

Republic of Austria

Introduction

Austrian labor law consists of several legal provisions regarding employment, contained in various laws. A contract of employment is deemed to exist if a person (employee) undertakes to provide services to another (employer) for a specific period of time. Employees are personally and economically dependent on the employer. Labor law contains legislation on employment contracts (individual labor law), on industrial relations (collective labor law), procedural law and terms on health and safety at work. Labor law's primary objective is to offset the social imbalance between employees and employers. It is thus an essential part of social policy. Austrian employment legislation has traditionally drawn a distinction between waged ("Arbeiter") and salaried ("Angestellte") employees. Salaried employees are generally covered by legislation, while most of the provisions for waged employees are contained in collective agreements. Senior executives and directors have a special position in labor law and certain protective laws do not apply to them to the same extent as to other employees.

Austrian Labor Law still recognizes a distinction between waged and salaried employees. To be qualified as a salaried employee, the employee must perform office work or activities of a commercial nature, or more complex activities of a non-commercial nature, which require particular training. Any other employees are considered to be waged employees. However, as far as statutory law is concerned, the distinction between salaried and waged employees has lost much of its significance. It still has consequences for social insurance, Works Council, membership of trade unions, compensation rules, termination and notice periods. In the following, "employee" refers to salaried employees only.

After 1945, Austria enacted legislation to enhance the protection of employee's rights. The purpose of this protective legislation was to lay down measures to protect the life, health and morals of the employees by preventing industrial accidents and employee illness and to guarantee working conditions corresponding to the state of the art of technology and medicine. Furthermore, Austria has implemented an Equal Treatment Act ("*Gleichbehandlungsgesetz*"), providing general protection against all types of discrimination by an employer.

Statute Law, Collective Bargaining And Other Agreements

Numerous statutes regulate Austrian labor relations and the individual rights and duties of employer and employee. The most important is the Austrian Constitutional Act on Industrial Relations ("*Arbeitsverfassungsgesetz*"), which provides a framework regulating the interaction between employees and employers. Furthermore, almost all employers and employees are subject to collective bargaining agreements. These agreements are concluded between the employer and employees organizations for certain services or industry sectors. They regulate most of the terms and conditions of employment and are legally binding upon the individual employers and employees. While collective bargaining agreements cannot usually alter statutory provisions to the detriment of the employee, they have, for all other purposes, the same legal force as a statute. All individuals covered by the agreement may enforce any right arising under such agreement, just as with statutory or contractual rights. Collective bargaining agreements are concluded on a nationwide basis, setting uniform minimum standards of employment.

The most important area of participation of the Works Council is in the conclusion of single plant bargaining agreements ("*Betriebsvereinbarung*"). A single plant bargaining agreement is a special agreement concluded between the Works Council and the employer on certain issues permitted by law or by a higher-level collective bargaining agreement. It is binding on all employees in a company or, in case of larger organizations, on a certain group of the employees in the business. An entity operating more than one business may therefore be a party to more than one single plant bargaining agreement.

Terminations And Dismissals

Notice Provisions/Consequences Of A Failure To Provide The Required Notice

Individual termination may be unilateral, subject to a notice period or by mutual consent. This period varies according to the length of service, the type of work performed and an individual's conduct. Termination usually does not require any cause or any specific form; it is sufficient for the information on termination to have been received by the employee.

According to Austrian labor law, an employer must observe a scale of notice periods for termination ("*Kündigung*") of an employee's employment, which may be lengthened

under the terms of a collective bargaining agreement or individual employment agreement. This notice period ranges from six weeks' notice for up to two years of service to five months' notice after 25 years or more service. In any case, the notice period may not be derogated to the detriment of the employee. Unless otherwise agreed, the employment may only end upon completion of each calendar quarter. This rule may be changed by individual agreement so that employment may instead end on the fifteenth day or at the end of each calendar month.

The employee may terminate the employment at the end of any given month by adhering to a notice period of one month. However, this effective notice period may be extended by individual agreement for a period of up to six months. It is a frequent practice of employers to release the employee from duty (gardening leave or "*Dienstfreistellung*") for the duration of all or part of the notice period. During this period the employee remains entitled to receive full salary and employee benefits.

Furthermore, the employees may immediately terminate their employment contract if they become physically incapable of continuing work, or if the employer does not pay their salary or fails to comply with occupational health and safety obligations, or commits some other fundamental or material breach of the employee's terms and conditions of employment. It is particularly important that the resignation takes place without undue delay. Otherwise, the employees may be deemed to have waived their right to terminate the employment.

An employer may immediately dismiss the employee for reasons of insubordination, disloyalty and other types of gross misconduct, or in case of violation of the duty of good faith. If an employer issues a notice of dismissal (or "*Entlassung*"), the employment will normally end immediately. However, the employee will be entitled to either full payment for the notice period applying to ordinary termination, or to have the termination cancelled, if he or she initiates and wins a claim under the rules for protection against termination.

Where an employer wishes to terminate or dismiss a protected class of employee it may normally only do so with good cause and where a labor court has approved the termination. The principal protected groups are: members of and candidates to the Works Council, pregnant employees up to four months after giving birth, employees on maternity leave and working parental part-time, employees doing their prescribed military service and disabled employees.

Restrictions On Employers

General Protection Against Ordinary Termination

According to the statutory provisions of Austrian labor law, all employees are entitled to protection against ordinary termination. This protection, however, is limited to specific provisions and requirements. As a general rule, the Works Council may contest the termination by way of filing legal action with the labor court. If there is no Works Council, the right to contest the termination rests with each individual employee. If such action is successful, the termination is invalid (and therefore cancelled), and the employee will be reinstated and entitled to full salary and benefits for the duration of the labor court proceedings.

An employer must first notify the Works Council of the intended termination. The Works Council may then comment on the termination within five working days. After this period the employer may proceed with the intended termination. If this pre-notification requirement is violated, the “termination” is null and void.

Should the Works Council approve the termination, the affected employee may not contest it in court - except for an illegal termination - and the termination will become effective. If an employee nevertheless wishes to contest a termination that has been approved by the Works Council, the employee must do so within one week by filing a lawsuit with the Labor Court. In cases where the company’s employees have not elected a Works Council, the rules involving approval of the Works Council will not apply.

The court may cancel a termination if there is an illegal basis for such termination, such as the fact that it concerns a pregnant employee. It may also rule against a termination because it is socially unjustified, which means that it infringes substantially upon the interests of the employee and, in a balance of interests test, has not been sufficiently justified by the employer.

The most common basis for termination by an employer is that there are economic reasons preventing continuation of the employment contract. The other principal reasons for termination are based upon the behavior or performance of the employee, such as the violation of an employment contract where the events are not serious enough to justify an immediate dismissal.

Protection Against Dismissal

The employer has to notify the Works Council immediately after dismissing an employee and, upon request of the Works Council, has to consult with it within three working days from the intended notification. The dismissal may be challenged in court if the employer has not set any reason justifying the dismissal and if the dismissal is unjust on social grounds. However, dismissal may not be challenged in some cases if the Works Council has approved it. The consequences of a legal action against dismissal are identical with the consequences of legal action against termination. The Court will cancel the dismissal and the employer will be obliged to pay the outstanding remuneration and the employee has to return to work.

Collective Redundancy

In the event of an intended mass layoff, the employer must notify the local office of the Labor Market Service (*Arbeitsmarktservice*) in writing that such terminations are intended within a 30-day term. This provision applies if at least five employees are to be made redundant in a business with more than 20 and fewer than 100 employees; or at least five per cent of the employees in a business with between 100 and 600 employees; or at least 30 employees in a business with more than 600 employees, or at least five employees aged 50 or over in any business.

This notification must take place at least thirty days before the first notice of redundancy is issued or a mutual termination agreement is concluded. Without such prior notification any termination would be invalid. Furthermore, during the thirty-day period following the date of notification, no notice of redundancy may be issued and no termination by mutual consent may be agreed, unless the approval of the Labor Market Service has been obtained. Any such mass layoff is likely to trigger an entitlement to a “social plan.”

Furthermore, the employer must notify the Works Council before implementing certain measures defined as “major changes” in the business, and this includes any collective redundancy program. Once notified, the Works Council may submit a proposal to prevent, remove or mitigate any negative effects of the program on employees. Where more than 20 employees are employed and the measures to be taken will result in considerable disadvantages for all or a considerable part of the work force, the Works Council may request that the company draw up a “social plan.” A social plan has the purpose of preventing, removing or mitigating any disadvantages in respect of the intended “major changes.”

Laws On Separation Agreements, Waivers And Releases

As a general principle, concluding an agreement on amicable dissolution may terminate an employment relationship. Such agreement may be concluded by mutual consent at any time. In the absence of any specific statutory provisions governing such a case, the general provisions on cancellation of contracts applies. The amicable dissolution is not subject to any specific form requirement because such requirements only exist for termination of persons enjoying special protection. The amicable dissolution is the most common way of terminating any employment relationship because neither the restrictions nor the statutory notice period in the case of a termination by the employer need be observed.

Termination Indemnities/Severance Payments

Severance payments are extraordinary statutory payments paid upon termination of employment in order to mitigate the consequences of termination. However, severance payments are not due if it is the employee who terminates the contract, prematurely resigns without cause or is dismissed for good reasons. If an employment relationship commenced before January 1, 2003, its termination without good cause will automatically require the payment of statutory severance compensation. Severance compensation may only be claimed after a person has been in a post for at least three years. It ranges from a minimum payment of two months' salary to twelve months' salary after 25 years of service.

If an employment relationship commenced after January 1, 2003, the statutory severance compensation will be payable through a state-run fund, as the result of a new system of severance payments that went into effect in 2003. These provisions, which are applicable to all new employment contracts starting on or after January 1, 2003, require that the employer provide termination indemnities through an individually defined contribution fund (or "*Betriebliche Vorsorgekasse*" – commonly known as the BVK). Moreover, transfers of already existing severance payment claims to the new system are permitted. The employer may either transfer the complete claims or freeze the old claims and make all future contributions to the new fund. In order to transfer already existing claims, a mutual agreement is required between the employer and the employee.

Employment Discrimination

Although statutory prohibitions against employment discrimination have increased significantly in Europe as well as in Austria, they are far from being as relevant to personnel decisions as they are in the United States. Employment discrimination cases are not frequently asserted in Austria, primarily because Austrian labor law already provides substantial protective rules for employees. Therefore, no administrative process for asserting a discrimination complaint exists, such as it does in the United States, and employees may proceed directly to court with such a claim.

Laws On Employment Discrimination

Although the provisions of the Austrian Equal Treatment Act (*“Gleichbehandlungsgesetz”*) equally protect both women and men from discrimination at work on gender grounds, they are principally geared to women’s needs and are in practice predominantly for the benefit of women. However, there have been continuous aspirations to ensure that men and women are treated equally in the workplace, as the plain facts of daily life show that it is women who are still suffering discrimination compared to their male fellow-employees, both in terms of their job, on-the-job education and training and professional advancement.

The Austrian Equal Treatment Act (the “Act”) and other similar laws are intended to remedy this situation. Any discriminating differentiation without objective justification is prohibited. This applies also to indirect discrimination. Indirect discrimination means that if a rule is applied without distinction to men and women, the disadvantage will actually affect significantly more women than men (e.g., in case of part-time work).

The Act defines various prohibited unequal treatment scenarios, for example, those created where an employment contract is concluded or terminated, or, in connection with the fixing of the remuneration, the granting of voluntary fringe benefits, the involvement in on-the-job education and training, promotions or other working conditions.

Through major amendments, the Act has been adapted to comply with the provisions of the European Commission’s Equal Treatment Directive N° 76/207. The Act now prohibits any discrimination, be it indirect or direct, by the employer based on of the employee’s gender with regard to hiring, working conditions, compensation, fringe benefits, promotion, schooling and training, and termination.

Furthermore, the provisions of the Act prohibit sexual harassment by the employer and regulate the consequences upon failure of the employer to prevent sexual harassment by third parties.

Race discrimination in Austria is also prohibited by the Act, and an employer is liable for such discrimination according to the Austrian Civil Code and the Act. However, it is rare and there have been no recently reported cases dealing with race discrimination.

Furthermore, no major cases dealing with disability discrimination exist, because most of Austrian law already provides for substantial statutory protections for disabled employees. In particular, an employment relationship (if it has lasted more than six months) may be terminated only after the approval of the Labor Court, because disabled persons are one of the protected groups in case of termination. Indeed, it can be assumed that this process sufficiently protects the rights of disabled employees, since disability discrimination claims are rare.

Employee Remedies/Potential Employer Liability For Employment Discrimination

Any violation of the equal treatment principle entitles the male and female employee having suffered discrimination to lodge claims for damages or for an end to the discriminating situation. However, various time limits have to be observed, depending on the type of discrimination. The Austrian Equal Treatment Act is enforced by the Equal Treatment Commission ("*Gleichbehandlungskommission*"), which is part of the Federal Ministry of Labor. Additionally, an employee who is or has been subjected to discrimination may sue the employer directly for damages in court in case of a violation of the statute.

However, in a lawsuit, the female or male employee has to prove demonstrably the discriminating situation on which he or she bases his or her claims. The burden of proof is therefore on the person having suffered discrimination, which does not encourage the persons affected. On the contrary, persons who have suffered or continue to suffer a form of discrimination often tend to accept their situation and terminate the employment themselves. Therefore, the new laws are an attempt to change the behavior of the victims and the jurisdiction of the courts.

Sexual Harassment

Section 6 of the Austrian Equal Treatment Act defines sexual harassment and regulates the consequences of such unlawful behavior. Unlawful discrimination on the grounds of gender must also be affirmed, in such case where a female or male employee becomes the victim of sexual harassment during her or his employment. It is irrelevant in this context whether the employer himself/herself is the harasser, or whether he or she acts culpably by denying the employee concerned protection against harassment by third parties (colleagues or customers).

Sexual harassment means any sexually related conduct affecting a person's dignity that is undesirable, inappropriate, or indecent for the female or male employee concerned and that creates either an intimidating or humiliating working environment or subsequently results in disadvantages on the job as a result of the victim's reaction (rejection or tolerance).