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Employment

Austria
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Law and Practice

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1. Introduction

1.1 Main Changes in the Past Year

In the last 12 months, Austrian employment legislation was foremost concerned with containing the consequences of the coronavirus crisis for the labour market, but also saw some legislative changes pertaining to family care.

Daddy Month

Starting September 2019, Austrian employers must allow fathers to take one month of unpaid leave immediately following the birth of their child (so-called "Daddy Month"). The leave entitlement previously only applied to male employees who were covered by a collective agreement with a leave provision, or who had successfully negotiated a corresponding leave period with their employer. Fathers are eligible if they live in the same household with their child, but need not also have completed a minimum service period with their employers. Employers, in turn, have no obligation to pay a salary during Daddy Month. Instead, eligible fathers are entitled to a one-off payment by the quasi-governmental social security-provider amounting to EUR700. Employers must also not discriminate against male employees requesting this new form of parental leave.

Leave Periods Equal Service Periods

Furthermore, the recognition of parental leave periods has been extended. Since August 2019, periods of parental leave (maternal and/or paternal leave of up to two years per child) are to be fully credited for each child against legal entitlements calculated on the length of service, such as continued remuneration during sick leave, annual leave entitlements, notice periods and salary advances.

1.2 COVID-19 Crisis

COVID-19 legislation as explained here is foremost a temporary initiative by the Austrian government, planned to be abolished by year end.

Short-Time Work

Introduction

Short-time work schemes were first introduced in 1949, amended during the financial crisis in 2008 and 2009 and now again overhauled to meet the requirements of both employers and the workforce.

Like so many other furlough schemes across Europe, the model aims at reducing costs to employers while at the same time safeguarding that lay-offs are avoided and the workforce is ready to support an economic recovery. From employees' perspectives, they retain their jobs and spending power, which helps to stimulate the economy once the pandemic has subsided and government measures seeking to contain the spread of the virus are lifted.

Eligibility

Generally, all employers are eligible to participate, regardless of industry or type of workforce, with the exception of entities not pursuing primarily economic purposes, such as political parties and certain other public or quasi-governmental bodies.

Also, all types of employees are eligible for support, including chief executive officers and managerial personnel, apprentices and trainees and also parents returning from parental leave of absence, provided they are insured under the General Social Security Act (ASVG) and earn above the current marginal level of EUR460.66 per month.

Contractual arrangements and proceedings

The so-called "social partners", ie, the Chamber of Commerce as the quasi-governmental employer organisation, and the labour unions, play a decisive role in administering the short-time scheme. Introduction of short-time work requires employers to sign a model agreement drafted by the social partners, which is then counter-signed by the social partners and also those staff who are affected, whereby staff are represented by the works council, if such a representative body has been elected.

The model agreement provides for an initial term of short-time work of up to three months, starting (also retroactively) from 1 March 2020. An extension for another three months is possible.

During the term of the scheme and for a period of one month thereafter (retention period), employers are prohibited from terminating any employment relationship concerning the operational unit where short-time work has been introduced, regardless of whether all staff participate, unless terminations were prompted by the misconduct of employees, in which case the employer had to hire a replacement. Mutual terminations also require replacement hires, unless the employee was counselled by the Chamber of Employees or the union that a refusal to agree on a termination would hardly aggravate the employee's legal position.

Reduced work hours, subsidies and net replacement rate

Under the current model, employees must accept a reduction in work hours of between 10% and 90% compared to their previous working time.

The allowance paid by employer to compensate for the resulting shortfall in earnings is a flat rate that is staggered on the basis of the employee's salary level.

Employers therefore continue payment of salaries for work actually performed during reduced work hours and, in addition, pay a subsidy which depends on the employee's previous net salary/month, as follows:

- monthly gross salary of up to EUR1,700, salary + subsidy amount to 90% of previous net salary;
- monthly gross salary of up to EUR2,685, salary + subsidy amount to 85% of previous net salary;
- monthly gross salary of more than EUR2,685, salary + subsidy amount to 80% of previous net salary.

Salaries above EUR5,370 are not eligible for allowances.

The employer is refunded by the government for almost all of the subsidies paid to employees.

Continued Remuneration without Performance

Short-time work schemes are not the only legislative initiative that was introduced to mitigate the consequences of the COVID-19 crisis.

Employee quarantine

Based on the Act on Epidemics, employees quarantined by health authorities are entitled to continued remuneration by their employer, unless the need for a quarantine was prompted by negligent conduct on the part of employee, eg, infection with the virus due to travels in countries that were to be avoided under travel advisories by the Austrian government. If expressly decreed by authorities, the employer can then request reimbursement for remunerations paid during quarantine without the employee rendering any corresponding services.

Childcare in the case of sickness

A parent can apply for care leave of up to one week if their child suffers from COVID-19. Employers must afford continued pay during such a leave period, and if childcare takes more than one week, the parent can take annual leave without requesting approval from their employer, also triggering continued remuneration. Employers are not eligible for government subsidies under this scheme.

Business closures

The COVID-19 lockdown prompted closures of retail, gastronomic and tourist outlets. A pandemic-triggered lockdown would be classified as a *force majeure* incident by Austrian courts, which would therefore have avoided an obligation to continued pay on the part of employers. New legislation changed this long-standing view and now provides that employers carry the burden of continued pay, nonetheless. Employers can then request from their staff that all entitlements to paid leave accrued during previous holiday accrual periods, and also current entitlements of up to two weeks, must be used up, but not exceeding a total period of eight weeks.

Childcare due to school and pre-school closings

Once pre-schools and schools were closed for educational purposes, school children were taught remotely at home and required parental care. As a consequence, the Austrian government introduced a special care leave: an employer can agree with the parent that a care leave of up to three weeks can be taken if this is necessary to care for children not older than 14 years, or for near relatives in need of care. Employees have no entitlement to request this form of leave, but employers introducing the measure are entitled to a subsidy covering one third of the remuneration paid to employees during the care period.

2. Terms of Employment

2.1 Status of Employee

Blue-Collar/White-Collar

Employees are grouped into white-collar and blue-collar workers. According to the legal definition, white-collar workers are employees who are employed in the business of a merchant primarily for the performance of commercial or higher non-commercial services or for clerical work, for example, office staff and sales staff. Blue-collar workers are said to perform "manual" work of a kind that is less demanding of cognitive faculties, such as waiters, craftsmen, drivers, construction workers, and also soccer players. The distinction between white-collar and blue-collar workers has been considered anachronistic for a long time now, and, consequently, Austrian parliament has started a legal initiative to harmonise the legal entitlements of both groups. Most recently, adjustments that have been made concern continued remuneration during sick pay (2018) and harmonisation of notice periods (2021).

Freelance Service Contracts

A distinction is made between contracts of employment and freelance service contracts. Freelance contracts are not regulated by statute, except for their inclusion as personal service contracts subject to social security contributions. According to settled case law, a freelance service contract is of a more relaxed nature where discipline and oversight is concerned. The "free" employee renders personal services for a definite or indefinite period of time, but without being subjected to the same level of monitoring by the employer pertaining to working time and place of work. The freelance employee is also integrated into the client's business to a much lesser degree than a "real" employee and usually also has the right to have a replacement worker perform the services owed under the contract.

Mandatory employment legislation seeking to protect the "personally dependent" employee, such as provisions on notice periods (Employee Act), annual leave (Holiday Act), working time (Working Time Act; Act on Rest Periods) and challenge of dismissals (Labour Relations Act) does not apply: nor do collective bargaining agreements.

2.2 Contractual Relationship

With regard to contractual relationships covering personal services, a distinction is made between employment contracts, freelance contracts for services and contracts for work (see **2.1 Status of Employee**). The employment contract need not be in writing; oral or also tacit/implied employment contracts are legally valid. However, the employer must provide the employee with a written record of the essential rights and obligations arising from the employment contract (service note – *Dienstzettel*), summarising:

- the name and address of the employer;
- the name and address of the employee;
- the start of employment;
- the termination date if the employment is fixed-term;
- the notice terms;
- the general place of work, indication of alternating work place;
- the job grade;
- the job description;
- the remuneration or salary;
- the annual holiday entitlement;
- the hours of work;
- the applicable collective agreements;
- the name and address of the outside severance pay provider.

An employment contract can be concluded for a fixed term or for an indefinite period. Under settled case law, a succession of fixed-term employment contracts is only permissible if economic or social reasons so require. Without such an objective justification, consecutive short-term employments are deemed to be concluded for an indefinite period of time.

2.3 Working Hours

Working Hours and Rest Periods

Working hours are regulated in the Working Hours Act, the Working Hours Rest Act and collective-bargaining agreements. The daily standard working time is eight hours, the weekly working time is 40 hours (some collective-bargaining agreements provide for 38.5-hour work weeks). As soon as the normal working hours are exceeded, overtime is accrued, to be compensated with a statutory surcharge of 50%, or time off at a ratio of 1 to 1.5. Many collective-bargaining agreements provide for higher compensation, in particular for work on Sundays and public holidays, and also during night-time. "All in" or flat-rate compensation schemes for overtime worked are permissible, if the employee, on average, receives at least the minimum wage under applicable bargaining agreements. The statutory maximum daily work hours have been set at 12 hours and the weekly working time limit at 60 hours. Also, the average weekly working time must not exceed 48 hours during a period of consecutive 17 weeks.

Employees are entitled to the following rest periods:

- 30 minutes' rest (lunch break) if the total daily working time exceeds six hours;
- 11 hours' rest after the end of the daily working time;
- 36 hours of weekend rest, including the whole of Sunday, starting on Saturday at 1pm;
- 24 hours' rest on public holidays.

Part-Time Work and Flexitime

Part-time work is permissible and quite common. An employee is working part-time if the agreed weekly working time is, on average, less than the statutory normal working time. If part-time employees exceed the agreed working time, they are entitled to a statutory overtime bonus of 25%, or time off without a surcharge if this time off is granted within the three months following performance of the work.

In recent years, flexitime agreements have become increasingly popular, allowing employees to determine the start and end of their daily working hours within an agreed timeframe. Where established, a flexitime arrangement must be concluded with the works' council in written form (plant agreement).

2.4 Compensation

Collective-Bargaining Agreements

Minimum wages are not mandated by statute, but by collective-bargaining agreements, which cover approximately 99% of the Austrian work force. Recently, the social partners, who are the parties to collective-bargaining agreements, representing all employers and the entire work force of a specific trade or industry, have determined that minimum wages under collective-bargaining agreements must not fall below EUR1500 pre-tax per month (full-time).

13th and 14th Salary Instalments; Performance-Related Bonus; Stock Options

Special bonuses are also frequently agreed in collective-bargaining agreements, consisting of a 13th and 14th salary instalment, usually termed "holiday pay" and "Christmas bonus", taxed at only 6% and exempt from social security contributions.

It is also increasingly common to agree on performance-related bonus payments; there are generally no statutory restrictions.

Other forms of remuneration include commissions and employee stock options.

2.5 Other Terms of Employment

Holiday Entitlement and Pay

The statutory holiday entitlement is five weeks per year, increasing to six weeks after 25 years of service. During annual leave, the employee is entitled to continued pay. Taking leave requires an agreement between employer and employee, and, generally, neither has the right either unilaterally to take leave or instruct that leave be taken.

Maternity Leave

Expectant mothers are prohibited from performing any work eight weeks before the expected date of birth and eight weeks (12 weeks in the case of a Caesarian section) after giving birth. Instead of continued pay by their employees, female employees receive a weekly allowance (*Wochengeld*) from the social security provider. Mothers and fathers are entitled to share parental leave up until their child's second birthday, during which they are eligible to receive an allowance by the government.

Parental Part-Time Employment

If a parent has already been employed for at least three years with their employer (the two-year maternity leave does count against this period) who employs more than 20 staff, he or she is entitled to part-time work until the child's seventh birthday. The regular weekly working time must be reduced by at least 20%, but must not be less than twelve hours. If the employer has fewer than 20 staff, or if the parent has not completed three years of service, and in the absence of a contractual solution, the employee can go to court and seek to enforce a part-time model that suits their needs for child care.

Sick Leave

Employees are entitled to continued pay in the case of sickness or accident, payable by the employer, unless their lack of capacity to perform services had been caused intentionally or with gross negligence. An employee is entitled to full remuneration for six weeks per year of service, and as the length of service increases, so does the entitlement, resulting in continued pay of twelve weeks after 25 years of service.

Following the full pay-entitlement, the employee can additionally claim 50% of the salary for a period of four weeks.

Confidentiality

Confidentiality obligations apply to business and trade secrets which have become known to the employee during their professional activities. Under a theory of fiduciary duty, and in the absence of an express clause in the employment contract, employees are solely bound by secrecy obligations during the term of their employment relationship. It is possible and advisable, though, to agree on a far-reaching confidentiality obligation in the contract that also survives termination. Such confidentiality obligations are also outside the scope of the rules on post-termination non-competes and can therefore be concluded for periods exceeding one year. The breach of the duty of confidentiality constitutes a ground for dismissal.

In 2016, the EU issued a directive on the protection of trade secrets, which was transposed into Austrian national law through an amendment of the Act against Unfair Competition in 2018. The directive provides for a uniform definition of the term "trade secret", classifying it as information which is secret, has a commercial value because it is secret, and has been subject to reasonable steps by the employer to keep it secret. The measures for the protection of trade secrets are only applicable if the company has actively taken appropriate confidentiality measures to protect its information. It is thus essential to review existing employment contracts and samples to ensure they reflect the amendment of the Act against Unfair Competition.

Employee Liability

The Employee Liability Act modifies general tort law and principles under the Austrian Civil Code in that employees' liability in relation to their employers can be reduced to zero if damage was caused with only a lesser degree of fault. The liability is graded according to the degree of negligence on the part of the employee: in the case of an "excusable misconduct" (the slightest form of negligence), the employee is exempt from any obligation to pay compensation; in the case of slight negligence, the court may, for reasons of equity, exclude liability in part or in its entirety; and even in a case of gross negligence, the court may decide that compensation to the employer should be reduced in part (although not entirely).

If the employee inflicts damage on a third party while performing services (eg, a customer), and the employee holds the third party to be harmless following a claim supporting compensation, the employee has a right of recourse against his or her employer if damage was caused with only a lesser degree of fault.

3. Restrictive Covenants

3.1 Non-competition Clauses

Statutory Non-compete during Employment

White-collar workers must neither operate an independent commercial enterprise during their employment without the employer's approval nor conduct commercial transactions in the employer's branch of business on their own or a third party's account. A violation of this statutory prohibition of competi-

tion during the term (Sec. 7 of the Employee Act) is a ground for dismissal.

Non-compete Post Termination
Restrictive covenants pertaining to post-termination periods are also permissible, following some statutory restrictions (Secs 36 et seqq. of the Employee Act).

A post-termination non-compete, within the purview of those statutory restrictions, is defined as an agreement that limits the employee's freedom to pursue his or her occupation for the period after the termination of employment. The restrictions on post-termination activities (employed, self-employed or otherwise) may relate to a specific group of customers (customer-protection clause), a specific industry, or also locally to a specific territory.

A non-competition clause is null and void if the employee is a minor at the time the non-competition clause is concluded, or if the employee's remuneration in the last month of their employment does not exceed an amount equalling 20 times the daily maximum contribution basis under the General Law on Social Security (currently: EUR3,580.00 per month). Moreover, non-competition clauses are only effective to the extent that the restriction relates to the activity in the employer's line of business, does not exceed a period of one year and does not render the employee's professional advancement unreasonably burdensome. A post-termination non-compete is also not enforceable if the employer gave notice without cause, or if the employee had terminated the employment relationship with cause (eg, breach of contract by the employer). Non-compliance with statutory restrictions pertaining to the scope of the non-compete (territory; activity) does not render the entire provision invalid, but only the part exceeding the statutory limits. The question of validity must be considered on the basis of equity considerations.

Compensation Payments for Specific Performance
Generally, enforceability of non-competes does not require payment of compensation by the employer, unless the employer gave notice (without cause) and still wishes to enforce the clause. In such a case, the employer had expressly to state, together with the notice letter, that they wish to invoke their statutory right to enforce the non-compete clause and offer continued pay during the restrictive period (one year maximum).

Remedies in the Case of Breach
If an employee violates a competition clause, the employer has the following options:

- to file for damages, which is difficult to prove and is the least advisable avenue to pursue;
- to request specific performance and seek injunctive relief, which is the most likely and advisable route; or
- to collect a contractual penalty if such a penalty had been agreed in advance. Contractual penalties are, however, also not advisable. In the case of breach, (i) the employer is then restricted from suing for specific performance, (ii) contractual penalties are capped at six times the employee's net salary, and (iii) under more recent case law by the Austrian supreme court, a new, competing employer could agree to hold the breaching employee harmless by offering a signing on-bonus equalling the contractual penalty.

3.2 Non-solicitation Clauses – Enforceability/ Standards

Customer and Supplier Protection
A customer- or client-protection clause prohibiting an employee from entering into business relations with customers of the employer post termination are also deemed competition clauses and such a clause is therefore also subject to the statutory restrictions delineated under **3.1 Non-competition Clauses**. Supplier-protection clauses prohibiting the employee from entering into business contacts or maintaining business relations with the employer's suppliers post termination are also subject to those restrictions.

Non-solicitation/Non-poaching Clauses
Clauses seeking to avoid solicitation of (former) co-workers by the employee are viewed differently. Such clauses prohibit the employee from enticing away employees of their common (former) employer but need not pertain to a specific competing activity following termination of employment. The restrictions on competition clauses are not applicable so the agreement of a contractual penalty does not exclude specific performance and contractual penalties are also not capped. However, the judicial right of moderation is applicable.

4. Data Privacy Law

4.1 General Overview

Principles and Legal Sources
The protection of employee data is covered under a combination of tightly interwoven legal sources, namely employment contract law, statutes governing labour relations and, of course, data protection law. The EU's General Data Protection Regulation (GDPR) is directly applicable in Austria, and the Austrian Data Protection Act additionally covers certain specifics of the Austrian legal landscape.

When handling the personal data of their employees, employers (as data controllers) must comply with the principles of the GDPR, including:

- the existence of a legal basis for data processing;
- secure storage of employee data;
- limitation of data to what is necessary for the purposes of the processing;
- personal data must be accurate and, where necessary, kept up to date;
- transparent processing.

The processing of personal data is only lawful if one of the following conditions is met:

- the data subject has given his or her consent to the processing of personal data;
- the processing is necessary for the execution of the employment contract;
- the processing is necessary for compliance with a legal obligation to which the data controller is subject;
- the processing is necessary in order to protect the legitimate interests of the data controller or a third party, except where such interests are outbalanced by the interests or fundamental rights and freedoms of the data subject.

Sensitive Data
The processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership is particularly sensitive, as is the processing of genetic data, biometric data, health data or data concerning a person's sex life or sexual orientation. The processing of sensitive data is generally prohibited by the GDPR, unless one of the exceptions listed exhaustively in the regulation is applicable.

Under the GDPR, the employee has certain rights that they can enforce against the employer. The employer must provide the employee with all information on data processing in a comprehensible and transparent form, free of charge and without delay. The employee has the right to obtain information on the origin of the data, the recipients, the purposes of processing, the legal basis and the storage period. If the data were processed incorrectly, the employee has a right to rectification. Furthermore, the employee has the right to request deletion if the data have been processed unlawfully, if there is no legal basis, if the data are no longer needed, or if the employee withdraws his or her consent to the processing of their data.

Under the terms of the Data Protection Act, employees must keep confidential any data that has been entrusted to them or has become accessible to them as a result of their employment.

5. Foreign Workers

5.1 Limitations on the Use of Foreign Workers

Free Access to Labour Market
In accordance with the principle of free movement of labour, employees from the European Economic Area (EEA) do not require special permits to work in Austria. Since 30 June 2020, the transitional provisions for Croatian citizens restricting access to the labour market have expired. Foreigners who are not citizens of an EEA member state who have the residence titles "family member" or "permanent resident EU" also have free access to the Austrian labour market.

Red-White-Red Card
Foreigners who are not citizens of an EEA member state may apply for a Red-White-Red Card (RWR Card), if they meet certain criteria. Applicants must be part of one of the following particular occupational groups:

- highly qualified employees;
- employees working in shortage occupations;
- self-employed key personnel;
- other key personnel;
- graduates of an Austrian university;
- start-up founders.

The application for the RWR Card is either submitted to the competent Austrian representative authority abroad (embassy or certain consulates) or, under certain legal conditions, to the competent authority in Austria. The authority is responsible for issuing the residence permit. It forwards the application to the competent regional office of the Austrian Labour Market Service (AMS), which decides whether the requirements for the granting of an RWR Card have been met. These include the general requirements for granting residence permits (secure livelihood, health insurance, accommodation) and, additionally, the following special requirements:

- the achievement of a minimum score (based on a defined skill set) mandated under the Act Governing the Employment of Foreign Nationals;
- a secure job with a minimum gross salary set by the Act Governing the Employment of Foreign Nationals;
- for the vacant position to be filled, there is neither a national nor a foreigner available on the labour market who is willing and able to perform the employment applied for (labour market assessment).

Achievement of the minimum score depends on criteria laid down by law, including education, professional experience, age and language skills. After the AMS has carried out the labour market assessment, the application is returned to the settlement

authority, which finally issues the combined residence and work permit. The RWR Card is employer-bound and is issued for a limited period of two years.

Blue Card EU
Particularly highly qualified academics from non-EEA states can apply for a Blue Card EU. Applicants must fulfil the general requirements for the granting of residence permits. In addition, the following requirements must be met:

- completion of a college degree or similar (study time at least three years);
- a binding job offer for a highly qualified employment for at least one year;
- a gross annual salary corresponding to 150% of the average Austrian gross annual salary (2020: EUR63,672).

In contrast to the RWR card, there is no minimum score required for the Blue Card EU. However, the mandatory minimum salary is higher. The residence and employment law procedure is the same as for the RWR Card, and the Blue Card EU is also employer-bound. The Blue Card EU is issued for a limited period of two years.

Red-White-Red Card Plus
The RWR Card Plus entitles foreigners who are not citizens of an EEA member state to settle and work for a limited period of time in any part of Austria, in other words, it is not employer-bound. The RWR Card Plus can be obtained if the applicant has already held an RWR Card or a Blue Card EU for two years and has been employed for 21 months within the last two years. Family members of employees with a valid RWR Card or Blue Card EU can also apply for an RWR Card Plus. The RWR Card Plus is issued for a maximum period of three years, with the possibility of renewal.

Work Permit
A normal work permit is issued to the employer and entitles them to employ the foreign worker concerned in a specified workplace. In order to apply for a work permit, the applicant/employee must already have obtained a valid residence or settlement permit. Work permits are particularly relevant for students, seasonal workers and harvest workers (all others usually apply for either a RWR Card or Blue Card EU). The procedure is conducted at the regional office of the AMS. The work permit is issued for a limited period of one year and can be extended by one year at a time.

Posting Permit
For foreigners who are employed in Austria for less than six months by a foreign employer without a permanent establishment in Austria, a posting permit issued for a maximum of four months is sufficient.

Intra-corporate Transferees (ICT)
This permit is aimed at key personnel from non-EEA states (executives and professionals) who are being transferred within the company to an Austrian branch of a foreign company.

5.2 Registration Requirements
Apart from general registration requirements such as notification requirements or registration with social security, there are no particular registration requirements for foreign workers.

6. Collective Relations

6.1 Status/Role of Unions
Organisation
The Austrian Trade Union Federation (ÖGB) with its specialist labour unions is the only Austrian organisation representing the interests of employees based on voluntary membership. Not only employed personnel, but also unemployed and retired people are represented. The tasks of the ÖGB are to promote trade union action to bring about favourable employment relations, not only by concluding collective agreements with the competent employer organisation (Chamber of Commerce), but also by participating in the law-making process through legal opinions and negotiations with their employer-counterpart. Other tasks include providing free legal protection for their members and fostering the education and training of employees.

The Federation of Trade Unions is divided into seven specialist labour unions, including the Union of Private Employees, the Union of Public Employees, the Union of Production Workers and the Union of Transport and Services.

Employees who wish to join a trade union are protected by the constitutionally guaranteed freedom of association. If employees are dismissed because of their membership in a trade union, they can challenge such an unfair dismissal in court.

Membership
Union membership has been decreasing constantly since the 1980s, when approximately 60% of the Austrian work force was unionised (today, only approximately 32% of the workforce are union members). This is in large part due to the increased degree of how labour and the workforce are organised (eg, the increase in part-time employment), since the total number of members has only decreased from approximately 1.7 million to 1.2 million over the same period. Unions, however, are very much ingrained in the Austrian employment landscape and still have considerable political clout.

6.2 Employee Representative Bodies

General

The Labour Relations Act provides for the establishment of a works council in companies with at least five full-time employees with permanent employment. However, in practice, only larger employers with 50 staff or more have an elected works council and no sanctions are imposed on either staff or employer where the work force fails to hold elections. The works council under the Labour Relations Act is the only representative body on the company level acknowledged by law and authorised to represent staff in connection with certain tasks that are exhaustively enumerated in both the Act and applicable collective-bargaining agreements.

Organisational Principles

Depending on the size and type of the workforce, there must be separate works councils for white-collar and blue-collar workers, a general meeting, a central works council, a group representative body and, under certain legal premises, a European works council. The number of works council members is dependent on the number of employees. The works council will consist of:

- one member in operations with fewer than ten employees;
- two members in operations with ten to 19 employees;
- three members in operations with 20 to 50 employees;
- four members in operations with 51 to 100 employees;
- one additional member for each 100 additional employees; or
- in organisational units with more than 1,000 employees, one additional member for every 400 employees.

The works council represents the entire workforce, irrespective of union affiliation or membership of individual workers/employees. Members of the works council need not also be trade union members. The works council election mirrors the general election principles that also apply with respect to parliamentary elections (equal and direct vote, secret ballot, proportional representation). The period of office of the works council is five years, and re-election is possible.

The employer must provide the works council with equipment necessary to fulfil its statutory tasks (eg, separate office space within the employer's premises; office equipment). The employer and works council must consult quarterly, and the works council must convene at least once per month.

Special Rights/Protections of Works Council Members

Works council members are not bound by instructions when carrying out their duties, must not be disadvantaged or privileged and are bound by confidentiality obligations. Members of the works council enjoy special protection against dismissal/termination. They may only be dismissed for reasons specified by law (in essence: material breach of contract, criminal conviction), and the prior consent of the labour court (see **7.5 Protected Employees**).

Employee rights, voiced through the works council, include the right to information, disclosure, monitoring, consultation, objection and approval. The employer and the works council can conclude plant agreements, so that some measures that the employer wishes to introduce can be vetoed by the works council, while others can be coerced by either the employer or works council upon the other side before a special panel set up at the labour court in the event of a refusal to consent to a measure. Other types of plant agreements are voluntary and cannot be vetoed or enforced by either party through legal means. Plant agreements that require the approval of the works council and can effectively be vetoed include the introduction of control measures that affect human dignity, such as surveillance cameras. Enforceable plant agreements include, for example, the introduction of systems for the automated transmission of employees' personal data, introduction of disciplinary measures, regulations or the setting of working hours and social plans. Voluntary plant agreements include introduction of bonus and pension systems.

In addition, the works council has rights of participation in the hiring, transfer and promotion of employees and must be informed about terminations/dismissals (see also **7.1 Grounds for Termination**). The works council must also be represented on a supervisory board of employer; one employee representative must be appointed to the Supervisory Board for every two shareholder representatives.

Transfer of Undertaking

Furthermore, the works council has participation rights in the event of a transfer of business (eg, restriction, relocation or closure of the entire business, mass dismissals, introduction of new working methods). It has to be informed about the planned changes in operations and can make suggestions to mitigate any detrimental consequences for the workforce resulting from the transfer of undertakings. If a transfer of business prompts substantial hardship for a significant part of the workforce, the works council can enforce the conclusion of a social plan.

6.3 Collective Bargaining Agreements

Parties/Mechanism

The most important mechanism of collective labour law in Austria is the collective-bargaining agreement. In general, it is concluded by the competent branch of the Chamber of Commerce and the Austrian Trade Union Federation or its separate labour unions.

Collective bargaining agreements are not concluded on the company level, but for entire trades and industries. For instance, there is one collective-bargaining agreement for all of Austria's metal workers, regardless of who their employer is, if their employer is a member of the competent branch of the Chamber of Commerce (membership is mandatory for all employers conducting a trade or industry, and their affiliation with a specific branch is determined by the type and scope of their business licence).

99% of all workers (both white- and blue-collar) are covered under one or more of the several hundred collective-bargaining agreements currently in place across various trades and industries. It is possible, however, to conclude company collective agreements, but this rarely happens and mostly concerns very large employers (eg, the national Austrian carrier "Austrian Airlines").

Normative Effect
A collective bargaining agreement is not only a contract between the parties but also has a normative effect in that its provisions are not only binding on the parties to the agreement, but in particular also on their associated members (employers and employees of the respective sector).

While on the employer side, membership with a professional association of the Chamber of Commerce determines the application of a particular collective bargaining agreement, it is not a legal requirement for employees to be a member of the trade union acting on their behalf for the collective-bargaining agreement to become legally binding. Once an employer is bound by its terms, all of his or her employees are also defined under the personal scope of the agreement. Rights and obligations under a collective bargaining agreement thus apply, regardless of a unionisation of the work force.

Subject Matter/Termination
Collective bargaining agreements must not run counter to statutory law in that the terms of any such agreement can only be more beneficial than statutory regulations, otherwise the respective provision in the collective-bargaining agreement would not be enforceable.

Collective bargaining agreements set forth rights and obligations of employers and employees on such diverse issues as minimum wages, working hours, vacation, notice terms and introduction of pension schemes. The current minimum wage under any collective-bargaining agreement is at least EUR1,500 (pre-tax), and many agreements provide for a reduction of weekly work hours from 40 hours to 38.5 hours.

Collective agreements can be concluded for a limited or unlimited period of time. Signed for an unlimited period, they can be terminated not earlier than after one year.

7. Termination of Employment

7.1 Grounds for Termination

General
Subject to contractual or statutory default notice terms, the employer can generally terminate the employment relationship without stating a reason or motivation. This is also true with respect to a summary dismissal. The dismissal (oral or written) itself need not state the reason for the employer's decision. Only if the employee then seeks to challenge his or her termination/dismissal before a court must the employer show sufficient cause.

Pre-notice Proceedings (Works Council Involvement)
The Labour Relations Act requires employers to notify the works council (where elected) of any intended ordinary termination at least one week before notice is given. In the case of a summary dismissal for cause, which is always given with immediate effect, no such restrictions apply, but the employer must notify the works council that a summary dismissal has occurred.

Following receipt of information of the ordinary termination of a specific employee intended by the employer, the works council has one week to state its position on the measure. A notice of termination given by the employer before this one-week period has lapsed is legally void. The works council has three options:

- it can expressly consent to the termination of the employee, in which case the employee is barred from challenging his or her dismissal before a court on grounds that the termination lacks social justification (general protections against termination/dismissal). The employee can, however, still challenge on other grounds (unfair dismissal, discrimination claim; see also **8.1 Wrongful Dismissal Claims**);
- it can expressly oppose the termination, in which case the works council can also challenge the termination on social grounds on behalf of the employee (or the employee also can, on any other ground); and
- it can refrain from commenting on the termination, ie, remain silent, in which case the employee has all the legal remedies to himself or herself, including the general protection against dismissal/termination which is commonly used by plaintiffs to invoke a lack of social balance and undue social hardship prompted by the redundancy.

Statutory provisions on the special protection against dismissals/terminations must be observed (see **7.5 Protected Employees**).

In the absence of a works council, employees can challenge a termination on the same grounds within two weeks following receipt of the respective notice.

Early Warning System
Redundancy measures exceeding certain thresholds require compliance with specific procedures and notifications under labour-market legislation.

7.2 Notice Periods/Severance

Notice Periods
The statutory default rules on notice terms provide for staggered notice periods depending on years of service (some collective-bargaining agreements mandate that previous years of service with other employees must be taken into account for purposes of this calculation):

- minimum notice period of six weeks, increasing to;
- two months after two years of service;
- three months after five years of service;
- four months after 15 years of service; and
- five months after 25 service years.

The statutory notice periods are minimum periods. Collective-bargaining agreements and individual employment contracts can therefore only provide for longer notice periods.

Also, notice can only be given as of certain dates. The statutory notice date is the end of a calendar quarter, but employment contracts can provide for notice dates ending as of the end of a month and also on the 15th day of a calendar month.

Payment in Lieu of Notice; Compensation Payment; Writing Requirement
If an employer does not comply with the contractual or statutory notice terms when giving ordinary notice, or if the employee is summarily dismissed without cause, the employee is entitled to a compensation payment which puts them in the same financial position they would have been in had the employer correctly given notice under applicable notice terms.

Alternatively, the employee can challenge the termination/dismissal and move for reinstatement of employment (see **7.1 Grounds For Termination**).

Neither an ordinary notice nor a summary dismissal must be in writing, although this is advisable for evidentiary purposes, and for some collective-bargaining agreements; however, individual employment contracts often contain a clause requiring a termination notice to be made in writing.

Severance Pay (Old Scheme)
Upon termination of employment, the employee can be entitled to severance pay, depending on the applicable severance scheme.

The "old" severance pay scheme's personal scope covers employment relationships that commenced before 1 January 2003 (and that have since been abolished), and that have lasted for at least three years. The severance is calculated as a multiple of the remuneration payable to the employee before termination, as follows:

- two monthly salaries, increasing to;
- three monthly salaries after five years of service;
- four monthly salaries after ten years of service;
- six monthly salaries after 15 years of service;
- nine monthly salaries after 20 years of service; and
- 12 monthly remunerations (ie, annual income) after 25 years of service.

Employees forfeit their claim to receive the "old" severance pay from their employer if they themselves resign or terminate without cause, or if they are summarily dismissed for cause. This system was conflicting with job mobility, because, often, employees only stayed on with their employer so as not to forfeit their severance pay entitlements and, instead, hoped for their employer to instigate a termination. The "old" system was funded and paid for by employers.

Severance Pay (New Scheme)
The "new" severance pay scheme in place for all employment relationships which commenced after 31 December 2002 requires employers to pay monthly contributions amounting to 1.53% of the pre-tax salary to an outside severance fund provider (special-purpose affiliates of insurers and banks) who then also manages and invests funds received from employers. The employee is entitled to the "new" severance pay regardless of how the employment relationship ended, although summary dismissals, resignations by employee and terminations before three years of service have lapsed trigger waiting periods. In any event, however, employees can "piggy-back" their entitlements regardless of how the employment relationship ended and all entitlements will vest, but only once the employee retires.

7.3 Dismissal for (Serious) Cause (Summary Dismissal)

Grounds for Summary Dismissal
Employees may be dismissed with immediate effect for cause, including the following reasons:

- severe breach of fiduciary duties;
- incapacity to perform the agreed services;
- violation of restrictive covenants;
- acting against the employer's instructions; or
- material misconduct against employer or co-workers.

Procedure and Formalities
A summary dismissal need not be made in writing; oral communication, email or text/social media message will suffice.

Where staff have elected a works council, the employer must inform the works council immediately of any summary dismissal and, upon request, consult with the works council. The works council need only be informed after the dismissal.

The proceedings delineated under **7.1 Grounds For Termination** apply accordingly.

If the dismissal lacks sufficient grounds, the employee can opt either to claim money damages (compensation claim), or to challenge the dismissal in court, moving for reinstatement of employment.

7.4 Termination Agreements
Termination agreements are permissible and, in general, no specific procedures or formalities must be observed.

Exceptions to this rule apply where the staff have elected a works council. An employee can request to be counselled by the works council on the consequences of such a move, and within two days following his or her request, a termination agreement cannot be validly concluded.

Another exception concerns employees on maternity or paternity leave and apprentices. Termination agreements with parents on leave must be made in writing. If the parent is a minor, the agreement must also include a written certification that the employee has been counselled by the labour court or the Chamber of Employees on his or her rights and on the special protection against dismissal while on leave. In the case of apprentices, identical legal requirements apply.

7.5 Protected Employees
The following categories of employees enjoy special statutory protection against dismissal:

- pregnant women;
- parents on maternity or paternity leave;
- members of the works council;
- apprentices;
- disabled employees; and
- employees on military draft.

Protected employees may only be dismissed if there is a statutory reason for dismissal and the labour court or, in the case of the disabled, the Disability Committee (a specialist panel established at the ministry of social affairs) has given its prior consent. Without this consent, the dismissal/termination is legally void and the affected employee can opt either to challenge the dismissal and request reinstatement, or to accept the illicit termination and claim damages for wrongful dismissal.

8. Employment Disputes

8.1 Wrongful Dismissal Claims
Dismissals can be challenged before a court either if socially unfair or if premised on an inadmissible motivation (see also **9.1 Judicial Procedures**). If successful, the court challenge results in a reinstatement of the employment relationship and backpay of all income the employee would have received without the dismissal. Losing such a court battle can therefore be rather costly for employers, and often, such cases are settled in or out of court.

Lack of Social Fairness (Operational Reasons)
The assessment of social unfairness is carried out in a three-step test. Firstly, the employee must show that, because of the dismissal, their economic interests are significantly impaired and that they are put at a disadvantage far worse than should be expected from a dismissal process. The court then assesses the entire economic circumstances of the employee, such as total family income and assets, caring responsibilities, costs of living and, most importantly, the court will appoint an expert who can testify as to whether the employee's chances of finding other gainful employment within a reasonable time period are intact. Secondly, in defence of such a showing by the employee, the employer can argue that there are personal or operational reasons justifying the dismissal, nonetheless. Such operational reasons for dismissal include a decline in orders/business (eg, due to the coronavirus pandemic), outsourcing of operational units and other restructuring measures. The business judgement of the employer will not be put into question, but the employer must show that the dismissal serves a viable business purpose. In a last step, and only if the employee and the employer could each meet their burden of proof, the court will then weigh against each other the conflicting interests involved and conclude whether the employee is harder hit by the dismissal or the employer by a reinstatement of the employee.

Lack of Social Fairness (Personal Reasons)
Instead of operational or business-related reasons, the employer can also raise a defence that seeks to justify the dismissal through a misconduct on the part of the employee. Any such misconduct must be serious to warrant a dismissal if the employee was suc-

cessful in showing that his or her interests have been materially impaired through the dismissal.

Inadmissible Motivation
A dismissal is also not warranted if the motivation behind it is rooted in the employee's:

- union membership;
- instigation or administration of works council elections;
- activities as safety officer or occupational physician;
- military draft; or
- assertion of claims pertaining to the employment relationship.

8.2 Anti-discrimination Issues

General
The Equal Protection Act provides for equal treatment in connection with the employment relationship. Any discrimination based on gender, ethnicity, religion or belief, age or sexual orientation is prohibited. Employees with a disability are protected under the Disabled Persons in Employment Act. The prohibition of discrimination applies to the conclusion and termination of employment relationships, the determination of remuneration, career advancement and other working conditions. This includes both direct discrimination, which is based directly on the protected characteristic, and indirect discrimination, where a seemingly neutral differentiation is meant to justify an act of discrimination.

Harassment
Harassment is a separate discrimination issue. Sexual harassment is any unwanted or offensive conduct that violates the dignity of the person concerned and creates an intimidating environment. The harassment may originate from the employer or a co-worker. The employer also discriminates if, in the case of harassment by third parties, he or she fails to take appropriate remedial action.

Burden of Proof
In the case of discrimination, the burden of proof has been relaxed. An employee claiming discrimination only has to show credible evidence but need not prove beyond doubt that a discrimination occurred. It is then up to the defendant to show that, when weighing all circumstances, it is more likely that a motivation other than the evidence shown by plaintiff was the reason for the unequal treatment.

Relief
Depending on the facts of the case, the discriminated employee may be entitled to injunctive relief, specific performance (eg, promotion) or damages. In the case of harassment, the employee is entitled to reasonable compensation from the employer who has violated the obligation to remedy the situation (minimum EUR1000).

9. Dispute Resolution

9.1 Judicial Procedures

Labour Courts
Jurisdiction in employment matters is exercised by the courts in senates composed of judges and expert lay judges. The lay judges are representing the circle of employers and employees (elected by employer and employee representatives). The regional courts act as competent labour and social courts in the first instance (in Vienna, an independent "Labour and Social Court" is established as the court of first instance at regional level). Rulings are adopted by a three-member senate, consisting of one professional judge as chairman, and one expert lay judge each from the circle of employers and employees. An appeal against a judgment of the regional court may be filed with the competent court of appeals within four weeks. The court of appeals also decides in special senates (three judges, two lay judges). An appeal against the decision of the court of appeals can be filed with the Austrian supreme court, if the judgment depends on legal questions of general importance (ie, questions that are not only relevant for the individual case, but may serve as a precedent for similar cases).

Attorneys/Qualified Representatives
In employment-related disputes, the parties need not be represented by a lawyer in the first instance. They may conduct the proceedings themselves, or be represented by a lawyer, another "Qualified Representative" (eg, functionaries of statutory representative organisations, such as the Chamber of Employees and the labour union), or other representatives enumerated in an applicable statute (eg, members of the works council). In the second instance, representation must be by a Qualified Representative, and at the Supreme Court, representation by a lawyer is mandatory.

Class Action
There are two types of special declaratory proceedings in employment-related matters that are comparable to class actions (but rarely used in practice): the works council or the employer may file a declaratory action regarding the existence or non-existence of rights or legal relationships that affect at least three employees of the respective company. Alternatively, any employee or employer of the representative organisation with the competence to negotiate collective bargaining agreements (Chamber of Commerce, labour union) may file a declaratory action with the Austrian Supreme Court regarding the existence or non-existence of rights or legal relationships affecting at least three employers or employees.

9.2 Alternative Dispute Resolution

Arbitration

Arbitration agreements are invalid and unenforceable in disputes on matters governed by the Labour Relations Act (including wrongful dismissal claims based on social unfairness/inadmissible motivation; see also **8.1 Wrongful Dismissal Claims**). In other labour-related matters, an arbitration agreement may validly be concluded only in respect of legal disputes that have already occurred, but not in relation to potential future disputes (with the exception of arbitration agreements that are concluded with managing directors/management board members, who are not classified as "employees" in the legal sense). Arbitral awards may be submitted to judicial review by a regular court.

Other Dispute Resolution

The parties to an employment contract may validly agree on conciliation clauses stipulating the dispute to be referred to a conciliation body (not an arbitration tribunal) before the regular court is called upon.

Disputes between employer and employee representative organisations concerning the conclusion or amendment of a collective bargaining agreement can be brought before the Federal Settlement Office (*Bundeseinigungsamt*), which initiates settlement proceedings.

Disputes related to the conclusion, amendment or cancellation of plant agreements between the employer and the works council may be brought before an ad hoc conciliation committee (*Schlichtungsstelle*) established upon request of a party to the plant agreement with the competent labour court (eg, on the terms of a social plan). An appeal against the decision of the conciliation committee can be lodged with the Federal Administrative Court.

9.3 Awarding Attorney's Fees

General

In general, the prevailing party in judicial proceedings is awarded attorney's fees incurred, which have then to be reimbursed by the other party (the amount of fees to be reimbursed is governed by statute, depending on the amount at issue and the type of procedural act, eg, court hearing, written submission, etc). If functionaries of statutory interest groups or voluntary professional associations have intervened as Qualified Representatives for the prevailing party, applicable statute provides for a flat-rate reimbursement of expenses.

Special Disputes

In disputes related to matters under the Labour Relations Act (in particular, wrongful dismissal claims based on social unfairness/inadmissible motive), the prevailing party is not entitled to reimbursement of attorney's fees, ie, each party has to bear its own representative costs, irrespective of the proceedings' outcome (with the exception of attorney's fees incurred in proceedings before the Supreme Court).

Graf & Pitkowitz Rechtsanwälte GmbH was founded in 1994 and is a leading independent Austrian commercial law firm with offices in Vienna and Graz. As a full-service firm, Graf & Pitkowitz advises in all fields of Austrian and European business law, with a broad domestic and foreign client base from all sectors of industry. The firm's key areas are international arbitration, insolvency, corporate and banking, and real estate law. Quality and the highest-level legal standards take top priority in the firm's consulting work. Graf & Pitkowitz is comprised of 35 qualified lawyers, including eight partners; most are recognised experts in their field and have years of international experience. The firm is internationally known for its hard-work approach and efficient and creative way of handling complex cases in a solution-oriented manner. The firm co-operates with international leading law firms across the globe on a best-friends basis without exclusivity.

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Jakob Widner heads the firm's employment practice group – he has outstanding expertise, having advised extensively in this area for years. His practice includes the conclusion and termination of relevant employment contracts (including top-management contracts), advice on employment law in connection with corporate transactions and reorganisations (works council matters and collective bargaining, social plans, business transfer), employment-related compliance and data protection, occupational pension schemes and employment litigation. Another focus of Jakob's work is life sciences – in particular, advising on distribution and research and development contracts, including regulatory requirements and compliance. Jakob Widner studied law at the University of Vienna and at New York University School of Law. He is admitted to practise in Austria and the State of New York. He is the author of numerous legal articles and a contributor to the ILO (International Law Office) newsletter for Austrian updates on employment law.

Axel Guttmann is specialised in employment law; he advises and represents clients in all areas of individual and collective employment law. The focus of his practice is advice on the conclusion, performance and termination of relevant employment contracts (including service contracts and executive agreements with top-level executives), the ongoing day-to-day consultation on employment matters and employment-related advice in corporate reorganisations. Another core strength area of his work is employment litigation – he advises and represents clients in all procedures before the Austrian Employment and Social Court. Furthermore, Axel has extensive expertise in the area of laws governing the medical profession and in construction contracts disputes/litigation. He speaks German, French and English.

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