

New employment legislation 2016



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The new year has brought some substantive changes in employment legislation. This update summarises the most relevant of these changes.

Non-compete provisions

In general, post-termination restrictive covenants can be validly agreed between employers and employees if certain criteria are met – in particular, that the restrictive period not exceed one year following termination of the employment contract and that the regular salary be above a specified threshold (referencing a multiple of the health insurance contribution basis). As of 2016, the new salary base is €3,240 gross per month. The new statute also clarifies that contrary to the Supreme Court's interpretation of the former provision, any special payments (in Austria, monthly salaries are paid 14 times per year) cannot be taken into account when calculating the salary base. Consequently, a post-termination non-compete provision will be considered invalid where the employee earns less than €45,360 gross per year.

In addition, the new law introduced a provision which prohibits contractual penalties (payable in case of a violation of the non-compete) from exceeding the equivalent of six monthly net salaries. Based on recent case law – which essentially allows a new employer to compensate an employee for any contractual penalty payable to the previous employer without facing a claim of unfair competition – contractual penalties that are meant to compensate for a breach of non-compete provisions are now even less attractive. Therefore, employers should seek to enforce non-competes by way of preliminary injunctions rather than contractual penalties.

All-in salary

All-in salaries are widespread at both managerial and non-managerial levels. They allow employers to agree on a flat salary to compensate for any work performed within the statutory limits of maximum working hours instead of separately compensating for overtime. The only limit is the minimum wage under

the applicable collective bargaining agreement, meaning that for normal working hours, at least the minimum wage must be paid. Thus, all overtime must be compensated according to the portion of the employee's actual salary that exceeds the minimum wage. Seeking to increase transparency, the new law provides that employment contracts must also show the salary contributed to normal working hours (usually 40 hours per week). In the absence of such a clarification, the statutory default rule provides for an "adequate" base salary for normal working hours that is then deemed to have been agreed. This adequate salary is based on the industry average for the specific function and is thus typically higher than the minimum wage under the applicable collective bargaining agreement, thereby reducing the difference between the actual salary and the adequate salary; consequently, this also reduces the compensation cushion for overtime.

For example, assuming an all-in salary of €4,000 per month, a minimum wage under the collective bargaining agreement of €3,000 per month and an adequate base salary of €3,500 per month, the old rule would have allowed the employer to request overtime worth up to €1,000 per month. Under the new rule, this amount is reduced to €500 per month. In order for employers to avoid this reduction, employment agreements must specifically state that the minimum wage should also operate as the applicable base salary for normal working hours. Therefore, employers should have a provision in place that clarifies the base salary for normal working hours.

Working time

The maximum normal working time is eight hours per working day. Under the old law, working hours – including overtime – were capped at a maximum of 10 hours per working day. As of 2016, daily working hours can reach up to 12 hours in cases where an employee is driving a car while travelling on business. The new law is tailored specifically to address the working time requirements of sales personnel. Under the old legal regime, it was often necessary for sales representatives who were travelling in a company car to stay overnight in a hotel instead of driving back home, to comply with working time regulations.

Professional drivers and pilots are excluded from this new working time regulation. Their maximum working hours continue to be governed by a separate set of statutory rules.

Parental part time

Young parents have a legal entitlement to request part-time employment either immediately following maternity leave (eight weeks or, in case of a caesarean section or premature/multiple births, 12 weeks following the birth of a child) or after a subsequent period of parental leave (up to the child's second birthday). The old legal framework contained no statutory specifications on minimum working hours nor did it set a minimum reduction of working hours during parental part time. As a consequence, if a parent requested, for example, that his or her weekly working hours be reduced from 40 hours to 39 hours, he or she was afforded protection against dismissal under the Parental Leave Act, even though it was evident that such a reduction could not realistically serve the purpose of childcare. Conversely, some parents sought to reduce their working time from 40 hours per work week to merely five to 10 hours per week, requiring employers to put a disproportionate effort into their staff planning.

Under the new framework, the minimum working time is 12 hours per week (after reduction) and the reduction of previous working time must amount to at least 20% of the previous amount (eg, full 40-hour working week can be reduced from 12 to 32 hours per week). This also applies to parents who worked part time before the birth of a child (eg, an employee who worked 30 hours per week before the birth of a child would be entitled to parental part time between 12 and 24 hours per week). This bandwidth model should better balance the interests of employers and employees and avoid misuse by employees who had previously reduced their working time in a manner that did not benefit their children and those who were merely looking for statutory protection or – even worse – those that reduced their working time to a level which prevented their employers from achieving a reasonable work structure.

Job offers

As of 2016, employers must first offer jobs to part-time staff internally if they plan to fill a position requiring more working hours. Employers can post job offers on the company intranet or a bulletin board. Only after an internal search is conducted can an employer post the position in classifieds and job openings.

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