The Employment Law Review

Fifth Edition

Editor
Erika C Collins

Law Business Research

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EDITOR'S PREFACE

It is hard to believe that we have now published the fifth edition of *The Employment Law Review*. When we published the first edition of this book five years ago, I noted my belief that a book of this sort was long overdue given the importance to multinational corporations of understanding and complying with the laws of the various jurisdictions in which they operate. It has given me great pleasure to see the past editions of this book used over the last several years for just this purpose – as a tool to aid practitioners and human resources professionals in identifying issues that may present challenges to their clients and companies. The various editions of this book have highlighted changes in the laws of many jurisdictions over the past few years, making even clearer the need for a consolidated and up-to-date reference guide of this sort.

My practice in 2013 included a notable uptick in M&A activity – a welcome development after several relatively flat years in this area following the financial crisis. For this reason, we've opted to include once again a general-interest chapter in this book on addressing employment issues in cross-border mergers and acquisitions. It is our hope that this chapter, along with the relevant country-specific chapters, will aid practitioners and human resources professionals in conducting due diligence and providing other employment-related support in connection with cross-border M&A deals.

This year I have also experienced an increasing number of clients considering or revising their company's social media and mobile device management policies, and have noted a particular increase in the number of organisations that are moving toward 'bring your own device' programmes. One of the general-interest chapters in this edition addresses issues for consideration by multinational employers in rolling out policies of this sort. This issue is particularly timely as more and more jurisdictions pass or are beginning to consider privacy legislation that places significant restrictions on the processing of employee personal data.

Finally, the third general-interest chapter addresses diversity initiatives (both legislative and corporate), as this issue continues to be a hot topic for global employers.

In addition to these three general-interest chapters, the fifth edition of *The Employment Law Review* includes 50 country-specific chapters. This edition has once again

been the product of excellent collaboration. I wish to thank our publisher, particularly Katherine Jablonowska, Adam Myers, Gideon Roberton and Eve Ryle-Hodges, for their hard work and continued support. I also wish to thank all of our contributors, as well as my associate, Michelle Gyves, for their efforts to bring this edition to fruition.

Erika C Collins
Proskauer Rose LLP
New York
February 2014

Chapter 5

AUSTRIA

Jakob Widner[1]

I INTRODUCTION

The legal framework covering employment in Austria is multi-layered. Austrian employment legislation comprises numerous individual statutes, each of which governs specific aspects of the employment relationship (e.g., working hours, annual leave, protection of working mothers, employment of foreigners). In addition, certain types of staff are subject to different legal regulations. Special statutes regulate the employment relationships of certain groups (e.g., journalists, construction workers, actors, agricultural workers) and also cover specific activities by those various groups of employees (e.g., working hours). The legal status of the employer may also trigger legal distinctions on the employee level. There are, for example, special statutes for civil servants (federal, provincial and local government employees) and for employees of certain foundations, institutions and funds. Austrian law also differentiates between blue-collar employees and white-collar employees, a distinction that is widely considered outdated and is expected to be abolished in the near future. The main statutes are as follows.

i The Employment Act

This statute regulates the contractual side of white-collar employment. Its provisions are mostly mandatory and govern employment relationships unless otherwise agreed between the contracting parties. Under a doctrine of pre-emption, contractual terms must not run counter to most of the terms of this Act. The scope of the Act thus results in most of its terms being implied by law. The Employment Act regulates the most crucial aspects of an employment relationship, including restrictive covenants and non-compete clauses during and after employment, various kinds of paid leave (sick leave, holiday allowance), entitlement to commission payments and other regular benefits,

1 Jakob Widner is a partner at Graf & Pitkowitz Rechtsanwälte GmbH.

notice provisions and grounds for dismissal, severance pay provisions and regulations on how to word letters of referral.

ii The Labour Relations Act

This highly important statute (enacted in the mid-1970s) regulates the collective side of employment and covers such diverse issues as:

a collective bargaining at the industry level[2] and at the plant level;[3]

b in-depth regulations concerning the election and tenure of employee representatives elected to the works council and board;

c detailed regulation of works council rights in social, personal and business matters (co-determination and participation rights); and

d provisions governing the (partly) mandatory conclusion of plant agreements with the works council (e.g., 'social plans' as a measure to mitigate the detrimental consequences of mass redundancies and lay-offs in the wake of restructurings).

iii The Contract Law Adjustment Act

This Act regulates employment aspects of business transfers and provides for a mandatory transfer of employment relationships to the acquirer (with benefits and accrued 'seniority'). This statute also makes it compulsory for employers to provide employees with a written statement of employment terms and regulates various mandatory employment terms for employees on assignment or secondment in Austria.

iv The Equal Protection Act

Enacted in 2005, this Act prohibits employers from discriminating against employees on the grounds of age, race, religion, sexual orientation or gender. Protection under the Act starts with the hiring process, and recent case law suggests that 'at-will' employment during probationary periods must also not be terminated indiscriminately.

v The Maternity and Paternity Leave Acts

Both Acts allow the parents of a newborn child to alternately or solely be put on parental leave until the second birthday of the child. Thereafter, both parents can request from their employer to change from full-time to part-time employment until the child is seven. During parental leave the employer is under no obligation to pay salary, but the parent is entitled to a government allowance, which varies according to the duration of the leave and the employee's salary.

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2 The employee is represented by the trade unions, regardless of union membership; the employer is represented by the Chamber of Commerce, membership of which is mandatory for almost all employers conducting any type of business; exceptions apply to the media industry and not-for-profit organisations.

3 The employee is represented by the elected works council and need not be unionised; the employer is represented by management.

vi The Holiday Act, Working Hours Act and Act on Daily Rest Periods

These statutes regulate holiday entitlements and allowances, maximum working hours, flexible working schemes, minimum daily rest periods and related issues. Employment relationships are not only subject to mandatory provisions at the statutory level but are also governed by collective bargaining agreements. These bargaining agreements are entered into at an industry level between trade unions and the competent employer representative (i.e., the Chamber of Commerce in most cases). Although there is no statutory legal minimum wage, collective bargaining agreements usually fix minimum wages and salaries, subject to annual or biannual adjustment. Collective bargaining agreements also govern the employment relationship of non-unionised staff.

Enforcement of employment statutes mainly rests with the judiciary. The Austrian court system is strictly federal and has a three-tier structure. Subject matter jurisdiction in employment disputes at the first instance is with the district courts with territorial jurisdiction in each of the district circuits; the Vienna circuit has a specialised court at the district court level (the Vienna Labour Court). Appeals from any of the general or specialised district courts go to one of the four courts of appeal located across Austria. Appeals are decided by a panel of three judges. The Austrian Supreme Court may be called upon to review the judgment rendered by the court of appeals, if certain legal requirements are met, to take into consideration whether the review of the legal doctrine applied in a specific case requires uniform clarification or is of paramount legal significance. The panels of the appellate divisions and the Supreme Court deciding on employment issues specialise in employment matters (e.g., Panels 8 and 9 of the Supreme Court).

Administrative agencies come into play where the enforcement of occupational safety laws, hours of service laws and similarly 'regulatory' aspects of employment and the workplace are concerned (e.g., under the Act on Employees' Protection and Safety). The most important government agency in this respect is the Labour Inspectorate, whose officers are entitled to enter working premises at any time without notice.

II YEAR IN REVIEW

In April 2013 Austria's parliament adopted the Social Law Amendment Act with effect from 1 July 2013. The amendment provides employees with the possibility of pursuing further education alongside a part-time employment. The respective provisions are far more flexible than the already existing provisions on educational leave.

The status of educational part-time employment requires a mutual agreement between the employer and the employee. The agreement requires a written form and the employee has no legal entitlement to educational part-time. The most important provisions of the agreement include the start date, the period, the extent and the allocation of the educational part-time. Furthermore, the employee has to have been employed with the company for a minimum of six months prior to the start date of educational part-time. The current regular weekly working hours (before educational part-time) must be reduced by a minimum of 25 per cent and a maximum of 50 per cent during educational part-time work and the employment must be continued on a basis of at least 10 hours per week during the educational part-time period.

The educational part-time must have a minimum duration of four months and may have a maximum duration of two years. If the maximum duration of the educational part-time is reached, a new agreement is possible only after a waiting period of four years. The educational part-time may also be taken in parts. In this case, each part has to last for at least four months and the sum of these parts must not exceed two years. The scope of education must amount to a minimum of 10 hours per week.

If the legal requirements are met, the employee is entitled to receive a special payment for further education from the Austrian Public Employment Service (AMS), provided that the application has been filed at the latest four weeks before the start date of the educational part-time period.

Generally a maximum of four employees in a company with up to 50 employees, and 8 per cent of the employees in a company with more than 50 employees may work on an educational part-time basis at the same time. If, however, more employees shall be able to consume educational part-time, a majority decision by the AMS's Regional Advisory Council is required in order to be entitled to a special payment for further education.

III SIGNIFICANT CASES

In a recent decision, the Supreme Court clarified that the employer is neither obliged nor authorised to examine the decision-making process of the works council regarding its consent to the termination of an employee, provided that the employer was not aware of any transgressions of the law concerning the internal decision-making process of the works council.

Under Section 105 of the Austrian Labour Relations Act, an employer must inform the works council prior to terminating an employment agreement. Upon receipt of the relevant information, the works council has one week to submit a statement on the proposed termination. Any termination made without prior consultation of the works council or before the end of the one-week period shall be null and void, unless the works council has already stated its position. The works council may either agree or disagree with the proposed termination, or refrain from making a statement. The right to challenge a termination as being socially unjustified depends on the reaction by the works council. If the works council expressly consents to the intended termination, the employee cannot challenge the termination for being 'socially unjustified'. If the works council objects, the employee concerned can request that the works council challenge the termination on his behalf, and if the works council refuses, the employee can challenge the termination himself. If the works refrained from making any statement, the employee may challenge termination himself within two weeks following notice of termination.

In the case decided by the Supreme Court, employer decided to terminate the employment relationship with its human resources (HR) manager and informed the works council accordingly. The works council granted its consent without further consulting with either employee or employer. The reason for the works council's consent was its apparent dissatisfaction with the HR manager's actions and, as it turned out, the works council wanted to retaliate against certain of the HR manager's misdeeds and various measures taken by him conflicting with the works council's position. By virtue

of the works council's consent to the termination, the HR manager was prevented from bringing a challenge before court. Nonetheless, the HR manager brought the case before court and argued that the consent, aimed at retaliating against him, was ineffective and did not constitute a valid consideration of the employee's interests by the works council. Both the trial court and the court of appeals rejected his claim, the Supreme Court confirmed.

The Supreme Court ruled that the works council's decision on the termination is threatened with nullity only in cases where employer acted in collusion with the works council with the intention of cutting the employee off his rights to challenge a termination. Such a 'conspiracy' was not shown by plaintiff and, therefore, employer could validly rely on the works council's statement (consent to termination). The Supreme Court made it also clear that, absent a collusive element or an apparent transgression of the legal framework by the works council, neither the employer nor the courts are authorised to investigate the internal decision-making process of the works council as the representative body of all employees nominated in a democratic electoral process.

In another recent decision, the Supreme Court clarified that arrangements for a paid leave of absence of works council members are not enforceable if they go beyond the limits under the legal framework set forth in the Labour Relations Act.

Section 116 of the Austrian Labour Relations Act provides that works council members shall be granted the necessary time off with full pay during normal working hours to perform their duties as elected staff representatives. In addition, Section 117 of the Labour Relations Act provides that depending on the number of staff and upon request by the works council, one or more of its members shall have a right to be put on permanent paid leave of absence for that purpose during their four-year tenure.

In the case decided by the Supreme Court, the employer (an airline) concluded an agreement with the labour union according to which a named member of the elected works council (himself a pilot heading the labour union's airline department) should be put on paid leave of absence 'in analogy to Section 117'. The employer honoured this agreement for several years but then in 2011 decided that it should no longer be bound by it and refused payment to the extent the employee did not show up for scheduled flights. The employee sued for monetary damages, and both the Labour Court and the Court of Appeals granted his action. The Supreme Court reversed these judgments.

The Supreme Court ruled that Section 117 of the Labour Relations Act is of a mandatory nature and compulsory for both employer and works council members and leaves no room for deviation, regardless of whether an agreement would benefit the specific works council member. A works council member, under the legal framework, performs a voluntary and honorary activity and must not derive any extra benefits from their position. The permanent paid leave under Section 117 is the exception from that rule, and any agreement that provides for a paid leave in excess of the statutory framework is therefore null and void (and not only voidable). Consequently, the employer can also invoke the nullity of the agreement and refuse to continue an illicit practice that runs counter to basic principles of employee representation. The only permissible way to increase the number of works council members with a permanent paid leave of absence is therefore an increase in staff (i.e., once the number of employees in the respective organisational unit exceeds the thresholds under Section 117 of the Labour Relations Act). The Supreme Court also made it clear that the paid leave under the agreement at

issue did amount to a benefit that works council members must not accept in exchange for their honorary post.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

There is no legal requirement that there be a written employment contract; an oral or even tacit agreement suffices. For evidentiary purposes, it is advisable to execute a written agreement. In any event, an employer must provide a written statement of the terms and conditions of the employment to the employee immediately after the employment relationship has started, summarising:

a name and address of the employer;
b name and address of the employee;
c start of employment;
d termination date if the employment is on a fixed-term basis;
e notice terms;
f general place of work, indication of alternating work place;
g job grade;
h job description;
i remuneration or salary;
j annual holiday entitlement;
k hours of work;
l applicable collective agreements; and
m name and address of outside severance pay provider.

Other than this employment note (which does not qualify as a contract but serves only as a statement of facts), a written employment contract is not required, although it is recommended.

Fixed-term employment contracts are permissible under the Austrian Labour Law. However successive fixed-term employment contracts may not be permissible and therefore deemed as an employment contract for an indefinite period of time, if they are not concluded for a legitimate purpose or interfere with the legitimate interests of the employee.

An employer and employee can always amend the terms of employment and, if the parties cannot reach agreement on the new terms, the employer can give notice to the employee. Unless it concerns a salary decrease not exceeding 10 per cent or the new terms are otherwise covered under a reservation of rights clause already agreed to in the initial contract, the notice will be subject to court scrutiny.

ii Probationary periods

Probationary periods may be a maximum of one month and may not be extended at either the discretion of the employer or of the employee. During the probationary period, the employment is on a preliminary, at-will basis so that either party can terminate the employment relationship at any time and with immediate effect. Recent case law, however, shows that any discriminatory termination (e.g., because of pregnancy, thereby

discriminating against female employees) would be unfair and could be contested by the employee. The employee could then claim reinstatement. The same rationale would apply in the case of other discriminatory terminations (e.g., because of age, sexual orientation, race, religion or disability).

iii Establishing a presence

There is no legal requirement in Austria for an employer to be officially registered in order to hire employees. Section 7 of the Employment Contract Law Adjustment Act provides that foreign employers without a registered office in Austria can also conclude employment contracts with employees resident in Austria.

The same is true for temporary staffing arrangements. Neither the staffing company (employment agency) nor the primary employer need to be officially registered in Austria to execute employment contracts. Any employment relationship is, however, governed under Austrian law and payment must be in compliance with the industry level collective agreements.

A foreign company may also engage independent contractors. It is possible that, however, the independent contractor could act as the director of a permanent establishment (PE) for the foreign company (an independent contractor cannot create a PE of the company, however).

If a company creates a permanent establishment through an independent contractor, the company must apply for any required trade permits and would become a member of the Chamber of Commerce. Consequently, employment relationships previously concluded by the company would be subject to applicable collective bargaining agreements.

Under the Austrian Foreign Employees Act, a non-EU employee of a foreign employer that has no registered branch in Austria requires a secondment permit if sent to Austria for installation work. Austrian salary levels and working conditions must be observed and the secondment-related project must not exceed six months. Also, any employment exceeding four months is prohibited under this permit. All other types of employment require a fully fledged work permit that must be applied for by an Austrian employer. Further restrictions apply with respect to construction work, which always requires a work permit. The secondment and work permits are issued by the competent regional office of the Austrian labour agency. EU nationals – except for nationals of Bulgaria, Romania and Croatia – are not subject to those restrictions. Restrictions according to the Austrian Foreign Employees Act were applicable for Bulgarians and Romanians until 31 December 2013 and will continue to be applicable for Croatians until 31 June 2020.

Austria has a social security system where everyone in gainful employment makes compulsory contributions to the quasi-governmental social security provider, broadly covering medical treatment, pension contributions and unemployment. Social security contributions are mandatory and are shared between the employer (approximately 22 per cent of gross income) and the employee (approximately 18 per cent of gross income) and are deducted at source.

All wages exceeding the threshold amount, currently set at €12,000, paid to employees working and living in Austria are subject to income tax, which the employer

has to withhold and pay to the government. Austria has a progressive income tax system, with three bands varying from zero per cent to 50 per cent (for income exceeding €60,000 per year). The tax rates are calculated on the basis of an employee's annual gross income (after deduction of social security contributions).

V RESTRICTIVE COVENANTS

Austrian law does permit employers and employees to enter into non-compete agreements.

Under Section 7 of the Austrian Employment Act, the employee must not, without the employer's consent, perform any competing activity during employment (a breach of that statutory provision would be a cause for summary dismissal) and under Sections 36 et seq. of the Employment Act, an employer and employee can agree to extend that statutory restriction up to one year after termination of employment. Such a restrictive covenant must be fair and reasonable in terms of time and geographical scope, must not place any undue hardship on the employee and must be reasonably required for the protection of the employer's business.

Restrictive covenants pertaining to post-termination periods are not enforceable if the employer unilaterally terminated the employment relationship (termination notice, but not in the case of a summary dismissal) or if the employee terminated the employment relationship with immediate effect due to a breach of contract by the employer. In the case of an employer termination, the employer can still enforce the restrictive covenant by offering to pay full salary during any restrictive period. In all other cases (e.g., the employee terminating without cause), the non-compete clause is enforceable without the employer offering any payment during the restrictive period.

VI WAGES

i Working time

Normal working hours are regulated by the Working Hours Act, which provides for a regular maximum working week of 40 hours and a maximum working day of eight hours (many collective bargaining agreements provide for a 38.5-hour work week).

Under the amended Working Time Act, which took effect on 1 January 2008 and brought in sweeping changes, including increased flexibility of maximum working hours, any arrangements concerning working time can now be agreed upon at a plant level between the works council and the employer, if the applicable collective bargaining agreement (which is concluded in Austria for entire industries) expressly allows it.

Collective bargaining agreements also now have the general authority to extend the maximum daily working hours from eight up to 10 hours and have the general authority to introduce 12-hour shift work (at the industry level). In addition, the Working Time Act now provides for an option to introduce 10-hour working days in connection with flexible working time arrangements by way of individual agreements between the employer and employees (e.g., four-day work week).

Night work must not be performed by employees under the age of 18 or pregnant employees. Employees doing night work are entitled to longer rest periods and regular medical examinations and treatment. Employees performing night work also have an

entitlement to request a transfer to a workplace with day work, if continuing night work endangers their health or interferes with family care.

ii Overtime

Working overtime is generally permitted. Employers and employees must agree whether overtime is compensated through payment of a surcharge or compensatory time off in lieu of payment. The amended Working Time Act has also introduced a 25 per cent surcharge on overtime pay in consideration of any overtime worked above the agreed part-time work schedule but below the maximum statutory thresholds of eight-hour working days and 40-hour work weeks. Any overtime worked above the statutory threshold of eight hours per day or 40 hours per week is compensated with a 50 per cent surcharge or corresponding time off. Overtime performed on Sundays or public holidays or between midnight and 7am usually has a surcharge of 100 per cent.

The daily working hours (including overtime) must not exceed 10 hours and the weekly work hours (including overtime) must not exceed 50 hours. Several exceptions apply with respect to various professions and trades. Laws on working hours are mandatory, and neither employer nor employee can opt out of these statutory restrictions and limitations.

VII FOREIGN WORKERS

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. Due to the amendment of the Foreign Employees Act, as of 1 May 2011, employees from countries that acceded to the EU in May 2004 (the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, the Slovak Republic and Slovenia) are allowed to take up work in Austria without an employment permit. Bulgarian and Romanian nationals required a work permit until 31 December 2013 and Croatian nationals will continue to requirw a permit until 31 June 2020, respectively. Non-EU employees require a valid certificate of residence (residence permit or settlement permit) to work in Austria.

Employment permits are applied for by the prospective employer, granted to the foreign employee and entitle the employee to work with the employer at a specified place of work within Austria. Following this initial 52-week phase, an employee can apply for a work permit, allowing the foreign employee to work with any employer within one of the nine Austrian provinces, as requested by the employee. Work permits are valid for two years and may be extended. After five years of employment (under an employment permit and extended work permit), an employee can apply for a certificate of exemption that affords foreign employees the same legal status as Austrian employees. Certificates of exemption are non-transferrable, valid for five years and can be extended repeatedly.

There is no limit on the number of foreign workers a workplace or company may have, but Austria has a system where the number of foreign employees admissible to work in Austria is reviewed annually and set each year by way of an ordinance of the competent Ministry of the Interior. Special rules apply with respect to 'key personnel', namely, managerial or specially trained foreign personnel with a positive overall impact on the Austrian labour market. Key personnel can obtain a two-in-one permit

'Red-White-Red Card' (combining residence and work permits with an extended duration) within a simplified procedural framework.

Foreign employees are subject to the same tax and social security regime as other employees in Austria and their employment relationships are also governed by local employment laws.

VIII GLOBAL POLICIES

Although neither required nor common within the Austrian legal framework governing labour relations and dispute resolution, several collective bargaining agreements contain disciplinary procedures that an employer has to observe before dismissing an employee or imposing lesser disciplinary sanctions. Austrian subsidiaries of employers from the US or the UK, where formal disciplinary procedures are a widespread concept, are increasingly adopting disciplinary and procedural standards that mirror those of their foreign counterparts.

In several recent and widely discussed decisions, the Austrian Supreme Court ruled on the legal qualification and scope of disciplinary procedures and clarified how they can be brought into line with the representation rights of the works council. The Austrian system of employee representation at the plant level confers a number of representation and information rights on the works council as the elected representative body of the entire staff. Those rights are set out in the Austrian Labour Relations Act and provide the works council with the legal power to veto certain measures of the employer. One of these measures is the introduction of a formal disciplinary code or code of conduct. Consequently, if a disciplinary procedure were to be qualified as a disciplinary code within the purview of the Austrian Labour Relations Act, the works council could oppose its introduction without any recourse by the employer to the labour courts. The veto by the works council is absolute. Besides, such introduction would require conclusion of a shop agreement with the works council if the works council chose to agree to the measure. Additionally, any sanctions imposed under the disciplinary code have to be approved by the works council or imposed through a disciplinary body with the participation of the works council. The crucial question is thus under which circumstances disciplinary procedures can be qualified as a disciplinary code within the scope of the Labour Relations Act.

In the first of a series of decisions the Austrian Supreme Court construed the respective provisions of the Austrian Labour Relations Act narrowly and ruled that a formal reprimand or (verbal or written) warnings do not qualify as disciplinary sanctions within the meaning of the law if the employer merely exercises its contractual right to demand proper performance from the employee. Only sanctions that aim at imposing a penalty would require works council approval. In a related decision the Austrian Supreme Court also ruled that (summary) dismissals are governed under a different set of provisions under the Labour Relations Act than disciplinary procedures and that, as a consequence, dismissals or other acts of terminating an employment relationship cannot therefore be regarded as disciplinary measures or sanctions within the meaning of the Act.

The Supreme Court also ruled in that decision that employees cannot validly invoke an 'undue delay defence' if the employer starts disciplinary proceedings under applicable collective bargaining agreements before dismissing an employee. Abiding by procedural rules cannot be validly construed by an employee as a waiver to dismiss.

The Austrian Supreme Court also made it clear that the suspension of an employee in connection with disciplinary proceedings cannot be interpreted to mean a waiver to dismiss. Finally, the Court stated that asking the employee to give a statement and state his or her case before a decision is taken (e.g., as often provided for in disciplinary procedures by way of a formal hearing) does not qualify as a waiver by the employer to dismiss the employee.

The cases illustrate that disciplinary procedures meant to improve and maintain satisfactory standards of conduct, attendance and job performance by stressing corrective rather than punitive action are not subject to works council approval or participation and also do not run counter to statutory provisions governing dismissals and other forms of terminating employment.

If concluded by way of a plant agreement between the employer and the works council, internal discipline rules need to be sent to the Chamber of Employees and the Chamber of Commerce, which are both self-governing bodies. The rules can be written in a foreign language known by the employees (e.g., English). The plant agreement operates as a general statute-like rule and governs the employment relationship even without the employees' consent, but each affected employee must be given notice of it (posting it on the company intranet is sufficient). Under this legal structure, the discipline rules, although not formally incorporated into the employment contract, take effect by operation of the quasi-statutory force of plant agreements. Prior government approval is not necessary.

IX TRANSLATION

Generally, there are no special legal requirements with respect to the language that must be used when drafting employment documents. However, the Act against Wage and Social Dumping (LSDB-G) sets out regulations concerning provision of German-language employment documents in case of a secondment of non-Austrian staff. Seconding employers must be prepared to file with the competent agency the following documents:

a employment agreement;
b written statement of terms of employment;
c records on working time; and
d evidence of payment (e.g., bank transfer).

These documents must be available at the employee's workplace for the duration of the employee's secondment in Austria in order to enable the competent authorities to monitor compliance with the requirements set out under the LSDB-G. The LSDB-G does not require any formalities for translation, such as certified translation or notarisation of the employment documents.

Violations of the LSDB-G regulations are punishable by fines of up to €50,000. In addition, the competent authority may prohibit the respective activities by foreign

companies if a violation occurred. Foreign employers are therefore advised to consider the LSDB-G's provisions carefully.

X EMPLOYEE REPRESENTATION

Section 40 of the Labour Relations Act provides that there must be a works council established for each business unit or facility with at least five permanent full-time employees. Although this rule is meant to be mandatory, once this number of employees has been exceeded, in practice only a few businesses with a regular staff of fewer than 50 employees establish a works council. In turn, most companies or organisational units with more than 100 staff usually establish a works council. Labour-intensive industries, which usually also have a higher level of unionisation, are more likely to elect a works council. The works council is the only representative body acknowledged by law. The number of works council members to be elected by staff increases with the number of employees in the respective organisational unit or facility. Also, an employer comprising more than one business unit can have several works councils for each such unit. The works council will consist of:

a one member in operations with fewer than 10 employees;
b two members in operations with 10 to 19 employees;
c three members in operations with 20 to 50 employees;
d four members in operations with 51 to 100 employees;
e one additional member for each 100 additional employees; or
f in organisational units with more than 1,000 employees, one additional member for every 400 employees.

There is a higher level of unionisation in production businesses and less so in the various service sectors. The number of works council members depends on the number of employees in the respective business unit.

By law, unionisation and establishment of a works council are distinct legal concepts. Members of the works council need not also be trade union members and the works council represents the entire staff, regardless of their union affiliation. The electoral process mirrors Austrian parliamentary elections (proportional system, direct vote, secret ballot). Every employee above the age of 18 can cast his or her vote and the electoral system allows for proportional representation of candidates listed on different electoral registers. The length of a representative's term is four years.

Works council members enjoy specific protection against termination during their four-year term. A works council member can only be dismissed subject to prior court approval and only for specific reasons set forth in the Labour Relations Act (e.g., incapacity to work; material breach of contract; downsizing without the possibility of suitable alternative employment; violation of confidentiality obligation; or conviction for certain criminal offences).

The Austrian system of employee representation confers various consultation, representation and information rights on the works council as the elected representative body of the entire staff. The Labour Relations Act, in certain cases, provides the works council with the legal power to veto certain measures planned by the employer

(disciplinary rules, staff questionnaires, performance payments). Other measures cannot be vetoed by the works council but require works council consent to become effective. If the employer and the works council cannot agree on the terms of the respective plant agreement, either party can call upon an *ad hoc* tribunal to be established by the competent labour court that would eventually issue a required plant agreement. The measures governed by this set of rules include the electronic processing of personnel data exceeding the scope of employer's obligations towards the employee, guidelines on temporary staffing, regulations concerning daily working hours and social plans. Several other measures can but need not be negotiated with the works council and can thus not be enforced by the works council by calling upon the labour courts (e.g., reimbursement of expenses, grants of allowances and benefits). In addition, the works council must be informed about any planned termination of an employee and can request that the employer negotiate terminations and, in certain cases, can also challenge a termination before the court on behalf of the employee. Works council members are also delegated to the supervisory board of the employer (where established) at a ratio of two shareholder representatives to one employee representative.

Certain changes to the business structure (e.g., outsourcing, plant closures, organisation of workflow, changes of ownership and mergers) trigger an obligation by the employer to notify the works council of the proposed measures and start a consultation process. If the proposed measures entail redundancies or other detrimental consequences for affected employees, the works council has the legal power to force a social plan upon the employer in which the employer and the employee representative body agree on the terms of redundancy packages to mitigate the detrimental consequences of job losses.

Under Section 72 of the Labour Relations Act, a business owner must provide the works council with office space, office equipment and related needs that are adequate in relation to the size of the business and the requirements of the works council. In a recent decision, the Supreme Court held that the term 'office equipment' should not be narrowly but rather 'dynamically' construed to reflect technological progress and current standards of communication and text processing. The Court also ruled that in some cases it might even be necessary (e.g., during negotiations for a major social plan) to provide the chairman of the works council with a personal secretary. The employer and the works council must also meet quarterly to discuss work conditions and even management decisions regarding the well-being of staff. Under Section 67 of the Labour Relations Act the works council must meet for internal discussions at least once a month.

XI DATA PROTECTION

i Requirements for registration

According to the Austrian Data Protection Act there are three issues to be examined before any kind of personal data is processed, namely the legitimacy of the processing of data, the obligation to obtain an authorisation from the Data Protection Agency (the DPA) and the obligation to notify the agency of the processing. As a general rule, the employer must notify the DPA of processing unless an exception applies. Such exceptions include, for example, the transfer of personal data for personnel administration purposes to the social insurance carrier or to the local tax office and the transfer of customer data

to customers or to the corporate management for logistical purposes. The processing can occur only after the employer files with the DPA. The situation changes where sensitive data is processed; such processing requires prior approval from the agency, which usually takes up to three months. The agency requires precise information as to what data are being used for what purposes. As a general rule, companies are allowed to collect employees' personal data. This does not, however, include employees of affiliated companies. There is no (statutory) privilege for corporate groups that would justify any data transfer within the corporate group. The agency has, however, repeatedly acknowledged the necessity for data transfer within a group of companies, depending on the purpose of the data transfer.

One prerequisite for lawful processing of (non-sensitive) personal data is that the processing does not infringe upon the legitimate interest of the data subject (employee) in the secrecy of his or her data. This condition is met if either the law explicitly states an authorisation or a duty to carry out the processing, or the concerned person expressly agreed to the processing or has a vital interest in the processing. Obtaining consent from each employee is a possible solution to ensure compliance. In any event, such consent must be entirely free of any constraint and can be withdrawn by the employee at any time and without cause. Consequently, it is often more advisable to take into account the legitimate interest of the data subject (employee) through showing that the interest of the person processing the data (employer) in the processing outweighs the interest of the data subject (employee) in the secrecy of the data.

The provisions on data security and confidentiality of data[4] provide that the controller-employer must ensure data security and that the data is protected against accidental or intentional destruction or loss and is not accessible by unauthorised persons. Measures include regulating access to the premises of the data controller and to data and programs, and also maintaining logs and documentation so that the processing steps that were actually performed can be traced to the necessary extent.

ii Cross-border data transfers

Generally, the processing of data within the EU is not subject to (additional) registration or authorisation by the DPA. The transfer of data to countries outside the EU is, in principal, subject to an authorisation by the agency. Certain exceptions apply with respect to countries using safe harbour registration, which is sufficient to satisfy the statutory requirements.

iii Sensitive data

Under the definition of Section 4 of the Data Protection Act, sensitive data is considered data relating to natural persons concerning racial or ethnic origin, political opinions, trade union membership, religious or philosophical beliefs, and data concerning health or sex life. Medical information would thus qualify as sensitive data within the meaning of the Act.

The processing of sensitive data is in principle subject to the framework delineated above. The 'outweighing interest' test does not, however, apply with respect to sensitive

4 Sections 14 et seq. Data Protection Act.

data. Consequently, in most of the cases in which sensitive data is (or may be) processed, the express consent of the data subject (employee) will be required.

iv Background checks

There are no express statutory restrictions against background checks by the employer. Criminal record checks are not uncommon: employers request that employees show a certificate of good standing during their job interview or send one along with their CV. Credit checks are also permissible where the employer has a legitimate interest in an employee having good financial standing (e.g., banking industry, cashiers). Austrian labour courts, however, have repeatedly held that, during job interviews, any questions concerning pregnancy, financial standing and criminal convictions (if already deleted from the record) are impermissible and would allow the employee to reply with an inaccurate statement without any legal consequences.

XII DISCONTINUING EMPLOYMENT

i Dismissal

A dismissal need not be for cause but the employer must give prior notice under either the contractual notice terms or, in the absence of agreed notice terms, under the minimum statutory notice terms. The employer need not observe any notice terms if an employee is dismissed for cause. 'Cause' is defined in the Employee Act to include (without limitation):

a severe breach of mutual duty of trust and confidence;
b incapacity to perform the agreed services;
c violation of restrictive covenants;
d acting against the employer's instructions; or
e rude behaviour to the employer or co-workers.

Austrian legislation grants each employee protection against what is called a 'socially unjustified termination of employment'. This legal recourse regularly serves as a strong bargaining tool in the case of redundancies and follows a three-part test. Generally, employees (even in businesses where no works council has been established) may individually challenge their termination before a court if the termination of employment causes in his or her individual situation more than the 'usual' detrimental consequences and hardship associated with an employment termination (first part). The 'usual' consequences of termination are deemed to be a short period of unemployment (i.e., up to four months), but with realistic prospects of finding another job in a related area with similar pay. Conversely, 'unusual' consequences would be a longer-than-average period of unemployment where the employee is the only person who generates an income in his or her family or where the employee would default on payment obligations (e.g., loans, mortgages) as a result of the termination. All circumstances are to be considered (e.g., living standards, family income, age, education). A court-appointed expert witness is called to testify as to whether the employee has established this first part of the three-part test.

Under the second part, the employer can then claim that the challenged termination is still justified on grounds attributable either to the employee himself or herself (causes related to the individual, such as constant illness, inability to perform at an average level, unfriendly behaviour to customers or co-workers) or the fair business judgment of the employer (business-related causes, such as closure of the business or part of the business; outsourcing the employee's job or department; downsizing, considerable decline in revenue or commissions; or merger). The court will not try to second-guess the employer's business decision, but will rather scrutinise whether the measures taken are the result of sound business judgment and the right means to achieve the intended result. Thus, an employer would fail the second part of the test if, for example, older incumbent employees were made redundant and new, cheaper employees were hired.

In the third part, and only if both the employee (under the first part) and the employer (under the second part) have duly established their cases, the court weighs the first and second part against each other and considers whether the termination imposes greater hardship on the employee than continuous employment would impose on the employer. In the case of doubt, the employee wins. It is thus crucial that employers provide convincing evidence to support their business decisions. If the employer agrees with the employee on a mutual termination there is no right to challenge the decision.

ii Redundancies

Mass terminations require prior notification to the appropriate government employment agency, which triggers a 30-day waiting period during which any termination would be null and void. An employer is also required to consult with the works council and discuss measures to avoid dismissals, reduce the numbers of redundancies, mitigate the consequences of collective dismissals and create a social plan (a plant agreement between employer and works council). The conclusion of a social plan is mandatory if a particular number of employees (roughly one-third of staff) are affected by the planned measures. In the absence of an agreement on the terms of the social plan, both the employer and the works council can call on a special judicial committee set up at the labour court.

The labour unions usually conduct negotiations on behalf of or jointly with the works council and seek to bargain for financial and non-financial benefits (voluntary severance pay; outplacement assistance; specific pension schemes for older employees, personal counselling). A formal notification of the trade union, however, is not required.

For a redundancy to be lawful, all employees need to be fairly selected, consulted and, where appropriate, offered suitable alternative employment within the organisational unit affected. Although the employee does not have any formal rehire rights, offers of suitable alternate employment must be made by the employer to prove that employer has acted in conformity with the duty to structure any termination and lay-off in a socially adequate manner.

An employer may make payment in lieu of notice if the employer dismisses an employee without notice and without cause. The employee could then bring a tort action asking for the front pay (i.e., all payments due until the day on which the employment relationship would end if the employer had to observe the contractual or statutory notice terms) that would otherwise have been due to him or her. The employer and employee

can also agree on an earlier notice date where the employee (under the same tort theory) would typically claim 'front pay'.

On an individual level, the employer must notify the works council at least seven working days prior to an intended notice of termination. A failure to make this notification renders a subsequent termination ineffective.

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

a pregnant women;
b parents on maternity or paternity leave;
c members of the works council;
d apprentices;
e disabled employees; and
f employees on military draft.

These employees can only be dismissed on grounds defined by law and only after prior approval by the labour court or the competent disabled employees committee.

As for severance pay upon termination, Austria has two legal regimes covering the issue. The 'old' system was abolished in 2002, but still applies to employment relationships that started before 1 January 2003. It provides for staggered severance pay increasing with seniority of the employee (starting with two monthly earnings after three years of service up to one year's income after 25 years of service) if the termination of employment is not initiated or primarily caused by the employee.

This severance pay scheme proved inflexible in a changing work environment: employees were often hesitant when offered better career opportunities by prospective new employers, because employees had to terminate their employment and not receive severance pay. Prospective new employers more often than not refused to compensate for the shortfall. The new system (in effect for all employment contracts that started after 31 December 2002) mandates that employers withhold 1.53 per cent of employees' monthly gross earnings and contribute it to an account with a professional severance pay provider (such providers are usually managed by affiliates of major banks and insurers).

Severance pay providers administer a defined contribution fund and employees can shift their accrued entitlements to a different provider of a new employer, regardless of how the employment was terminated.

XIII TRANSFER OF BUSINESS

Section 3 of the Employment Law Harmonisation Act details the rights and duties that exist at the moment an undertaking, business, or part of an undertaking is transferred to another proprietor (transfer of undertakings). This law, which stipulates that existing employment contracts are to be transferred by operation of law to the new proprietor, was conceived in order to protect employees from the transfer of undertakings so as to meet the requirements of Council Directive 77/187/EEC (Acquired Rights Directive), which has been overruled by Council Directive 2001/23/EC.

The Acquired Rights Directive is applicable to situations when an undertaking, business, or part of an undertaking is transferred to another proprietor through a

contractual transfer or merger. In Article 2.2.c, the Directive explicitly states that contracts of employment or employment relationships shall not be excluded from the scope of this Directive solely because they are temporary employment relationships and the undertaking, business or part of the undertaking or business transferred is, or is part of, the temporary employment business that is the employer.

The Austrian Supreme Court, following the legal practice of the ECJ, has put forth several elements that can serve to indicate the existence of a transfer of undertakings under the Employment Law Harmonisation Act. These elements are as follows.

i Existence of an economic entity

There is a transfer within the meaning of the Acquired Rights Directive when there is a transfer of an economic entity that retains its identity. An economic entity is an organised group of resources that has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.[5] Similarly, Section 3 of the Employment Law Harmonisation Act requires the transfer of an organised source of income. According to the legal practice of the Austrian Supreme Court, an economic entity is defined as 'an organisational body with persons and things for the purpose of exercising an economic purpose with a goal'. This means that the transfer of a single economic good is not a transfer of an undertaking or part thereof.

ii Maintenance of the undertaking's identity

It must be possible for the acquiring entity to run the acquired economic entity in a manner identical or similar to the way it was before the acquisition as well as to protect the entity's productive capability. Therefore, the acquired company's *de facto* and organisational processes must remain as they were before the transfer. Under the ECJ view, the undertaking retains its identity if its operation was actually continued or resumed by the new employer, with the same or similar activities.

The non-existence of a contractual relationship between the buyer and seller or between two businesses that contracted with a third party regarding the same subject matter immediately subsequent to one another can be indicative that there was no transfer in the sense of the Directive. The Austrian Supreme Court (following the ECJ) ruled that the Directive is applicable wherever, in the context of contractual relations, there is a change in the natural or legal person responsible for the obligations of an employer towards the employees of the undertaking.

The deciding factor is that the power of control over the undertaking is transferred – the legal basis of this transfer is irrelevant. A change of proprietor does not necessarily imply a transfer of property.

What the Directive does, however, require is the transfer of a stable economic entity whose activity is not limited to performing one specific employment contract. The term 'entity' refers to an organised group of persons and assets facilitating the exercise of an economic activity which pursues a specific objective.

5 See Directive 2001/23/EC Article 1.1.a – b.

In order to determine whether the conditions for the transfer of such an entity are met, under the ECJ view it is necessary to consider all the facts characterising the transaction in question, including:[6]

a continuation of a previous or similar line of business;
b maintenance of the transferred entity;
c transfer of resource;
d adoption of the majority of the workforce;
e value of the intangible assets at the time of the transfer;
f eventual crossover of customer base;
g degree of similarity of the line of business before and after the transfer; and
h duration and eventual interruption of the line of business.

According to the opinion of the ECJ and the ensuing Austrian Supreme Court decisions all of these features are to be examined in a flexible framework and considering the totality of the circumstances, not as isolated elements. Thus, for example, a transfer of undertakings can exist even when no resources are transferred, if other important criteria are present. Indeed, in certain economic sectors, those assets are often reduced to their most basic and the activity is essentially based on the labour force.

Thus, an organised grouping of wage earners who are specifically and permanently assigned to a common task may, in the absence of other factors of production, amount to an economic entity.

Though the fact that the activity in question was performed, prior to the transfer, by a single employee sufficient to preclude the application of the Directive since its application does not only depend on the number of employees assigned to the part of the undertaking that is the subject of the transfer. Likewise, the fact that in such a case the activity transferred is for the transferor merely an ancillary activity not necessarily connected with its objectives cannot have the effect of excluding that operation from the scope of the Directive. The decisive criterion for establishing whether there is a transfer for the purposes of the Directive is whether the business in question retains its identity. The retention of that identity is indicated *inter alia* by the actual continuation or resumption by the new employer of the same or similar activities. The similarity in the work performed before and after the transfer is typical of an operation that comes within the scope of the Directive. The Directive is applicable when an undertaking entrusts by contract to another undertaking the responsibility for carrying out operations that it previously performed itself, even though, prior to the transfer, such work was carried out by a single employee.

The fact that the services provided by the old and new contractor are similar does not permit the automatic conclusion that the transfer of an economic entity was valid under the Acquired Rights Directive as an entity is not to be understood as a 'mere activity'. Their identity comes from other features such as personnel, leadership, organisational structure, philosophy and available resources.

6 ECJ 18 March 1986, Rs 24/85, *Spijkers*; 11 March 1997, Rs C-13/95, *Ayse Süzen*.

The mere loss of a contract to another bidder (as in *Ayse Süzen*; see footnote 5, *supra*) does not create a transfer of undertaking in the sense of the Directive because, although the service company loses a customer, it continues to exist in the same state, without its undertaking or part of its undertaking having been transferred to the new contractor. The previously described situation is commonly known as a 'successor of the function' of the transfer of an undertaking as described in the Directive on the Transfer of Undertakings and the Employment Law Harmonisation Act.

XIV OUTLOOK

It appears that extended education-oriented programmes like the amended regulations for educational leave (see Section II, *supra*) and other, new types of subsidised leaves of absence show a trend that allows employees to find their balance in an ever more competitive work environment. While the statutory overhaul of the educational leave also helps employers during times of an economic downturn to keep their work force at previous levels without keeping them on their payroll during times of leave, other statutory types of leave of absence support a family-oriented career planning. To ensure an improved reconciliation of family care and career, as of 1 January 2014 employees will have the opportunity to take a family care leave or a part-time employment in order to look after their ill family members. The family care leave as well as part-time employment can be agreed with the employer only for the purpose of taking care of close family members, which receive Austrian care allowance of a certain level.

Family care leave and part-time employment both require a mutual agreement between the employer and the employee, stating its start date, duration and scope of the part-time or family care leave. Furthermore, the employee has to have been employed with the company for a minimum of three months prior to the start date of family care leave or part-time employment. The family care leave as well as part-time employment must have a minimum duration of one month and can have a maximum duration of three months, but must be consumed at once and not in parts. During the family care part-time working period, the employee must continue her work with a minimum 10-hour working week.

If the legal requirements are met, the employee is entitled to receive a special payment by the Austrian Public Employment Service.

Appendix 1

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Jakob Widner is a partner in Graf & Pitkowitz Rechtsanwälte GmbH's Vienna office and specialises in employment law, both contentious and non-contentious, including employee benefits and labour relations. He also practices in the area of company disputes and commercial litigation and commercial contracts (including licensing and regulatory matters). He heads the firm's labour and employment law practice and has many years of experience in advising on the employment aspects of corporate transactions, business and company sales and acquisitions, employee benefit arrangements (including pension and stock option plans) and company law issues relevant to directors and officers of Austrian companies. More recently, Mr Widner advised a quasi-governmental body on liability issues in connection with the transfer of its pension plan obligations to a private pension fund and a pharmaceutical conglomerate in connection with staving off unionisation efforts by its workforce.

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