



GUIDE TO EMPLOYMENT LAW IN AUSTRIA

1. INTRODUCTION

Employment law was one of the first areas in which the growing influence of the European Community on the national laws of its Member States became apparent. However, it was clear that the main goal of this development was to enable the effective functioning of the Common Market by creating a level playing field for Member States.

Nevertheless, employment law is also one of the areas in which Member States most fiercely defend their influence. As a result, every aspect of any “employment law” regulation emanating from Europe is thoroughly discussed, remains highly controversial among Member States and is only implemented, if at all, reluctantly. The obvious reason for this is that Member States regard employment law as an opportunity to gain a competitive advantage over other Member States. As a result, national influence is strongly defended.

Notwithstanding all the efforts to unify employment law across Member States and considering the numerous European directives and regulations in this area, employment matters still remain too diverse for businesses to be able to draw easy conclusions by way of direct comparison between the respective provisions of each Member State. National employment law – and this holds true for most Member States of the European Community – still needs to be supplemented with competent local advice in order for companies to circumvent the pitfalls of day-to-day business successfully.

2. EMPLOYMENT LAW IN AUSTRIA

Similar to many other industrialised countries in Europe, there is no single statute governing all aspects of individual and collective employment law in Austria. Accordingly, the most important areas of Austrian labour law are codified in a wealth of diversified statutes and in-depth regulations. The goal of these provisions is naturally to provide a certain level of protection for the rights

of employees. Given the diversification outlined above, the four main sources of Austrian employment law are as follows:

- | legislation,
- | collective bargaining agreements,
- | shop agreements and
- | individual employment agreements.

A brief overview of each of these sources is presented below.

2.1. Legislation

Austria has a wealth of statutory regulations covering employment law. Deliberations as to how to codify these regulations have been ongoing for decades now. However, the sheer scope of this task seems to prevent this from happening, much to the annoyance of labour lawyers. Though there are many diverse sources, a compact overview would include the following principal sources, namely:

2.1.1. THE GENERAL CIVIL CODE (*ABGB*)

The *ABGB*, in particular the provisions in sections 1151 to 1164, provides the bases for employment relationships. To some extent, these provisions also provide fall-back provisions and protection for those employees not covered by the Salaried Employees Act (*Angestelltenengesetz – AngG*).

2.1.2. THE LABOUR CONSTITUTION ACT (ARBEITSVERFASSUNGSGESETZ – ARBVG)

This act provides basic provisions on the collective employment law which is applicable in Austria. It deals with, inter alia, issues on different aspects of works councils and their members, shop agreements and collective bargaining agreements. However, it also contains important provisions on protection against dismissal.

2.1.3. THE ACT ON THE ADJUSTMENT OF LABOUR LAW (ARBEITSVERTRAGSRECHTS-ANPASSUNGSGESETZ – AVRAG)

This act is used, inter alia, to provide a statutory basis for the implementation of European employment law applicable to most types of employees. The best-known example is the implementation of the EC Directive on the transfer of businesses (commonly known as “TUPE” or Transfer of Undertakings (Protection of Employment)) in sections 3 to 6.

2.1.4. DIFFERENT STATUTES ON CERTAIN ASPECTS OF LABOUR LAW

There is a considerable number of statutes regulating relevant employment law issues such as holiday, the employment of juveniles, actors, foreigners or journalists and the equal treatment of and health protection for employees at the work place.

2.1.5. STATUTES ON DIFFERENT TYPES OF EMPLOYEES

There are separate statutes regulating blue-collar workers, white-collar workers, domestic workers, public workers, etc. However, the most important piece of legislation for non-manual workers which we will refer to most frequently is the Austrian Salaried Employees Act.

Statutory provisions are generally for the benefit of employees. Accordingly, further sources of employment law which affect the employer-employee relationship such as collective bargaining agreements, shop agreements or individual employment agreements may not contain provisions less advantageous to employees (*Günstigkeitsprinzip*).

Austrian employment legislation has traditionally drawn a distinction between blue-collar workers (*Arbeiter/in*) and white-collar workers (*Angestellte/r*). Provisions for the former have mostly been developed through collective bargaining agreements while legislation has traditionally been utilised to provide a framework of provisions for white-collar workers. However, recent changes in Austrian labour law are directed at treating blue-collar and white-collar workers in a similar manner.

Senior executives and directors have a special position in labour law. Due to their specific position within the business, representing, at least partly, the employer's interests, certain protective employment laws do not apply to managing directors (MDs) of joint stock corporations (*Aktiengesellschaft – AG*) and limited liability companies (*Gesellschaft mit beschränkter Haftung – GmbH*), and only partly to senior employees. Furthermore, it should be noted that senior employees may not be represented by the works council, if at all.

The Salaried Employees Act also applies to MDs of limited liability companies (LLCs), but never applies to MDs of joint stock companies unless explicitly agreed between the parties. However, even if such an agreement has been entered into contractually, the MD of a joint stock company is – by law – not considered to be an employee with respect to other protective provisions.

2.2. Collective Bargaining Agreements

A collective bargaining agreement (CBA) is a written agreement entered into between employers' associations and employees' associations for the purpose

of (1) regulating working conditions between employers and employees and (2) regulating the legal relations between the parties to the CBA. As a rule, a CBA is concluded for all businesses and all employees of an industry; a CBA contains mandatory provisions which, within the scope of the CBA, will directly affect each single employment agreement. Accordingly, these provisions must be understood as having a direct impact on the individual employment contract while existing in parallel to the agreement itself. For the purposes of the individual agreement, the provisions of a CBA may neither be revoked nor restricted by an individual employment agreement or a shop agreement to the disadvantage of the employee.

The parties to a particular CBA are most often the relevant trade unions (or their respective umbrella organisation, the Austrian Trade Union Association) and the Austrian Federal Chamber of Commerce or its respective branches. The Labour Constitution Act is the principal source of regulations for CBAs. Historically, CBAs mainly regulated the issue of remuneration. Due to the fact that CBAs encompass most employees in the private sector in Austria, a certain kind of minimum wage exists in the country, though there is no legislation in this respect. Closely linked to the issue of remuneration are provisions in CBAs concerning overtime payments and working hours. Moreover, the scope of a CBA often includes issues such as additional protection against dismissal (for example, longer notice periods and different termination dates), provisions with regard to parental leave, a sabbatical or gap-year and special remuneration for long time service.

Blue-collar workers and white-collar workers often have separate CBAs dealing with the special needs of each group, which naturally stem from the different tasks to be carried out by the respective employees. CBAs for blue-collar workers, for example, may provide more detailed regulations with regard to health protection due to the impact of heavy machinery utilised to carry out the specific tasks that are required.

The applicable CBA for a specific business is based on the decision of the Austrian Federal Chamber of Commerce regarding the mandatory membership of the business within the employers' association (*Kammer-Fachorganisation*). Furthermore, its applicability depends on the type of work or trade carried out by the business.

Pursuant to section 9 of the Labour Constitution Act, the policy that only one single collective bargaining agreement applies to one undertaking generally applies in Austria (*Tarifeinheit*). However, if the employer has mandatory memberships in more than one of the employers' associations owing to statutory provisions, more than one CBA may apply to the employer. Having said that, it is important to note that only one CBA will apply to an individual employment relationship in each case. When there is an organisational division at the operational level of the business (for example, principal and ancillary businesses), different CBAs may apply to the employer, but never to the individual employee.

2.3. Shop Agreements

Shop agreements are agreements entered into between the works council, if there is one, and the proprietors. It is mandatory that they are in writing and they may only regulate specific matters which, either by law or owing to the applicable CBAs, are reserved for shop agreements. Self-evidently, a shop agreement may only be entered into when a works council has been established for the business in question. In fact, several issues such as the introduction of a disciplinary code or certain control mechanisms may, where a works council has been set up, only be considered when a shop agreement exists.

The provisions of shop agreements may neither contravene mandatory statutory provisions nor mandatory collective labour law and are to be posted prominently in the business so as to enable employees to have easy access to and knowledge of their content. Single agreements which deviate from shop agreements are valid only when they are more favourable for employees or the matter under consideration is not regulated in the shop agreement.

2.4. Conciliation Boards

With respect to shop agreements, a further institution should be mentioned, namely, the so-called 'conciliation boards' (*Schlichtungsstellen*). Upon request by either party to a shop agreement, such a conciliation board is to be set up repeatedly for every specific dispute at the Labour and Social Security Court of first instance (*Arbeits- und Sozialgericht – ASG*), depending on the district in which the individual business is located.

The board comprises a presiding judge and four assessors, two of whom are appointed by each party to the specific dispute. One of each set of assessors is to be chosen for each party from a list provided by the Austrian Federal Chamber of Commerce (representing and providing in-depth knowledge from the employer's side) and the Austrian Federal Chamber of Labour/Works Council (representing and providing in-depth knowledge from the employee's side) respectively.

Overall, the specific disputes dealt with by conciliation boards are the entering into, amendment or cancellation of a shop agreement, disputes which are reserved for these institutions by statute.

Practically speaking, recourse to the institution of a conciliation board is normally sought to provide a solution where the parties have failed to agree on measures to prevent, eliminate or alleviate adverse effects in connection with an alteration to the business in question. The reason for this is that this situation would require the drawing up of a social plan, something which must be done in the form of a shop agreement.

An appeal against the decision of a conciliation board has to be filed with the Federal Administrative Court (*Bundesverwaltungsgericht*). Such an appeal has a suspensive effect, i.e. the decision of the conciliation board cannot be enforced until the final decision of the Federal Administrative Court becomes effective.

2.5. Individual Employment Agreements

Generally, there are different types of agreements depending on which work is carried out and by whom. Naturally, the applicable statutory provisions on employment law as well as social security provisions also vary depending on the way in which the work is carried out under the agreements. However, it should be noted that the contracts set out below are not decisive for the final assessment as to which statutory employment and social security provisions apply to which contractual obligation. The decisive basis for this assessment remains the manner in which the services are effectively carried out on a day-to-day basis independent from the title of the agreement or the mere intention of the parties with regard to the type of employment.

2.6. Employment Agreement (*Dienstvertrag*)

Under standard employment agreements in Austria, the protective provisions of Austrian labour law generally apply.

In essence, an employment agreement exists where a person undertakes to provide services to another person or legal entity for a specific period. It has certain characteristics, not all of which need to apply in every single case. An overall assessment is to be carried out in order to determine whether an employment agreement exists or not.

Generally, for the purpose of a standard employment agreement, the employee is integrated within the organisation of the employer's business and uses the resources provided by the employer. The employee is to comply with the instructions of the employer and is personally liable to the employer. Normally, the employee is not allowed to delegate duties resulting from the employment agreement and is obligated to carry out the contractual obligations personally. Furthermore, although the employee is to act under a duty of care when carrying out the services, the employee generally does not guarantee the success of the product of those services or is not to be held liable for their failure.

Overall, under an employment agreement, the employee is economically and personally dependent on the employer. The employee is economically dependent on the employer since his or her livelihood likely depends on the remuneration paid. The employee is personally dependent on the employer since he or she is to comply with the employer's instructions.

The main cornerstones of this relationship of dependence that an employee typically enters into are, obviously, the constraints that the employee is to bear in mind with regard to the period for and location at which the services are to be rendered. The typical situation is, therefore, that the employee renders services at the premises of the employer using the employer's resources (for example, computers, offices, stationary, cars, etc.) and for a regular 40-hour (or less, depending on the applicable collective bargaining agreement) working week.

Since 2016, the employment contract or the written statement of terms of employment have to indicate the gross basic monthly salary for the normal amount working hours which have been stipulated (e.g. 40 hours/week).

2.7. Service Agreement (*Freier Dienstvertrag*)

Under a service agreement, similar to the standard employment agreement above, a person undertakes to provide services for a certain period of time. However, there are differences such as the fact that the person affected is generally not personally dependent on the employer and not as fully integrated within the employer's organisational structure as a normal employee. Students or pensioners often work on the basis of service agreements by providing only a few hours of service each week, something which they normally arrange independently. Another difference is that the service contractor generally uses his or her own resources while not providing a guarantee as to the success of the product of those services. Accordingly, in summary, the person rendering these services is less personally and, most likely, less economically dependent on the employer than a normal employee as described above.

Generally, the protective provisions of Austrian employment law do not apply to service agreements. However, some analogous situations, such as a notice period in case of termination, do apply. As already set out above, reference to the Austrian General Civil Code is made in such cases. Overall, and in accordance with the respective case law, employment law provisions, which are not based on the personal dependency of the employee and which are not intended to protect the socially disadvantaged party, are to be applied to service contracts by analogy. Moreover, certain protective provisions contained in the Maternity Protection Act (*Mutterschutzgesetz – MSchG*) also apply to pregnant women on a service agreement.

2.8. Agreement for Work and Services (*Werkvertrag*)

Under an agreement for work and services, a designated task is to be completed and a specific and successful performance is agreed upon between the parties. Generally, no payment is to be rendered on the unsuccessful completion of a task. Based on that, the contractor is generally not integrated within the organisation of the principal. The contractor may substitute any person to carry out the task at any time and for whatever reason, and may use other personnel while remaining liable for the performance. Therefore, put succinctly, the contractor performing the agreed task bears the business risk and is also to provide a guarantee for the performance.

Accordingly, the protective provisions of Austrian labour law do not apply to an agreement for work and services.

2.9. Marginally Employed Employees (*Geringfügig Beschäftigte*)

The term “marginally employed employee” is taken from social security law. According to subsection 5(2) of the Austrian General Social Security Act (*Allgemeines Sozialversicherungsrecht – ASVG*), employment is considered “marginal” if earnings per calendar month do not exceed €460.66.

This amount applies for 2020. Employers are only obliged to pay general accident insurance (*Unfallversicherung*) for such employees.

Persons who are occasionally employed or whose employment lasts for less than a calendar month are also subject to the monthly threshold.

However, when employing at least two “marginally employed employees” whose earnings together total more than 1.5 times the monthly limit as stated above (for 2019 this amounts to €690.99), the employer pays a flat-rate charge. This amounts to 17.6% of the sum of the remuneration and supplementary payments (holiday bonus and Christmas bonus) that the employer is paying to the “marginally employed employees”.

With respect to labour law issues, these employees are not, as a matter of principle, to be treated differently to other (part-time) employees. Therefore, labour law principles apply to them as well as to other types of employees.

This also holds true with regard to statutorily applicable notice periods and end dates for white-collar workers. This is because the respective exception of section 20(1) of the *AngG* for employees with low normal working hours has no longer applied since 1 January 2018.

As regards holiday entitlement, “marginally employed employees” are also to be treated in the same way as part-time workers. Accordingly, they are entitled to holidays in proportion to the work to be rendered annually. Therefore, the entitlement of full-time workers in accordance with the Austrian Vacation Act (*Urlaubsgesetz – UrlG*) of 30 working days (5 weeks including Saturdays) is to be prorated relative to the working days rendered by the “marginally employed employee” and, additionally, is to be multiplied by the amount of working days rendered. Given that, one needs to translate holiday entitlement from working days (normally 5 weeks including Saturdays) into working days actually rendered.

However, “marginally employed employees” are sometimes exempted from the personal scope of a collective bargaining agreement.

2.10. Written Statement of Terms of Employment (*Dienstzettel*)

It is not mandatory for employers to issue written employment contracts. However, when no written employment agreement covering the information set out below exists, the employer is to provide the employee with a written statement immediately upon the commencement of the employment relationship that summarises the particulars (*Dienstzettel* – section 2 AVRAG).

This document does not have to be signed by the employee. Thus, such a statement is considered to be of a declarative nature only. Accordingly, these notes can be overruled by verbal and/or written employment contracts.

Generally, this abstract of the most important provisions applicable to the employment relationship between the parties involved is to contain the following information:

- | Name and address of employer
- | Name and address of employee
- | Commencement date of the employment relationship
- | Applicable notice period
- | Applicable end date of notice period
- | For employment of a restricted period, the end date of the restricted period
- | Expected location of work

- | Employee's salary scheme classification
- | Job title / function
- | The gross basic monthly salary/wage (salary/wage for normal working hours, e.g. 40 hours/week) and further elements of remuneration (e.g. special payments, etc.)
- | Due date of remuneration
- | Amount of annual leave
- | Agreed normal daily or weekly working times
- | Applicable collective bargaining agreement
- | Name and address of the corporate retirement fund applicable to the employee (Mitarbeitervorsorgekasse)



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