



PRACTICAL LAW

MULTI-JURISDICTIONAL GUIDE 2011/12

LABOUR AND EMPLOYEE BENEFITS

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Austria



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SCOPE OF EMPLOYMENT REGULATION

1. Do the main laws that regulate the employment relationship apply to:

- Foreign nationals working in your jurisdiction?
- Nationals of your jurisdiction working abroad?

Laws applicable to foreign nationals

If no express choice of law is made in the relevant contract, Austrian employment law automatically applies to a foreign national who works in Austria on more than a temporary basis (for example, on a secondment) (*Article 8(2), Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations* (Rome I)).

Legislation regulating the employment relationships includes:

- White-Collar Employees Act 1921.
- Labour Constitution Act 1974.
- Temporary Employment Act 1988.
- Working Hours Act 1969.
- Rest Periods Act 1983.
- Paid Holidays Act 1976.
- Act Governing the Employment of Foreign Nationals 1975.
- Act Governing the Employment of Disabled Persons 1970.
- Equal Treatment Commission Act 1979.
- Equal Treatment Act 2004.
- Act on Equal Treatment in Civil Service 1993.
- Maternity Protection Act 1979.
- Paternity Leave Act 1989.
- Employee Protection Act 1994.
- Employment Contract Adaptation Act 1993.
- Insolvency Insurance Act 1977.

Employees who are temporarily posted to Austria, or who work in Austria for an employer without a registered office there, are entitled to receive at least the remuneration due to Austrian employees of comparable status with comparable employers, as specified by law, government regulation or collective bargaining agreement (CBA) (*section 7, Employment Contract Adaptation Act 1993*).

Employees who are posted to Austria also have a mandatory right to paid holidays under Austrian law. The working time provisions set out in CBAs must also be respected. These provisions apply regardless of any choice of law in the employment contract.

The parties are free to specify for a particular state's law to apply, provided that the relevant regulations are as favourable (or are even more favourable) than the compulsory regulations which would apply under the rules of Article 8, in the absence of a choice of law.

Laws applicable to nationals working abroad

An employee who does not ordinarily work in only one country is subject to the law of the jurisdiction where the branch that employs him is situated. If an employee works for a company branch in Austria, he is entitled to the mandatory statutory protection regardless of any choice of law clause in the contract, if the mandatory regulations are more favourable for the employee (*see below*).

Legislation (*see above, Laws applicable to foreign nationals*) provides significant mandatory protection that cannot be contracted out of to the detriment of employees. This includes:

- Restrictions on working hours and minimum annual holiday allowance.
- Salary protection (for example, sickness pay).
- Protection of pregnant or disabled employees.
- Employee representation and works council rights.
- Equal treatment of men and women in the workplace.
- Protection against dismissal.
- Automatic transfer of rights and obligations to a new employer under a transfer.
- Protection of employees on the employer's insolvency.

RESTRICTIONS ON MANAGERS AND DIRECTORS

2. Are there any restrictions on who can be a manager or company director?

Age restrictions

There are no specific statutory age restrictions for managers, but the general rules concerning "capacity to act" also apply to managers. Therefore, company directors (under commercial law which governs the actions of companies) must be at least 18 years old (as the "capacity to act" which starts at this age



is a prerequisite to hold the position of company director). Employment contracts can be concluded (and also ended) by persons aged 14 years old or older. But their contracts can be prematurely terminated for cause by their legal representatives (even contrary to the minor's will).

Nationality restrictions

There are no statutory restrictions regarding nationality.

Other

There are no further restrictions applicable to managers or company directors.

RECRUITMENT INCENTIVES

3. Are any grants or incentives available for employing people? If so, please give details.

There are different incentives available from the Austrian Public Employment Service (*Arbeitsmarktservice*) (AMS)). For example, enterprises can obtain a subsidy for wage costs for the employment of long-term unemployed and elder workers. The amount of the subsidy is decided on the merits of each case. Another example is a subsidy for four months for the employment of unemployed people to substitute employees on parental part-time work. Furthermore, the employment of people on reduced hours (short-time work) was strongly promoted by the Public Employment Service during the economic crisis.

PERMISSION TO WORK

4. What prior approvals do foreign nationals require to work in your country?

Visa

Holders of an EEA or a Swiss passport do not require a visa. Most other foreign nationals do require a visa. A "Schengen" visa (visa C) is required for all short-term business conferences and trips.

A "National" visa (visa D) is required for stays of more than 90 days, up to a maximum of six months (temporary residence permit). This visa allows its holder to engage in gainful employment during their stay.

Procedure for obtaining approval. Visas C and D can be issued by the Austrian Consulates in the foreign national's country of residence. Details of all Austrian Consulates (for example, addresses, telephone numbers, and so on) are available at the homepage of the Federal Ministry for European and International Affairs (*Bundesministerium für europäische und internationale Angelegenheiten*) (BMeIA): www.bmeia.gv.at/.

Cost. The consular fee for a visa C is EUR60 (as at 1 August 2011, EUR1 was about US\$1.4), and for a visa D it is EUR76.

Time frame. The length of time to process applications for both a visa C and a visa D can vary according to seasonal and regional circumstances, but they are usually issued within two to three weeks.

Permits

Procedure for obtaining approval. There are several types of permits which can be required. Please note that only non-EEA nationals need specific permits to work or live in Austria. All EEA nationals (except nationals from Bulgaria and Romania; hence the term "non-EEA-nationals" which is used to also include nationals from these two countries) are free to work in Austria under Article 45 of the Treaty on the Functioning of the European Union (TFEU). The process for obtaining permits is as follows:

- **Work permit.** Only the employer can apply for a work permit, from the relevant agency's regional office. Therefore, a non-EEA national who wants to work in Austria must find an Austrian employer first.
- **Rot-Weiß-Rot card.** High-skilled workers (the Public Employment Service has defined the criteria for highly-skilled workers) can request a residence permit valid for six months to search for employment. Once employment is obtained, they can request the *Rot-Weiß-Rot* card, which is valid for 12 months and permits the holder to work for one employer.
- **Employment authorisation.** Non-EEA nationals apply for this themselves, at the regional branch office of the Public Employment Service (*Arbeitsmarktservice*) in the district in which they live.
- **Exemption certificate.** Non-EEA nationals apply for this themselves at the regional branch office of the Public Employment Service in the district in which they live.
- **Residence permit.** The procedures here differ between EEA and non-EEA nationals. Non-EEA nationals must apply for a residence permit at their Austrian embassy or consulate before entering Austria (except for the spouses and children of EEA citizens, who can file their application after arriving in Austria).

When applying for a residence permit, the non-EEA national must submit a number of documents, including:

- a valid passport;
- a signed application form;
- an original or notarised copy of the applicant's birth certificate;
- proof of health insurance, sufficient financial means and accommodation in Austria.

All foreign documents must be translated into German and, if the applicant is a minor, both parents or legal guardians must sign the application form.

In contrast, EEA nationals and Swiss citizens do not need a permit to reside in Austria. They only have to inform the Office of residence within four months from their entry if they plan to reside for more than three months in Austria. The Office of residence will issue a registration certificate. Furthermore, the first establishment of any accommodation in Austria, or house moving within Austria, requires a registration with the local residence registration office within three days after moving, irrespective of the nationality of the person.

In addition, almost all non-EEA citizens who apply for a residence permit and plan to stay in Austria for more than 24 months must sign an integration agreement.



Cost. The costs are as follows:

- Work permit: about EUR20.
- *Rot-Weiß-Rot* card: about EUR100.
- Employment authorisation: about EUR127.
- Exemption certificate: about EUR127.
- Residence permit: usually about EUR100.

Documents attached to the application can incur additional costs.

Time frame. The length of the process can vary greatly and depends on different circumstances (for example, completeness of the applications, workload of the competent official, and so on).

Only work permits have a specific processing time, which is six weeks (usually the process lasts three to four weeks). To obtain a *Rot-Weiß-Rot* card, six to eight weeks must be allowed. For the other types of employment permit, a general deadline of six to 12 months applies (if the competent authority does not come to a decision within a six-month period, the applicant can request that the authority makes a decision within a further six months).

With reference to residence permits, there is a special processing time of six weeks for highly skilled employees. For persons who already have a residence permit in another EU member state, the deadline for the authorities to make a decision is four months. For other types of residence permit, the general deadline applicable to administrative procedures of six to 12 months applies.

REGULATION OF THE EMPLOYMENT RELATIONSHIP

5. How is the employment relationship governed and regulated?

Written employment contract

An employer must give a written record (*Dienstzettel*) of the essential rights and obligations under the employment contract to the employee immediately after their employment begins. However, the employment contract is still binding if this written record is not provided. If there is no written record, the employment contract must mention the mandatory rights and obligations of employment.

Implied terms

Employment law mainly consists of mandatory rules, which cannot be contracted out of to the employees' detriment (see *Question 1*).

Collective agreements

CBAs apply to the vast majority of employment relationships in Austria. They are made between the unions on behalf of employees, and usually the Chamber of Commerce on behalf of employers. Employers who do not join any representational institution such as the Chamber of Commerce are not subject to a CBA.

6. What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

Terms and conditions of employment can be unilaterally changed only where both:

- The change doesn't result in a change in the regulation of the employment contract.
- The change is not only to the employer's advantage.

If both of these points do not apply, the employee must agree to the change. In addition, the works council must be informed about a relocation of employees (and any other changes to the terms and conditions of employment which work to the employee's detriment). In certain circumstances (for example, where the relocation of employees last for over 13 weeks) the works council must give its prior consent to the change.

MINIMUM WAGE

7. Is there a national (or regional) minimum wage?

There is no statutory minimum wage. However, CBAs can set minimum wages. The social partners (Austrian Chamber of Commerce and the Austrian Trade Union Federation) in June 2007 signed an agreement (*Grundsatzvereinbarung zum Mindestlohn von 1,000 Euro*) which stipulates that a minimum monthly wage of EUR1,000 must be implemented in all collective agreements. The amount of minimum wage contained in a collective agreement typically depends on the:

- Classification of the work (there are different classification criteria set out in the collective agreement).
- Length of employment.

For example, under relevant CBAs, the gross monthly minimum wage is:

- About EUR1,300 for trained retail trade employees until the third year of employment.
- About EUR4,283 for experienced employees in the IT and data-processing sector.

RESTRICTIONS ON WORKING TIME

8. Are there restrictions on working hours?

Working hours

The maximum working day is eight hours (or ten hours including overtime), and the maximum working week is 40 hours (or 50 hours including overtime) (*section 3, Working Hours Act 1969*). There are a number of exceptions (for example, flexible work time, other distribution of working hours implemented by a CBA or a works agreement (four-day-week, for example), and so on).

Some CBAs have decreased the standard weekly maximum to, for example, 38.5 hours.



COUNTRY Q&A

Rest breaks

If the working time exceeds six hours, a minimum rest break of 30 minutes must be guaranteed. The period of rest is unpaid unless otherwise agreed.

Shift workers

In the case of shift work, the normal weekly working time within the shift cycle (or the period for averaging earnings) must not exceed an average of 40 hours (or the weekly maximum defined in the applicable CBA). The maximum normal daily working time is nine hours. CBAs can provide for more flexible arrangements, within specific limits.

HOLIDAY ENTITLEMENT

9. Is there a minimum holiday entitlement?

Minimum holiday entitlement

The minimum holiday entitlement is 25 working days' paid holiday a year. After 25 years of service, the employee is entitled to 30 working days.

Public holidays

There are 13 paid public holidays, which have to be provided and are not included in the minimum holiday entitlement. If employees work on public holidays (which is only allowed in the cases permitted by law) they will receive salary for the working hours actually provided in addition to their regular continued remuneration (for work on Sundays and public holidays). Many collective bargaining agreements provide for extra pay for overtime on public holidays.

ILLNESS AND INJURY OF EMPLOYEES

10. What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Can an employer recover any of the cost from the government?

Entitlement to time off

The employee and the employer can agree on unpaid time off. In this case, the employment relationship continues, but the duty to perform work and the payment of the salary are suspended.

Entitlement to paid time off

Employees who fall ill, or are injured unintentionally or without gross negligence, are entitled to paid sick leave for:

- A minimum of six weeks and a maximum of 12 weeks.
- A further four weeks (after the 12-week period has elapsed) on half-pay.

However, these allowances can vary depending on:

- The employee's length of service.
- Whether the employee was ill within the last six months of employment.

If an accident takes place at work, the paid sick leave entitlement is:

- Eight weeks for white-collar employees (non-manual workers).
- Ten weeks for blue-collar employees (manual workers).

After the period of paid sick leave expires, employees can claim social security benefits from the state.

If the employer requests, the employee must provide written medical confirmation of the illness or injury (but not of the diagnosis).

Employees who are injured intentionally or with gross negligence are not entitled to paid sick leave; in cases of gross negligence or intentional injury employees may receive social security benefits from the state (depending on the circumstances).

Recovery of sick pay from the state

An employer cannot recover sick pay that it has given to employees from the state.

STATUTORY RIGHTS OF PARENTS AND CARERS

11. What are the statutory rights of employees who are:

- Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?
- Carers (including those of disabled children and adult dependants)?

Maternity rights

Pregnant employees and mothers are protected from dismissal from the date of pregnancy until at least four months after giving birth. During this time, they can only be dismissed with judicial consent. If employees who have given birth, and are legally allowed to return to work, claim maternity leave or part-time employment, protection from dismissal usually ends four weeks after the maternity leave or part-time employment ends.

The Maternity Protection Act 1979 also regulates the:

- Termination of employment by mutual consent.
- Length of maternity leave (a maximum of two years from the date of birth and a minimum of two months from the date of the birth).
- Right to be offered part-time employment.

Female employees are entitled to maternity pay (*Wochengeld*) for eight weeks before and eight weeks after giving birth. This pay amounts to the employee's average income earned during the 13 weeks before maternity leave begins.

After receiving maternity pay for a total of 16 weeks, employees are entitled to parental pay (*Kinderbetreuungsgeld*). Since 1 January 2010 new provisions apply. The purpose of the new provisions is to make it easier for parents to return to their jobs, to reduce the loss of income during parental leave and to make parental leave more attractive for men.



The mother or the father can claim parental pay, but not both at the same time. If both parents share the childcare arrangements, parental pay is available for up to 36 months. The following alternatives are possible:

- 30 and six months (taken by the respective parents): EUR436 per month.
- 20 and four months (taken by the respective parents): EUR624 per month.
- 15 and three months (taken by the respective parents): EUR800 per month.
- 12 and two months (taken by the respective parents): EUR1,000 per month.

Parents can also opt for income-related parental pay, which effectively allows parents splitting parental leave by 12 and two months between them to claim 80% of their recent net salary (providing a minimum of EUR1,000 and a maximum of EUR 2,000 per month).

In certain cases involving single parents or hardship, the parental pay can be received for two further months.

Paternity rights

Fathers can claim up to two years' paternity leave and/or part-time employment for childcare purposes, during which they enjoy special protection from dismissal. They cannot claim this if the mother has also claimed maternity leave (for the same period), but they can share parental leave. Fathers on paternity leave are entitled to parental pay in the same amount and for the same period as mothers on maternity leave (see above, *Maternity rights*).

Surrogacy

Surrogacy is illegal in Austria. However, the surrogate mother would be regarded as the mother under the Civil Code and enjoy protection under the Maternity Protection Act 1979. Therefore, she will not be allowed to work for eight weeks before and after giving birth. The protection against dismissal and the right to maternity leave will last as long as the child remains with the mother. The parents under the surrogacy agreement (which would be void) would have to adopt the child. For adoption rights, see below, *Adoption rights*. During the adoption process the parents who take care of the child and are going to adopt it have carers' rights (see below, *Carers' rights*).

Adoption rights

Maternity and paternity rights vary depending on the age of the child on adoption. If the adopted child is:

- Less than 18 months old, parents have full maternity and paternity leave (see above, *Maternity rights* and *Paternity rights*).
- 18 months to two years old, parents have maternity and paternity leave until up to six months past the second birthday of the child (assuming that the leave starts directly with the adoption of an 18 month-old child, a maximum of one year is possible).
- Over the age of two and under the age of seven, parents have six months' maternity and paternity leave.

The entitlement to parental part-time leave for adoptive parents is the same as for biological parents.

Parental rights

Parents who have worked for at least three years for a company with more than 20 employees are entitled to work part-time until their children reach seven years of age (but note that after the child's fourth birthday the special protection against dismissal is reduced to a protection against dismissal based on inadmissible reasons).

Carers' rights

Employees on compassionate leave (to care for critically ill family members or seriously ill children) are protected against dismissal. They can only be dismissed with the prior consent of the Labour and Social Security Court, which must consider the interests of both parties when making its decision.

CONTINUOUS PERIODS OF EMPLOYMENT

12. Does a period of continuous employment create any benefits for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

Benefits created

A period of continuous employment creates a right to a number of benefits, including:

- **Loyalty bonus.** Most CBAs allow bonuses for employees with a long period of service (typically 20 or 25 years). A loyalty bonus is a one-off payment equal to one month's income or more.
- **Holiday entitlement.** The minimum holiday entitlement (see *Question 9*) increases to 30 working days after 25 years of service.
- **Severance pay.** Employees are entitled to severance pay after a minimum of three years' uninterrupted work. The amount varies depending on the length of service. Different rules apply to employment relationships that started on or after 1 January 2003 (see *Question 17, Severance payments*).
- **Notice period for dismissal.** The statutory notice period for terminating employment increases according to the length of time worked (see *Question 17, Notice periods*).
- **Appeal against dismissal.** After a minimum of six months' work, employees have an automatic right to appeal against a dismissal that has an adverse social effect on them.

Credit for work done with another employer can also be given by express agreement. CBAs often specify that additional compulsory credits must be included when determining the length of previous employment used to calculate the minimum wage (see *Question 7*). Earlier work for the same employer must also be considered.



COUNTRY Q&A

Consequences of a transfer of employee

When an employee is transferred to a new entity, credit for earlier work is given in accordance with the contractual agreement, or if the law or a CBA provides for this. A period of continuous employment must always be maintained if a company or business is transferred (see *Question 26*).

TEMPORARY AND AGENCY WORKERS

13. To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees?

As regards the contract with the work agency, agency workers are entitled to the same rights as other employees.

The business which temporarily employs agency workers has a fiduciary duty towards them and must treat them equally to permanent staff.

The salary for agency workers while transferred to a company must be geared to the minimum salaries contained in the relevant CBA. In addition, working hours must not differ greatly from those of permanent staff.

DATA PROTECTION

14. What data protection rights do employees have?

The Data Protection Act 2000 gives employees a comprehensive right to information about their personal data and how it is to be used. In addition, employees have the right for their personal data to be kept confidential, if it is worthy of protection (*section 1, Data Protection Act 2000*).

The relevant works council must approve (in the form of a works agreement) any introduction of systems for computer-supported acquisition, processing and transmission of employees' personal data, if the data both:

- Relates to more than general information on the employees and their qualifications.
- Is not used by the employer to meet its legal obligations.

DISCRIMINATION AND HARASSMENT

15. What protection do employees have from discrimination or harassment, and on what grounds?

Protection from discrimination

The Equal Treatment Act 1979 aimed to ensure that men and women were treated equally in their working lives. The Equal Treatment Act 2004 amended it to implement:

- Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
- Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

The Equal Treatment Act 2004 implements the principle of equal treatment of persons irrespective of sex, sexual orientation, racial or ethnic origin, age, religion or beliefs. Any direct or indirect form of discrimination in employment or occupation (and since 2011 also in connection with other legal relationships) is prohibited. The Act on Equal Treatment in Civil Service 1993 sets out similar restrictions for civil servants.

The anti-discrimination laws apply to all employees, in both the public and private sectors, in relation to:

- Conditions for access to employment or self-employment (including selection criteria, the recruitment process and, since 2011, the base salary under the relevant CBA and any potential disposition for overpayments must be mentioned in the advertisement for the position) and promotion, in all branches of activity and at all levels of the professional hierarchy.
- Access to all types and levels of vocational guidance and vocational training, including practical work experience.
- Employment and working conditions, including dismissals and pay.
- Membership of, and involvement in, an organisation of employers or employees, or any organisation the members of which carry on a particular profession, including the benefits provided by that organisation.

In addition, the employer cannot discriminate against an employee because of their allegation of discrimination. For this discrimination to be proved, it must be associated, in fact and in timing, with the employee's allegation. There is no exact defined qualifying period for these types of claim.

Protection from harassment

Harassment is deemed to be a form of discrimination under the Equal Treatment Act 2004 (see *above*, *Protection from discrimination*).

WHISTLEBLOWERS

16. Do whistleblowers have any protection?

No special statutory protection is provided for whistleblowers.

DISMISSAL OF EMPLOYEES

17. What rights do employees have when their employment contract is terminated?

Notice periods

In the absence of any other agreement, all white-collar employees must give one month's notice by the end of the month, regardless of their length of service. Blue-collar employees and their employers must give 14 days' notice.



The notice period that the employer must give to white-collar employees depends on the white-collar employee's length of service:

- Less than or equal to two years' service requires six weeks' notice.
- More than two years' service requires two months' notice.
- More than five years' service requires three months' notice.
- More than 15 years' service requires four months' notice.
- More than 25 years' service requires five months' notice.

CBAs and works council agreements can include provisions that are more favourable for the employee than the statutory provisions. If no agreement has been made stating otherwise, the only permissible termination dates for the employer are those at the end of a quarter (31 March, 30 June, 30 September and 31 December).

The statutory provisions regarding notice periods and termination dates apply to all employees. If provisions that are different from the statutory ones are made in CBAs or works council agreements, they are valid only for those employees who are included in the relevant agreement's area of application.

Severance payments

If the employment contract began before 1 January 2003, employees must receive the severance payment to which they have a claim when their employment ends. A severance payment is due only if one of the following applies:

- The employer gives ordinary notice to the employee.
- The employer dismisses the employee without good cause.
- The termination is by mutual agreement.
- The termination is a favoured termination on the employee's part. This applies when employees are entitled to severance payments even though they terminated the contract, for example, if they want to retire or end the employment relationship following a business transfer.

Severance payments depend on the length of continuous service, as follows:

- Three years' service requires twice the last monthly salary.
- Five years' service requires three times the last monthly salary.
- Ten years' service requires four times the last monthly salary.
- 15 years' service requires six times the last monthly salary.
- 20 years' service requires nine times the last monthly salary.
- 25 years' service requires 12 times the last monthly salary.

All new employment relationships beginning on or after 1 January 2003 are subject to a new severance pay system. Under this new system, employers must pay contributions to a pension benefits fund for all employees subject to the new system, at a rate of 1.53% of their gross monthly salary. On termination, the

employees are given the option to either have the amounts paid out as severance pay (if they have a minimum of three years' service) or left in the pension benefits fund, into which any new employer will continue to contribute monthly payments.

Procedural requirements for dismissal

The employer must notify the works council before terminating an employment contract. The works council can then comment on the planned dismissal within one week. This stage is known as the preliminary procedure.

The works council can:

- Agree to the dismissal. This requires a two-thirds majority.
- Oppose the dismissal. This requires a simple majority.
- Make no statement (abstain from comment). The decision not to make a statement of position must be based on a valid resolution, that is, at least half the works council members must participate. Resolutions not to make a statement require a simple majority.

The statement of position can be verbal or written but, to best serve as evidence, it should be in writing.

Dismissals that take place within this one-week period are invalid, unless the works council had already submitted a statement of position. The employer can give notice of dismissal after either receiving the works council's statement of position or once the one-week period is over. The notice of dismissal must be reasonable within the legal and actual context of the preliminary procedure.

After the employer has given the employee notice, the employer must inform the works council again, but there is no specific deadline for this second notification. A representative of the employer must give the notice.

18. What protection do employees have against dismissal? Are there any specific categories of protected employees?

Protection against dismissal

Most of the employees (except, for example, board members or certain executives) have protection against dismissal under the Labour Constitution Act 1974. Depending on the works council's statement, the employee or the works council can claim that a dismissal is either unfair or made for inadmissible reasons provided that the employee has been employed for six months or more. They must lodge a claim with the Labour and Social Court within two weeks of being informed about the notice of dismissal or the notice being delivered. There is no need for the employee or the works council to accept the dismissal, but only to receive notice of it.

A dismissal is considered as being made for inadmissible reasons if, for example, an employee is dismissed because of union activities. Alternatively, the dismissal of a 55-year-old employee with custody of a child and 25 years' service, who has not done anything to interfere with the employer's operational interests, is likely to be considered unfair.



Protected employees

There are special provisions that provide a higher degree of protection for the following exhaustive list of nine employee groups:

- Employees with disabilities.
- Pregnant employees.
- Parents to whom the Maternity Protection Act 1979 or Paternity Leave Act 1989 applies.
- Members of the works council.
- Apprentices.
- Employees on compassionate leave.
- Employees carrying out their compulsory military or alternative community service.
- Concierges employed by the landlord of an apartment building.
- Public-sector employees.

REDUNDANCY/LAYOFF

19. How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs?

Definition of redundancy/layoff

If a business reorganises and lays-off employees as a result of the reorganisation this is classified as a redundancy. However, Austrian law does differentiate between redundancies and other lay-offs based on business reasons.

Procedural requirements

Employers must notify the regional offices of the Public Employment Service in writing, within 30 days, if they intend to dismiss at least:

- Five employees, in companies with more than 20 and fewer than 100 employees.
- 5% of employees, in companies with 100 to 600 employees.
- 30 employees, in companies with more than 600 employees.
- Five employees who are at least 50 years of age.

The employer must consult with the works council (if there is any) about the planned business reorganisation. The consultation documentation must be attached to the notice to the Public Employment Service. In addition to the notice to the Public Employment Service, the preliminary procedure with the works council must be respected for every single dismissal (see *Question 17*).

Redundancy/layoff pay

If an operational change causes substantial detriment to the employees' interests, the works council can insist on a social compensation plan being made. This contains provisions that anticipate and remove a business reorganisation's negative effects on employees. For example, it can provide for longer notice periods, voluntary payments in addition to severance pay, occupational retraining, reappointment clauses, and so on.

TAXATION OF EMPLOYMENT INCOME

20. What is the basis of taxation of employment income for:

- Foreign nationals working in your jurisdiction?
- Nationals of your jurisdiction working abroad?

Foreign nationals

Nationality does not have an impact on income taxation. Under Austrian tax law, an individual is generally taxable in Austria if he has his residence or habitual place of abode in Austria. In principle, if the individual spends more than six months during a calendar year in Austria, he is subject to Austrian tax (unless bilateral tax treaties specify otherwise).

Nationals working abroad

Double taxation treaties must be used to decide the country in which tax should be paid if either:

- Austrian nationals have their domicile or ordinary residence not only in their country of employment, but also in Austria.
- Some other tax connection to Austria exists (for example, the nationals have spent more than 183 days in Austria during a calendar year).

21. What is the rate of taxation on employment income? Are any other taxes or social security contributions levied on employers and/or employees?

Income tax

Marginal tax rates are as follows, where the employee's gross income (after social insurance costs and other allowable expenses have been deducted) is:

- From EUR11,000 to EUR25,000: 36.50%.
- From EUR25,000 to EUR60,000: 43.214%.
- Over EUR60,000: 50%.

There is no tax due on the annual income up to EUR11,000, unlimited liability for tax provided.

Social security contributions

Social security contributions are due on all employees' earnings that are over a marginal level. This level is defined each year and in 2011 is EUR374,02 per month. Social security contributions are due at the following rates over employees' salaries (these figures are valid for white-collar employees; figures for blue-collar employees differ slightly):

- Retirement insurance: the employer pays 12.55% and the employee pays 10.25%.
- Health insurance: the employer pays 3.83% and the employee pays 3.82%.
- Workplace safety insurance: the employer pays 1.4% and the employee pays nothing.
- Unemployment insurance: the employer and employee pay 3% each.



- Residential housing fee: the employer and employee pay 0.5% each.
- Insolvency contribution: the employer pays 0.55% and the employee pays nothing.
- Workers' chamber contribution: the employee pays 0.5% and the employer pays nothing.
- Pension benefits fund contribution: the employer pays 1.53% and the employee pays nothing.

EMPLOYER AND PARENT COMPANY LIABILITY

22. Are there any circumstances in which:

- An employer can be liable for the acts of its employees?
- A parent company can be liable for the acts of a subsidiary company's employees?

Employer liability

An employer is liable for any damage caused by its employees' negligent acts to a client or any third party with whom the employer has a contractual relationship.

If no contractual relationship exists, the employer is only liable if they have either:

- Employed a person incapable of performing their duties, even if the employer did not know that the employee was incapable.
- Knowingly employed a negligent employee.

Parent company liability

Parent companies are not generally liable for the acts of their subsidiaries' employees. However, in some exceptional circumstances, liability can extend to the parent company, for example, if the subsidiary company is undercapitalised.

HEALTH AND SAFETY OBLIGATIONS

23. What are an employer's obligations regarding the health and safety of its employees?

There are a number of laws that protect employees' health and safety. The employer must implement the required systems and processes (for example, setting up safety systems in the workplace based on risk assessments). Employers' duty of care includes protecting against loss of life, damage to health and harassment. This includes:

- Preventing work-related dangers.
- Providing information and training for employees.
- Organising any necessary means of protection for employees' health.

Employers must keep themselves up to date about current technological and other developments that relate to the working

environment. If a serious, immediate or non-avoidable danger arises, the employer must ensure that employees stop working and leave the workplace to reach safety. If employers are not often present in the workplace, they can delegate the task of implementing and controlling safety measures to others.

There are also special provisions regarding:

- Sanitary facilities.
- Breaks.
- Workplaces with computers.
- Protection for non-smokers.
- Night shifts.
- The employment of certain groups of employees, such as minors, pregnant women and nursing mothers.

EMPLOYEE REPRESENTATION AND CONSULTATION

24. Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

Management representation

Employees are entitled to management representation and have significant consultation rights. The company's works council, or the central works council (a joint council formed by the works councils of several enterprises of one company or joint companies) must appoint at least one out of every three members of a company's supervisory board.

For stock corporations (that is, joint-stock companies), and some private limited companies, a supervisory board is mandatory. Other types of company can opt to have a supervisory board, for example, limited liability companies.

Consultation

Through their works council, employees have wide-ranging information, consultation and, in some circumstances, intervention rights, for example:

- The works council is entitled to receive annual financial statements.
- The works council has substantial participation rights in operational changes, particularly if dismissals are planned (see *Question 17 and Question 19*). In particular, if an operational change creates material disadvantages for all (or significant groups of) employees, the works council can require a social compensation plan to be made.
- For businesses with more than 200 employees, the works council can appeal against an operational change if this is likely to be substantially detrimental to employees. Only an appeal against a planned factory shutdown can suspend an operational change (for a maximum of four weeks).



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- If the works council is not consulted about an operational change, the employer can be liable to pay compensation and be subject to administrative fines of up to EUR2,180. However, the operational change is still effective in these circumstances.
- The works council must be informed of a dismissal at least one week before it takes place (see *Question 17, Procedural requirements for dismissal*), and can demand consultation with the company owner.

Major transactions

Employee consultation or consent is not required for share sales.

On an asset sale, the works council must be informed and consulted about any operational changes. It can recommend how to prevent, eliminate or reduce any detrimental effects on employees. In certain circumstances, the works council can compel the employer to make a social compensation plan.

25. What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

Remedies

If the employer refuses to allow works council members to represent employees on the management board, the works council can bring an action for a declaratory judgment. If successful, the board's decisions become legally void.

Aside from this, generally the infringement of consultation duties has no legal consequences. In some cases an administrative penalty is due, and in other (rare) cases (for example, preliminary procedure when giving notice), the decision of the employer becomes void.

Employee action

The works council can appeal some employer decisions to the competent government agency. The agency must review the decision and either confirm or reject it. The decision is generally stayed until after the agency's confirmation or rejection, although sometimes a preliminary injunction can be issued instead.

CONSEQUENCES OF A BUSINESS TRANSFER

26. Is there any statutory protection of employees on a business transfer?

Automatic transfer of employees

The buyer of a company or business automatically takes over all rights and obligations under existing employment contracts. The employee can only object to a transfer if the buyer either does not:

- Grant the protection against dismissal as specified in the relevant CBA.
- Grant company pension benefits in an individual employment contract.

Protection against dismissal

In general, dismissals six months before or after a transfer are legally invalid if they are exclusively or primarily due to the transfer. However, they are permitted, whether carried out by the seller or buyer, if they are due to economic, technical or organisational reasons.

Harmonisation of employment terms

Changes to the terms of individual employment contracts that are detrimental to employees are not permitted if they only take place because of the transfer, or are close in time to the transfer. However, changes that would have been allowed if there had not been a transfer are valid, for example, those that are made for business reasons or that relate to an individual employee.

The terms of a buyer's CBA generally apply to transferred employees. This can lead to less satisfactory employment conditions, but the employee's pay for regular work performance before the transfer cannot be reduced. If the buyer is not subject to a CBA, the terms of the seller's CBA continue to apply.

If there is a significant worsening of employment terms and conditions because of a CBA or works council agreement, employees can terminate the employment relationship with the same financial effects as if the employer had given notice (see *Question 17*).

PENSIONS

State pensions

27. Do employers and/or employees make pension contributions to the government in your jurisdiction?

Contributions paid to the government

The following pension contributions are payable to the state:

- Employers pay 12.55% of employees' salaries.
- Employees pay 10.25% of their salaries.

No social security contributions are payable by employees who earn below EUR374.02 per month.

In addition to this statutory pension, new pension fund and statutory pay arrangements have been introduced for employee relationships beginning on or after 1 January 2003 (see *Question 17, Severance payments*).

Taxation of contributions

Employers' pension contributions are tax-deductible business expenses.

Monthly amount of the government pension

The monthly amount of the state pension depends, in particular, on the total contributions made during a person's working life.



Supplementary pensions

28. Is it common (or compulsory) for employers to provide access, or contribute, to supplementary pension schemes for their employees? Do these schemes provide pensions, the value of which:

- Is linked to the employee's salary?
- Is linked to employer and/or employee contributions and investment return on those contributions?

Linked to the employee's salary

Company pension schemes are becoming increasingly common, but are not mandatory. Provision for pensions can be made under individual employment contracts, CBAs or works council agreements.

Pension schemes can be either those under which the pension can be determined at the start of the arrangement and those that cannot, because, for example, the value is dependent on contributions. However, pensions for which the value cannot be determined at the start of the arrangement are more common.

Linked to employer and/or employee contributions

See above, *Linked to the employee's salary*.

29. Is there a regulatory body that oversees the operation of supplementary pension schemes?

Regulatory body

Austrian pension funds are supervised by the Austrian Financial Markets Supervisory Agency (*Finanzmarktaufsicht*). This authority can also influence individual pension plans, but only as regards the rules that they must follow (that is, the influence is created by strict rules controlled by the FMA which a pension plan must follow).

Regulatory framework

The regulatory framework is contained in the Austrian Act on Pension Funds 1990 (*Pensionskassengesetz* (PKG)) and the Act on Occupational Pensions 1990 (*Betriebspensionsgesetz* (BPG)).

The PKG contains the organisational framework for internal and supplementary pension schemes. It is aimed at a revising legal coverage for the prospective beneficiary. To meet the requirements the pension schemes are supervised by the Austrian Financial Markets Supervisory Agency, who conduct secure and efficient assessments. Furthermore, the PKG states the range of activities that the pension schemes can be involved in and there are guidelines for the assessment of the contributions.

Beyond that it defines the minimum content and the requirements for the contract between the pension funds and the employer.

The BPG states the requirements for the establishment of internal and supplementary pension schemes and regulates their organisation and activities, providing security for pension commitments under a labour law perspective.

Tax on pensions

30. Are any tax reliefs available on contributions to supplementary pension schemes (by the employer and employees)?

Tax relief on employer contributions

An employer's contributions to company pension funds are tax deductible provided certain conditions are met.

Tax relief on employee contributions

Employees' contributions are promoted by federal government premiums and are, to a certain extent, tax deductible.

31. Is there any legal protection of employees' pension rights on a business transfer?

Automatic transfer of pension rights

If the new employer is the universal legal successor (of the transferring employer), the pension rights (based on individual agreements) automatically transfer (that is, they are part of the employment contract between the new employer and the employee) and the new employer therefore must provide the transferring employees with respective pension benefits. If the new employer fails to do this, the employees can refuse to be transferred, or they can claim the accrued benefits from the transferring employer.

Other protection for pension rights

Where the pension scheme formed part of a CBA, the application of a new CBA can result in inferior pension benefits. In this instance, the employee cannot claim for the difference. If the pension scheme is part of a works agreement, that agreement can be terminated by the new employer. In this case, the employee can claim for the accrued benefits from the transferring employer.

32. Can the following participate in a pension scheme established by a parent company in your jurisdiction:

- Employees who are working abroad?
- Employees of a foreign subsidiary company?

Employees working abroad

Employees who are working abroad can participate in a pension scheme established by a parent company in Austria.

Employees of a foreign subsidiary company

Employees of a foreign subsidiary company can participate in a pension scheme established by a parent company in Austria.

33. Is there any protection provided for pension scheme benefits where the sponsoring employer becomes insolvent? If so, who provides the protection, and how does this operate?

A part of the company pension is protected under the Insolvency Insurance Act 1977.



BONUSES

34. Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

There are no general guidelines on bonuses, such as profit shares, ad hoc awards and stock options. However, various kinds of bonus scheme are becoming increasingly popular, particularly at management level. Profit shares, profit bonuses and other premiums or bonuses often have favourable social security contribution treatment. Since 2011, profit shares as well as bonuses and premiums do not generally require a works agreement.

INTELLECTUAL PROPERTY (IP)

35. If employees create IP rights in the course of their employment, who owns the rights?

If the employee creates IP rights in the course of their employment, in general, they own the rights. However, the parties can agree in writing that IP rights created by the employee are owned and can be used by the employer.

RESTRAINT OF TRADE

36. Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Restriction of activities

Employees must not take part in activities that compete with their employer while they have a valid employment contract.

It is a ground for dismissal if employees operate an independent commercial enterprise, or engage in trading activities, on their own or on someone else's behalf, in the employer's line of business.

Post-employment restrictive covenants

An employment contract can include a term stating that after leaving the company, the employee cannot engage in any activity that represents competition for the ex-employer. The maximum term for such a clause is one year. Any non-compete clause that strongly restricts the employee's career advancement is ineffective. Whether employees must observe such a clause depends on the nature of the termination of their employment. A non-compete clause is only permitted if the employee is more than 18 years old (at the time of the conclusion of the clause) and earns more than EUR2,389 gross per month. This limit does not apply to employment concluded before 17 March 2006.

A court of law can reduce a contractual penalty for breaches of a non-compete clause if a dispute arises.

PROPOSALS FOR REFORM

37. Are there any proposals to reform employment law or pensions law in your jurisdiction?

At present, there are no relevant proposals to reform employment law or pensions law.



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Recent transactions

- Advising and representing companies, as well as executives, in all of their employment and labour law matters.
- Involved in a considerable number of legal disputes between executives and their employers (amongst them many companies listed on the stock exchange) concerning their diverse mutual claims.
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Recent transactions

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