International
Comparative
Legal Guides

Employment & Labour Law

2024

14th Edition

Contributing Editors:
Stefan Martin & Jo Broadbent
Hogan Lovells

glg Global Legal Group

Expert Analysis Chapter

Q&A Chapters

Austria

Edthaler Leitner-Bommer Schmieder & Partner Rechtsanwälte GmbH

Johannes Edthaler

Christina Hödlmayr

1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

Austrian employment law is determined by numerous legal sources. Laws and directives form the basis. In addition, there are collective agreements at the supra-company level, as well as statutes. At the company level, there are company agreements between the employer and the relevant employee representative body, as well as individual contracts and work instructions.

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

A worker is someone who undertakes to perform work for the employer on the basis of a contract of employment. The essential characteristics of an employment relationship are the personal and economic dependence of the worker (also called "employee"). Employees are divided into the following groups with different regulations:

- White-collar and Blue-collar workers: Whether an employee is a White-collar worker or a Blue-collar-worker depends in general on the type of work. White-collar workers are predominantly employed in the commercial sector, higher, non-commercial services or in the office. The term "Blue-collar worker" is not defined by law. According to case law, Blue-collar workers are recognised as "residuals". This means that any worker who is not a White-collar worker is generally recognised as a Blue-collar worker.
- Marginal employees: Employment is considered marginal if the remuneration does not exceed the monthly marginal earnings threshold (adjusted annually by value).

Apart from the above distinctions, there are various other forms of employment that must be distinguished from employees (e.g. apprentices, trainees).

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 a contract of employment is not bound to any particular form. It can be in writing, verbal or implied.

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 need only 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, remuneration agreements for overtime work, 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 remuneration and special payments (13^{th}/14^{th} 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?

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. Neither the employer nor the employee can unilaterally specify work from home or telework.

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; and
- supra-company co-determination within the framework of the economic and social partnership.

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

There is no statutory set right to strike, but there is a general right to take industrial action and 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 also includes the conclusion of company agreements in various areas.

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) 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 (*Arbeitsverfassungsgesetz*) 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 law against unfavourable treatment in working life in various ways. This primarily includes comprehensive protection against discrimination based on certain protected characteristics in the Equal Treatment Act (*Gleichbehandlungsgesetz*) and the Disability Employment Act (*Behinderteneinstellungsgesetz*). In addition, there are various individual statutory prohibitions of discrimination as well as the so-called principle of equal treatment under labour law.

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

According to the Equal Treatment Act, discrimination is prohibited if employees are discriminated against on the basis of their ethnicity, gender, religion or ideology, age or sexual orientation.

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.

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 (*Gleichbehandlungskommission*).

An agreement based on an out-of-court solution or a court settlement may be reached between the parties either before or after the claims have been initiated.

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?

Yes, certain regulations exist for part-time employees, employees with fixed-term contracts and temporary agency workers to ensure that they are not disadvantaged compared to other employees due to their employment status.

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*) came into force on 25th February 2023 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.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

Companies with 150 or more employees are obliged to submit a "remuneration analysis report" (i.e. income report) to their employees every two years. The report must be prepared in anonymised form.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

In implementation of the Work-life Balance Directive, the Maternity Protection Act (*Mutterschutzgesetz*) and Paternity Leave Act (*Väterkarenzgesetz*) were amended for births from 1st November 2023, among other things.

In principle, parental leave can only be taken until the child is 22 months old (i.e. two months earlier than before). Parental leave will continue to be possible until the child reaches the age of 24 months, provided the mother is a single parent. Parental leave can be shared twice with the father and one part of the leave must be at least two months. If it is shared, the parental leave entitlement is extended until the child is 24 months old. Part of the parental leave may also be postponed until a later date.

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 (i.e. period from the last eight weeks before the expected date of birth until at least eight weeks after the birth) as well as the maternity leave. During the maternity protection period, employees are entitled to maternity allowance from the state. It is further possible to apply for childcare allowance during maternity leave. There is the possibility to choose between different systems of childcare allowance.

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 eighth birthday for a maximum period of seven years, if certain requirements are met (certain length of service, company size and specific range of working hours). The period between the age of seven and the child's later entry into school is to be added to this maximum amount. For applications for parental part-time work before 1st November 2023, there is an entitlement to parental part-time work until the child's seventh birthday and/or until the child starts school at a later date.

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 (*Papamonat*).

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, according to which termination or dismissal is only permitted for certain reasons after court approval.

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

There is no legal entitlement to work "*flexibly*". However, in companies with more than five employees, there is a legal entitlement to part-time care leave (reduction in weekly working hours) for a period of up to two weeks under certain conditions.

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 this information results in the employees concerned being inadmissibly impaired in the assertion of their rights.

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.

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?

A distinction is made between termination and dismissal for cause by the employer when terminating the employment relationship.

In the event of termination by the employer, the employer must observe certain notice periods and dates when terminating the employment relationship, unless it is a fixed-term employment relationship. The notice periods are set by law:

- The employer's statutory notice periods begin with a minimum period of six weeks and increase to up to five months depending on the length of service. The employee must observe a notice period of one month to the end of the month. This notice period for both employer and employee can be extended to up to six months by agreement.
- The statutory termination date is generally the end of the respective quarter. The employer and employee can agree in individual contracts that the employment relationship can be terminated on the 15th or last day of a calendar month.

The above regulations only apply if the applicable collective agreement does not provide for any special regulations.

Dismissal is the immediate ("without notice") termination of the employment relationship by the employer for certain important reasons 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?

It is not necessary to state a reason for termination when giving notice. Under certain conditions, however, the employee may contest the termination at the Labour and Social Court (e.g. on grounds of social hardship or an unlawful motive for termination).

The grounds for dismissal for White-collar workers are listed by way of example in the Employees Act (*Angestelltengesetz*), and for Blue-collar workers in full in the Industrial Code 1859 (*Gewerbeordnung*). The decisive factor for any reason for dismissal is particularly serious misconduct on the part of the employee combined with the unreasonableness of continued employment for the employer. An employee may contest the dismissal in court if it was unjustified.

There are special grounds for termination and dismissal for employees who are protected by law.

There are certain information and consultation rights of the works council to be observed.

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

The following employees are under special protection:

- 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 specially protected against termination or the termination is contested in court. In these cases, the employer may have to prove that the termination was for economic or personal reasons, e.g. if it is contested on the grounds of social hardship. Dismissals are permissible for various reasons, some of which are regulated by law, e.g. betrayal of company secrets, incapacity for work, or persistent neglect of duties. Whether the employee's behaviour is sufficient for dismissal depends on the specific individual case.

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 can either claim that the termination was invalid for various reasons (social hardship, unethical motive) and that the employment relationship continues or, in the event of termination without notice or failure to meet the notice period, the employee can demand compensation for termination.

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?

The employer is obliged to notify the Austrian Public Employment Service (AMS) in writing of any intended downsizing when certain thresholds are met and 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 AMS 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 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 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 Article 88 of the GDPR, the participation right of works 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 Article 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?

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

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

There are no specific restrictions (yet), but data protection and personal rights must be respected in the workplace and must not be subject to excessive interference.

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.

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. A particular characteristic of Labour Court proceedings is that at the first hearing before the court, the judge must attempt to reach a settlement. In practice, however, it is common that the claim is first asserted out of court, 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. Labour law actions that are not aimed at money, e.g. where only a right is to be established or consent to termination is to be obtained or similar, are usually free of court fees.

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, obtaining expert opinions).

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.

Johannes Edthaler is an Attorney at Law (Partner) at LeitnerLaw Rechtsanwälte. As an economist with a doctorate in law, he was previously an assistant at the Chair for Financial and Economic Criminal Law at the University of Innsbruck and then practised as an Associate and Attorney with a focus on advising small and medium-sized enterprises and on litigation. He lectures and publishes regularly on his specialist areas and is a lecturer at the Johannes Kepler University Linz.

Edthaler Leitner-Bommer Schmieder & Partner Rechtsanwälte GmbH
Ottensheimer Straße 36
4040 Linz
Austria

Tel: +43 732 73 03 69-105
Email: johannes.edthaler@leitnerlaw.eu
URL: www.leitnerlaw.eu

Christina Hödlmayr is an Attorney at Law (Partner) at LeitnerLaw Rechtsanwälte. She studied law at the Johannes Kepler University Linz. Previously, she worked as an Associate at LeitnerLaw Rechtsanwälte and Saxinger, Chalupsky & Partner Rechtsanwälte GmbH in Linz, Austria. She is specialised in the areas of labour law, administrative criminal law, litigation, corporate and contract law. In addition, she is a specialist author and lecturer on her areas of expertise, especially in the field of labour law and the Anti-Wage and Social Dumping Act (*Lohn- und Sozialdumping-Bekämpfungsgesetz*), regarding which she also wrote her doctoral thesis.

Edthaler Leitner-Bommer Schmieder & Partner Rechtsanwälte GmbH
Ottensheimer Straße 36
4040 Linz
Austria

Tel: +43 732 73 03 69-374
Email: christina.hoedlmayr@leitnerlaw.eu
URL: www.leitnerlaw.eu

Edthaler Leitner-Bommer Schmieder & Partner Rechtsanwälte GmbH – LeitnerLaw is a dynamic law firm in Austria that specialises in business law, with locations in Linz, Vienna, Graz and Prague. Our labour law expert team consists of two partners, one attorney and two associates. We advise national and multinational corporations, as well as small and medium-sized businesses from all industry sectors on all issues related to labour law. This includes comprehensive advice on individual employment law and collective employment law, representation before all courts and government agencies as well as support when in negotiations with works councils, trade unions, or other interest groups.

www.leitnerlaw.eu

LeitnerLaw
Rechtsanwälte

International Comparative Legal Guides

The **International Comparative Legal Guide** (ICLG) series brings key cross-border insights to legal practitioners worldwide, covering 58 practice areas.

Employment & Labour Law 2024 features one expert analysis chapter and 33 Q&A jurisdiction chapters covering key issues, including:

- Terms and Conditions of Employment
- Employee Representation and Industrial Relations
- Discrimination
- Maternity and Family Leave Rights
- Business Sales
- Termination of Employment
- Protecting Business Interests Following Termination
- Data Protection and Employee Privacy
- Court Practice and Procedure

The International Comparative Legal Guides are published by: glg Global Legal Group