the company, a copy of this notification must be sent to it. If there is no works council, the copy of the notification must be sent to the employees likely to be affected at the same time.

6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

Failure to comply with the obligation to notify the Austrian Public Employment Service and the blocking period of 30 calendar days may result in terminations being ineffective.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Measures can be taken to protect business interests through confidentiality agreements, non-disclosure agreements, non-disclosure clauses in employment and work contracts, employee training, company guidelines on how to deal with secrets and non-competition clauses.

In practice, a so-called “conventional penalty” for breaching a non-disclosure obligation or non-disclosure clause is often agreed in the employment contract. A contractual penalty is an agreed lump-sum compensation, which serves to expressly sanction certain serious breaches of duty by the employee.

7.2 When are restrictive covenants enforceable and for what period?

This depends on the concluded agreement. However, the damage should in any case be asserted within the statutory limitation period or the expiry period agreed in the respective collective agreement or employment contract.

7.3 Do employees have to be provided with financial compensation in return for covenants?

Unless this has been agreed between the parties to the employment contract, there is no obligation to provide financial compensation.

7.4 How are restrictive covenants enforced?

If a breach of contract or agreement has taken place, such a violation will be asserted at the competent Labour and Social Court.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

The General Data Protection Regulation (GDPR) entails several obligations in employee data protection. Due to the opening clause of Art 88 GDPR, the participation right of work councils plays a significant role in the processing of employee data in the employment relationship.

While data traffic within the EU is not subject to any restrictions due to the equal standard of data protection guaranteed by the GDPR, data traffic with third countries is only permitted under the conditions of Art 44 *et seq.* of the GDPR.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Employees have the right to request and obtain a copy of their personal data held by their employer.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

In Austria, pre-employment screenings are rather unusual. In any case, written consent is required and a data protection declaration must be obtained.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

In general, control measures that affect the personal rights of

employees are only permissible to the extent that the works council has reached a company agreement with the company, or if there is no works council, the express consent of the employee concerned must be obtained. The privacy of the employee must in any case remain protected in the core area.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

A control by the employer is only allowed if it pursues objective and legitimate monitoring goals and the control is proportionate.

9 Court Practice and Procedure

9.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

Labour and social jurisdiction is exercised in the first instance by the regional courts, only in Vienna is there an independent court. In the second instance, labour and social jurisdiction is exercised by the Higher Regional Courts, and in the third instance by the Supreme Court.

In principle, labour and social jurisdiction is exercised in judiciary senates. In addition to the professional judges, expert lay judges from among the employees and employer representatives are also involved in the proceedings.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

A court claim may be brought in the competent court without prior compulsory conciliation. In practice, however, it is common that the claim is first asserted out of court by the Chamber of Labour, the trade union or a lawyer, and only then is a claim brought before the court.

A certain "flat fee" is payable to the court for bringing a claim. The amount of the fee depends on the amount in dispute.

9.3 How long do employment-related complaints typically take to be decided?

The length of the court proceedings varies and depends on the specific individual case (e.g. witnesses, complexity, etc.).

9.4 Is it possible to appeal against a first instance decision and if so, how long do such appeals usually take?

An appeal against a first instance substantive decision in the case itself can be filed within four weeks after service of a written judgment. How long the court of appeal then needs for a decision depends on the specific individual case.



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