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# EMPLOYMENT BULLETIN

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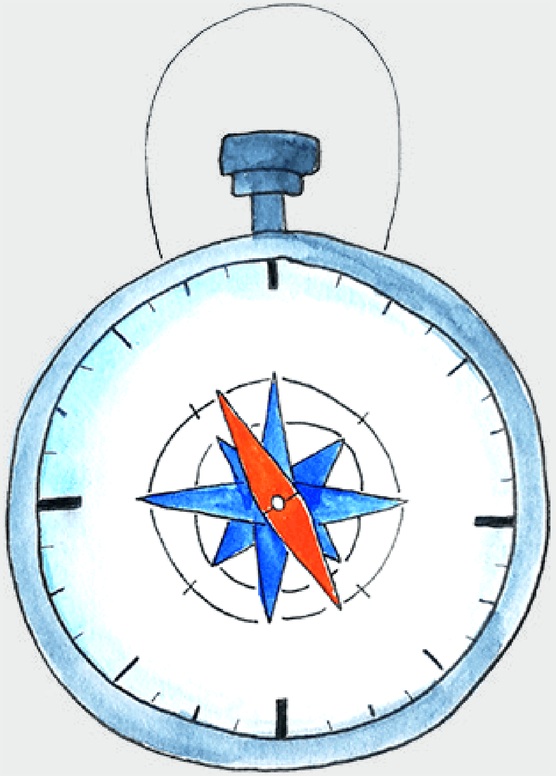

## Personnel Measures in Times of Crisis (AT)

Hans Georg Laimer & Lukas Wieser
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# PERSONNEL MEASURES IN TIMES OF CRISIS (AT)

*Written by Hans Georg Laimer & Lukas Wieser*

Times of global crisis such as the current COVID-19 pandemic can be challenging for employers. Personnel measures may become necessary to safeguard their business and to secure workplaces.

Austrian employment law provides for a variety of personnel measures from which employers may tailor custom packages for themselves depending on the needs of the individual business and the employment relationships concerned. The measures described below give an overview of the steps that may be taken by employers.

## 1. MEASURES IMPLEMENTED FOR THE COVID-19 PANDEMIC

To tackle the explicit challenges arising from the pandemic, the Austrian legislature introduced a short work (Kurzarbeit) scheme, which currently is in its third phase (October 2020 to March 2021), a special care time scheme (Sonderbetreuungszeit) and leave entitlement for risk groups, during which some or all costs are reimbursed to the employer. Employers also have the opportunity to order employees to consume vacation and time credits where the entering of the premises is prohibited or restricted due to COVID-19 measures.

## 2. CONSUMPTION OF VACATION AND TIME CREDITS

Employers may agree with employees that they consume outstanding vacation and time credits in response to low capacity utilization or demand. From an employer's perspective, such a step should be flanked by a strict overtime policy to prevent the accumulation of new time credits and overtime entitlements.

## 3. MODIFICATION OF CONTRACTUAL ENTITLEMENTS

Employers may consider revoking contractual entitlements which are contractually subject to revocation (e.g. an overtime lump sum payment subject to revocation). In general, employers and employees may agree to deteriorations within statutory and collective provisions (e.g. reduction of remuneration) for the future. Such a change of the employment relationship may also be achieved by a notice of termination with the option of altered conditions of employment (Änderungskündigung). Where a works council is established and an agreed or forced deterioration of the employment conditions lasts for 13 weeks or longer, the prior consent of the works council is required for any such change.

Another way of adapting the contract to safeguard the workforce and reduce the infection risk is to agree on home office with the employee for a definite or indefinite period of time (cf. our article on home office agreements in this bulletin).

## 4. REDUCTION IN WORKING TIME

Besides implementing a short work scheme, a reduction in working time may also be agreed on with the employee contractually. In this regard, it may also be assessed whether certain statutory part-time models, such as educational part-time (Bildungsteilzeit), care part-time (Pflegeteilzeit) or parental part-time (Elternteilzeit) apply to the employment relationship. Moreover, part-time work for older employees (Altersteilzeit) may also be agreed upon with employees who are only five years away from statutory retirement age.

## 5. UNPAID LEAVE / QUALIFICATION AND TRAINING MEASURES

Periods of low demand may also be used for qualifications and to train the workforce. Where external education measures of a certain scope and which are subject to certain requirements are undertaken, the employee and employer may agree on a period of educational leave (Bildungskarenz) of up to one year. During this time, there is no obligation on the part of the employer to remunerate. The employer and employee may also agree on unpaid vacation or a sabbatical.

## 6. TERMINATION OF THE HIRING-OUT OF LABOUR

If, despite all these measures, the employer is still forced to release manpower, the termination of the hiring-out of labour relationships may be considered as a first step.

## 7. REDUNDANCIES

If it becomes necessary to make redundancies, the risk of challenges to the terminations may be reduced by agreeing on mutual termination agreements. If considered advantageous from the employer's perspective, such termination of employment may be connected to a reinstatement commitment.

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Finally, it may become necessary for the employer to carry out unilateral terminations of employment. In case of mutual or unilateral termination of employment, mass redundancy procedures have to be observed and the employment office (Arbeitsmarktservice) may have to be given notice 30 days prior to the first terminations' taking place (cf. our article on the mass redundancy procedures in this bulletin).

Redundancies meeting the requirements of the mass redundancy procedure may also trigger a social plan (cf. our article on the mass redundancy procedures in this bulletin). Negotiating a social plan with the works council often facilitates the smooth processing of redundancies and helps avoid high numbers of court cases.

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**Additional content on this topic:**


# LEGAL PITFALLS REGARDING COLLECTIVE REDUNDANCIES (AT)

*Written by Andreas Tinhofer*

Hardly a week goes by without a company announcing extensive staff cuts. During the first months of the COVID-19 crisis, many employers reacted to the redundancy situation caused by the slump in sales by introducing government supported short-time working. Despite the extension of such state-subsidised **short-time working arrangements** (until 31 March 2021), more and more companies are now finding themselves forced to permanently adjust their staffing levels to the reduced demand for labour by terminating employment contracts.

In many cases these are „mass dismissals" for which a special notification procedure to the Public Employment Service (AMS) applies. This so-called **"early warning system"** requires employers to notify their regional AMS office in writing if they intend to terminate a certain number of employment relationships within a 30-day period.

However, the term "mass dismissal" is misleading as - according to the relevant provisions - the (contemplated) termination of five employment relationships may already trigger the obligation to notify the AMS. If older employees are affected (over the age of 50), this applies irrespective of the size of the company.

Formal errors made by employers regarding the notification requirements can result in **high costs for the company**. In many cases, such errors invalidate all terminations of employment relationships during the relevant period. Notably, invalidation is not merely limited to dismissals. This was established by the Supreme Court in 2018 (9 ObA 119/17s) where it was made clear that violations of the early warning system's regulations also invalidate **amicable terminations** (initiated by the employer). As such, the early warning system represents a „legal minefield" for employers which demands careful navigation.

Further to this, the Supreme Court stated that the obligation to notify the AMS may already have been violated if the **intention to terminate** a relevant number of employment relationships within the 30-day period **has manifested itself** in a sufficient manner. The facts of the specific case involved an employer offering a sufficient number of employees the amicable termination of their employment relationship and promised them a so-called "early termination bonus" if they accepted the offer by a certain date (less than 30 days).

In **practice**, therefore, when planning staff reduction measures, employers must pay the greatest attention to ensuring that they do not manifest an intention to terminate (e.g. by announcements in works meetings, press conferences etc) without complying with the relevant regulations of the early warning system.

If the employer initially only wishes to sound out which employees would agree to a termination of their employment relationship by mutual consent, they should therefore make it clear that these **"exploratory talks"** do not yet constitute a legally binding offer (e.g. by making an explicit reservation)

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and that the final decision on the termination of the concrete employment relationship has not yet been taken.

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**Additional content on this topic:**


# RE VIRGIN ATLANTIC AIRWAYS LTD – PUTTING THE 2020 RESTRUCTURING RULES TO THE TEST (UK)

*Written by Luke Zadkovich & Shannen Trout*

In September 2020 the High Court approved the first Restructuring Plan under the Part 26A Companies Act 2006. The update came as part of the Corporate Insolvency and Governance Act 2020 ("CIGA"), which was brought into effect on 26 June 2020 in an attempt to support businesses struggling with the effects of the Covid-19 pandemic.

## FACTS OF THE CASE

Virgin Atlantic Airways Ltd ("Virgin") is an internationally recognisable brand. Virgin has several thousand employees, 35 aircraft and in normal times would expect to carry roughly 6 million passengers a year around the world. However, these are not normal times. The Covid-19 pandemic has seen demand for air travel fall dramatically. Virgin has predicted that air travel will not return to 'normal' until at least 2023.

Without taking immediate steps, Virgin's liquidity would likely have reached a critical level by the end of September 2020. By October 2020, Virgin would have been in serious financial trouble.

As a result, Virgin sought to rely on Part 26A to implement a restructuring plan. This plan would involve reducing the debts of Virgin to a manageable level, creating a deferred repayment scheme and taking a cash injection from outside sources (the "**Restructuring Plan**").

The Court initially ordered that a meeting of each class of creditors should be convened to take a vote on the proposed Restructuring Plan. At the meetings, all four classes of creditor approved the Restructuring Plan under Part 26A. The first three classes of creditor approved these by 100%, and the fourth class approved the Plan by 99.24%. Only two creditors voted against the Restructuring Plan, with a further two abstaining from the vote.

The Court was then called upon to make the final decision as to whether the Restructuring Plan should be approved.

## PART 26A – WHAT IS NEW?

The introduction of Part 26A came as part of the Government's efforts to assist businesses facing financial distress during the Covid-19 pandemic. The ability to rely on restructuring plans, rather than the previous schemes of arrangement under Part 26, makes English restructuring law lean toward being more debtor-friendly, rather than creditor-friendly as it was in the past.

In the Virgin Atlantic case the Court addressed the main differences between the previous schemes of arrangement found under Part 26 and the much newer Part 26A restructuring plans. These differences can be summarised as follows:

- Any company wishing to rely on the Part 26A provisions will need to demonstrate that they have met the thres-

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hold provided by clause 901A of the Companies Act. This means that the company has to be able to show that it has encountered, or is likely to encounter, financial difficulties affecting its ability to carry on business. The restructuring plan would need to be able to "eliminate, reduce, prevent, or mitigate the effect of any financial difficulties".

Under Part 26 this is not a requirement. In fact, scheme of arrangement type plans are often used by solvent companies in order to effect restructuring to allow them to implement takeovers or changes in general to the structure of the company.

- Under section 901F of the Companies Act a restructuring plan will be deemed approved by a class if it is approved by 75% on value of those present and voting in person or by proxy. There is no need to obtain a majority of those attending and voting.

- For the first time in English law a "cross-class cram down" would be an available instrument to the court. This tool gives the court the ability to exercise discretion to sanction a restructuring plan even if the 75% of votes had not been obtained. Provided, however, that: i) Another class which would have received a benefit under the alternative plan had voted in favour of the plan, and ii) Members of the dissenting class would not be worse off under the plan than they would have been had the plan not been sanctioned.

## DECISION

Relying on the guidance of previous authorities the court sanctioned Virgin's Restructuring Plan. This outcome will likely provide some comfort to businesses looking to rely on Part 26A as the Court used a common-sense approach to making its decision, setting clear guidelines for others to follow.
The main considerations of the Court in making this decision were as follows:

- Had the proposed plan complied with the statutory provisions laid out by Part 26A and the accompanying provisions?

  In this case Virgin were clearly able to show that they were going to encounter financial difficulties. Along with this they obtained over 75% of the votes in favour from each class.

- Had the classes been fairly represented at the meetings? In looking at this point the court had to decide whether adequate information had been provided to the classes in order to allow them to make reasonable commercial decisions.

- Was the scheme fair? This element was summarised as considering whether a reasonably intelligent and honest man could reasonably approve the plan.

- Were there any defects in the plan? In this case the Court was confident that there were no blots or defects in the Restructuring Plan.

- Was the plan capable of being internationally effective?

  In this matter the Court considered expert evidence showing that the US Bankruptcy Court would likely recognise the proposed Restructuring Plan. It was later held by the US Court that the plan was allowed under Chapter 15 of the Bankruptcy Code, protecting Virgin's assets from US creditors.

In the end it was decided that Virgin's Restructuring Plan had satisfied all of these elements so justifying the use of the Court's discretion. Using the tools already provided to it by the previous Part 26 caselaw, the Court set a precedent for approaching the 2020 restructuring plans. Unfortunately, due to the high rate of approval amongst the classes in this case the Court did not have the chance to consider the "cross-class cram down" and how that should be implemented.

## CONCLUSION

The new provisions contained in the Companies Act are a welcome development that provide flexibility to facilitate the restructuring of companies in the UK. The Covid-19 pandemic has impacted public health and the way we live, but also the ability of businesses to stay afloat. The tools provided by Part 26A are not only useful but necessary in times like these.

The Virgin Atlantic case, the first of its kind, allowed the Court to provide clarity on the way in which it would use its discretion to sanction restructuring plans. However, the "cross-class cram down" still remains untested and it will be interesting to see how this is dealt with in the future where creditors do not support a company's proposed plan.

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# "RESTRUCTURING" IN AN EMPLOYMENT CONTEXT (US)

*Written by Eva-Maria Mayer*

The COVID-19 pandemic has not only affected our everyday lives but has also strongly impacted the global economy and labor markets. From adjusting the supply chain to the restructuring of the work force through reduction or outsourcing, U.S. employers and businesses have had to make numerous tough decisions over the past months, many of them new.

If a business finds itself in the difficult position of needing to reduce its work force, it is important to observe federal and state law in order to prevent lawsuits over wrongful termination, back-pay, penalties and discrimination. Below we provide some general insights into the different routes a business can take and what it should be aware of during these unprecedented times.

## FURLOUGH VS. LAYOFF:

Before taking any action, it is important to consider whether the intent is to reduce the business' workforce temporarily or permanently. Depending on which route the business decides to take, different requirements must be met to prevent possible litigation. For example, furlough is a mandatory, but temporary, unpaid leave of absence from work. Some employees may continue to receive benefits and apply for unemployment insurance. As this is not a termination of the relationship, the employer must stay in contact with furloughed employees and inform them of any relevant business decisions. It is important to be aware of the specific state requirements as some have strict guidelines as to what constitutes a furlough as opposed to a layoff.

A layoff is more straightforward procedurally but possibly a harder decision to make as it cuts the ties between the employer and employee. It should be noted that layoffs are different from termination as it is understood at the end of the employment relationship that such an ending of the relationship is due to a lack of funds or work. It is also important to keep track of the number of employees who have been laid off. Some of the more stringent state and federal requirements only become applicable after a certain threshold of layoffs has been met.

Should the hard decision to lay off employees be made, it is important to safeguard against any possible lawsuits by ensuring that proper documentation for the objective reasoning behind the layoffs exists.

We highlight a few possible claims an employer could expect and should prepare to defend against after laying off its workforce.

## WRONGFUL TERMINATION:

State and federal mandates on being able to work from home or being required to stay at home continue to change. It is important to keep a close eye on the cause of the layoff or termination and whether such cause may have come about due to a state or federal mandate. For example, a business that terminates an employee because they refused to work from the office may face a wrongful termination suit when the reason for such a refusal was a state or federal work-from-home mandate.

## WARN AND MINI-WARN LITIGATION:

Under certain circumstances, federal law, pursuant to the WARN Act, requires businesses with 100 or more employees to give at least 60 days' notice prior to a mass termination. There are twenty states including New York, New Jersey, and California which have enacted so called "mini-WARN" statutes. Such statutes can be even more protective. Failure to provide adequate notice can and has resulted in several suits which are currently pending before the courts.

## DISCRIMINATION SUITS:

Claims for discrimination may also be brought by employees that were laid off or terminated. Such claims can be brought for reasons of age, gender, religion, race and others. The terminated employee may allege that they were chosen for termination on the basis of a particular characteristic of his/hers. In order to prevent such allegations, it is important to utilize objective standards when terminating individual employees or groups and to ensure documentation of the same.

It should also be noted that discrimination claims may be brought when the business decides to bring its employees back to work. It is again important to have well documented objective standards that determine which employees should return to work as well as how and when. The Equal Employment Opportunity Commission (EEOC) has stated that employers should avoid blanket policies for employees falling within the group of individuals considered to be high risk pursuant to the Center of Disease Control and Prevention (CDC) guidance as doing so may result in inadvertent discrimination on the basis of age or pregnancy.

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## FAMILIES FIRST CORONAVIRUS RELIEF ACT ("FFCRA"):

The US Department of Labor's FFCRA came into effect on April 1, 2020. The FFCRA includes provisions which require employers to provide eligible employees with up to two weeks of paid COVID-19 related family leave ("EFMLA"). The Southern District of New York in *State of New York v. United States Department of Labor*, 20-cv-3020-JPO (S.D.N.Y. Aug. 3, 2020) invalidated certain aspects of the FFCRA (the work-availability requirement, intermittent leave and employer consent and documentation requirements), which has resulted in uncertainty amongst employers as to its application. Amendments and clarifications were announced on September 11, 2020 and are valid through December 31, 2020. It is important to be familiar with these guidelines when it comes to extending leave to employers pursuant to the FFCRA.

## CUSTOMER AND SUPPLIER CONTRACTS:

Navigating how best to deal with restructuring the business' workforce is not the only thing that businesses need to prioritize. Supply or customer contracts are vital to the success of a business, but they are likely under strain due to the current circumstances. It is important to be proactive and understand any possible effects the current situation may have on any such contracts. To do so, it is advisable to review current contracts to assess whether any clauses and/or rights require renegotiation to prevent any possible breaches. It is also advisable to familiarize oneself with any clauses which may be relevant in the current circumstances in order to make proper business decisions about, for example, the restructuring of supply chains, changing from work performed in-house and outsourcing without being blindsided by unanticipated results or liabilities.

Clauses such as *force majeure* clauses have become more relevant and it is important to be aware of the ability to invoke or defend against such claims as these may have a significant impact on the business' supply chain. Such cases have been making their way through the courts. One such case caused the Seventh Circuit to rule on *force majeure* clauses which do not address foreseeability, holding that such clauses may still apply regardless of whether the contracting parties could have reasonably foreseen the relevant events. Although this case arose prior to COVID-19, it will likely impact COVID-19 related litigation. *Acheron Medical Supply, LLC v. Cook Medical Inc.*, Nos. 19-2315 and 19-2410.

## INSURANCE COVERAGE:

Similarly, it is important to be proactive about insurance coverage. Although business interruption insurance generally covers lost revenue, fixed expenses or lost profits and costs that indirectly result from disruptions to a company's supply chain, many insurance companies have stated that COVID-19 related losses are not covered. Therefore, it is important to familiarize oneself with the coverage provided by the insurance company and any notice requirements to ensure compliance.

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# THE IMPORTANCE OF DUE NOTICE IN AN EMPLOYER'S SUBSTITUTION PROCESS (MEX)

*Written by Andrea de la Brena*

Most countries are experiencing a historic financial crisis due to the Covid-19 pandemic. Mexico is no exception. In the face of a financial crisis, companies must adapt in order to survive. Companies may join forces with other companies, split up, reduce their size or sell their business. Each type of restructure will have its own legal effects on the employment agreements in place depending on the circumstances of the case.

Under Mexican law, the substitution of an employer may occur when, as a consequence of the restructure: (i) an employer transfers the essential assets used for the performance of the work activities to another entity and the latter aims to continue with said work; or (ii) when the company acting as the employer or a work establishment is transferred to another but the majority of shareholders and the main business activities remain the same. A simple transfer of shares does not amount to the substitution of an employer because the identity of the employer is not changed. Likewise, the occupancy of the company's facilities by another company does not necessarily amount to the substitution of an employer unless one of the circumstances mentioned above applies (*Tesis Aislada* I.3o.T.128 L).

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Substitutions of employers do not release former employers from their labor and social security obligations per se. Under the Mexican Federal Labor Law ("FLL") and the Social Security Law ("SSL"), there are a series of notices which must be duly performed in order to limit and eventually release the former employer from liabilities in these fields.

In the event of an employer's substitution, the former employer will remain jointly liable with the new employer for all employment related liabilities incurred during a period of six months before the transfer takes place.

Under the FLL, this six-month period is not linked to the date of the transfer itself but runs up to the date when the employees or the employees' unions are notified of said transfer (Article 41 of the FLL). There is no legal provision as to the form of such notice. Nonetheless, due to the employer's burden of proof in labor law matters, reliable evidence of the notice should be recorded (*Jurisprudence* 2a./J. 28/2008). As to the content of the notice, it should at least contain the date of the transfer and the identity of the new employer (*Tesis Aislada* VIII.2o.25 L).

As to social security liabilities, the SSL stipulates that the six-month period of joint liability begins on the date when the former employer notifies the Institute of Social Security (*Instituto Mexicano del Seguro Social*) in written form (Article 290 of the SSL). Upon receipt of the notice, the Institute shall inform the new employer of the acquired social security obligations and any pending payments.

The general statutory limitation period for the employer's labor law obligations is one year. However, for certain obligations such as the right to claim payment of compensation for working risks, this period could amount to two years (Article 516 and 519 of the FLL), whereas the statutory limitation period concerning social security obligations is five years (Article 298 of the SSL).

Failure to comply with the above obligations to notify former employees and the Institute for Social Security and to keep proper records could extend the liability of the former employer up to two years in the case of labor obligations and up to five years in the case of social security obligations.

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**Additional content on this topic:**


# DIVISION OF THE EMPLOYMENT CONTRACT IN THE EVENT OF A TRANSFER OF UNDERTAKING (AT)

(ECJ 26 March 2020, C-344/18, *ISS Facility Services NV*)

*Written by Lukas Wieser & Vera Habe*

In the event of a transfer of undertaking, all employment contracts that are part of the affected business are automatically transferred to the transferee by law (subsection 3(1) of the AVRAG). The Austrian transfer of undertaking law is based on Directive 2001/23/EC. In a recent landmark decision, the European Court of Justice (ECJ) decided that it may even be possible to transfer an employee to two separate transferees under Directive 2001/23/EC.

## 1. FACTS AND NATIONAL PROCEDURE

In the case at hand, a cleaning company was responsible for the cleaning and maintenance of various public buildings in the city of Ghent, divided into three lots. The company employed a project manager responsible for all three lots.

The company's contract with the City of Ghent, however, was not renewed in 2013 and the three lots were allocated to two different companies. The first company was allocated two lots and the second company was allocated the remai-

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ning one.

The cleaning company then argued that the project manager's employment relationship had been transferred to both transferees in proportion to the lots (85% and 15%). The proportional transfer was disputed by the transferee who had taken over the greater proportion of the lots.

In the national proceedings, it was established that a transfer of business had occurred in the present case as an economic entity had retained its identity. Nevertheless, it was not clear for the Belgian court whether the employment contract had been transferred to both contractual successors in proportion to the lots (85% to 15%) or in its entirety to the contractual successor that acquired the part of the undertaking in which the employee was mainly employed. Thus, these questions were referred to the ECJ.

## 2. THE ECJ'S FINDING

The ECJ held that a transfer of the rights and obligations arising from an employment contract to each of the transferees in proportion to the tasks performed by the employee makes it possible, in principle, to ensure a fair balance between the protection of employees' interests and the protection of transferees' interests. The employee's rights arising from his/her employment contract are safeguarded while the transferees do not have obligations imposed on them that are greater than those entailed by the transfer of the undertaking concerned to them.

Thus, according to the ECJ, in the event of a transfer of undertaking involving several transferees, the rights and obligations arising from an employment contract are to be transferred to each of the transferees in proportion to the tasks performed by the employee concerned, where possible.

The division of the employment contract, however, may not worsen working conditions or adversely affect the safeguarding of the employee's rights as guaranteed by law, which is for the national (Belgian) court to determine.

However, if such a division were impossible to carry out or adversely affected the rights of that employee, the transferee(s) would be regarded as responsible for any consequent termination of the employment relationship even if that termination were initiated by the employee.

## 3. IMPACT ON FUTURE TRANSFERS OF UNDERTAKINGS

Based on this ECJ decision, a transfer of undertaking involving several purchasers may lead to several part-time employment contracts with different employers by operation of law. Whether or not such a division of the employment relationship is possible depends on the individual case. Such a division of an employment relationship between two employers is – at least from an Austrian law perspective – a rather uncommon legal consequence. Thus, it remains to be seen how Austrian courts will solve such situations in the future.

Nevertheless, it can be expected that employees in similar situations may claim employment relationships with both the transferee acquiring the main part of the business and any other transferees as well.

A similar situation also exists where the employee is only partially employed by the economic entity transferred to the transferee. The current ECJ decision was already partially applied by the French Cour de cassation in such a situation where the employee only worked half of his/her time in the transferring economic entity (cf. Cour de cassation, Sep 20, 2020, Arrêt n° 780 (18-24.881)). However, the French High Court concluded that a division of employment only takes place if it does not worsen the employee's working conditions or have adverse effects on the employee's rights under Directive 2001/23/EC. Otherwise, the employment remains with the transferor.

It can already be seen from this first national case in France that this ECJ ruling has opened the door for multiple further scenarios of transfers of employment relationships by operation of law under Directive 2001/23/EC in Austria in the future.

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# HOME OFFICE DURING COVID-19 (AT)

*Written by Hans Georg Laimer & Lukas Wieser*

In these times of COVID-19, working from home has become an increasingly popular and important tool for crisis management. The experience of working from home that has been gained means that many employers are likely to continue relying on home office as a permanent tool.

Currently, no clear and comprehensive legal regulations for home office exist under Austrian law. This has also been recognised by the Austrian legislature, something evinced by the establishment of a working group in the Ministry of Labour and the involvement of social partners in the issue. Therefore, it is to be expected that concrete regulations on the subject of home office will be adopted in the near future.

Where employees perform work from their home office - whether in a crisis situation or on a permanent basis – employers should pay attention to the following in particular:

## WRITTEN AGREEMENT

The performance of work from home cannot be arranged unilaterally. A corresponding agreement between employer and employee is required. The home office agreement must be concluded in writing. Some collective bargaining agreements also require the written form for home office agreements.

## DEFINITION OF FRAMEWORK CONDITIONS

The framework conditions of home office activities should be clearly regulated in detail. These include, in particular, working times, the place of work, the specific activities to be performed, etc. By including corresponding reservations, a certain flexibility for the employer can be achieved regarding these points.

## WORK EQUIPMENT AND LIABILITY FOR COSTS

It is recommended that the provision of work equipment and regulations regarding liability for costs are also agreed upon in advance. By agreeing that any costs (e.g. for internet, electricity, rent, etc.) are already covered by the current remuneration - assuming a corresponding overpayment is made with the monthly remuneration - the risk of additional claims by the employee can be significantly reduced for the employer.

## EMPLOYEE PROTECTION

Regarding the equipment provided by the employee him- or herself (e.g. work table, work chair), the employer has no obligations pursuant to employee protection law. However, the regulations regarding screen work are also applicable to employees working from home. If, for example, laptops, iPads, etc. are made available, employee protection law must be observed.

## SECRECY AND DATA PROTECTION

Home office also poses new challenges for secrecy and data protection. Effective protection of business and trade secrets require, in particular, that the employer takes appropriate secrecy measures. Therefore, employees should also be obliged to provide comprehensive protection of business and trade secrets in connection with home office and also with respect to persons living in the same household.

## DURATION AND TERMINATION OPTIONS

A home office agreement can be concluded for a definite or an indefinite period of time. Therefore, if the home office activity is to be made possible for the duration of a crisis only, this must be agreed accordingly. It is also advisable to include termination modalities in the home office agreement.

If the above points are clearly regulated in a corresponding agreement, there is nothing to prevent further use of home office.

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# SOCIAL PLANS (SOZIALPLÄNE) (AT)

*Written by Lukas Wieser & Melina Peer*

The implementation of personnel measures (cf. our article on personnel measures in this bulletin) may trigger a social plan (*Sozialplan*).

A social plan under Austrian law is an enforceable shop agreement. Thus, certain statutory preconditions have to be fulfilled cumulatively for a social plan to be enacted. Firstly, a works council has to be established in the employer's business (starting with five permanent employees). Secondly, a social plan may only be drawn up in a business which permanently employs 20 or more employees. Thirdly, one of the following "changes of business" (*Betriebsänderungen*) has to occur:

- Cutbacks or the closedown of the business or parts of the business;
- The termination of employment contracts which trigger a notification requirement pursuant to § 45a of the *Arbeitsmarktförderungsgesetz* – AMFG (provisions on mass-redundancies, cf. our article on the mass redundancy procedures in this bulletin);
- A merger or aggregation with other businesses;
- Changes to the business' purpose (*Betriebszweck*); changes to the operational facilities (*Betriebsanlagen*) or changes to the organization of work within the business (*Arbeitsorganisation*);
- The introduction of new working methods;
- The introduction of significant rationalization and automation measures.

Finally, such a "change of business" has to be detrimental to all or a substantial section of the employees employed in the business.

If all four preconditions are fulfilled, a social plan may be concluded between the employer and the works council in order to prevent or alleviate hardships for the employees affected by the change of business.

If the employer and the works council cannot agree on a social plan, the works council may address the conciliation board (*Schlichtungsstelle*) at the competent labour court. In such circumstances, the conciliation board is entitled to draft a social plan after hearing the employer and the works council on the matter.

A social plan often contains provisions on the following topics:

- Voluntary severance payments in the event of redundancies such as additional monthly salaries depending on the age and service period of each individual employee;
- Longer notice periods in order to grant the employee more time to look for alternative employment;
- The relocation of some employees instead of redundancy;
- The establishment of work foundations and/or social and hardship funds;
- Retraining programs for employees; and,
- Rehiring options.

By concluding a social plan with the competent works council, the employer can often avoid lengthy court cases involving challenges to the unilateral termination of employment. Thus, a good and balanced social plan negotiated with the works council provides the employer with a high level of certainty and allows for the measure to be implemented quite quickly. Solid preparation for the negotiations with the works council, however, is key from an employer's perspective.

***For additional information and queries, please contact lukas.wieser@zeilerfloydzad.com or melina.peer@zeilerfloydzad.com***

**Additional content on this topic:**

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With Hans Georg Laimer, Andreas Tinhofer and Lukas Wieser
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**| UPDATE ARBEITSRECHT SPEZIAL | UPDATE EMPLOYMENT LAW SPECIAL**
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With Hans Georg Laimer, Andreas Tinhofer and Lukas Wieser
**Thursday, 4 March 2021**

**| UPDATE ARBEITSRECHT**
"Aktuelle Rechtsprechung und gesetzliche Neuerungen"
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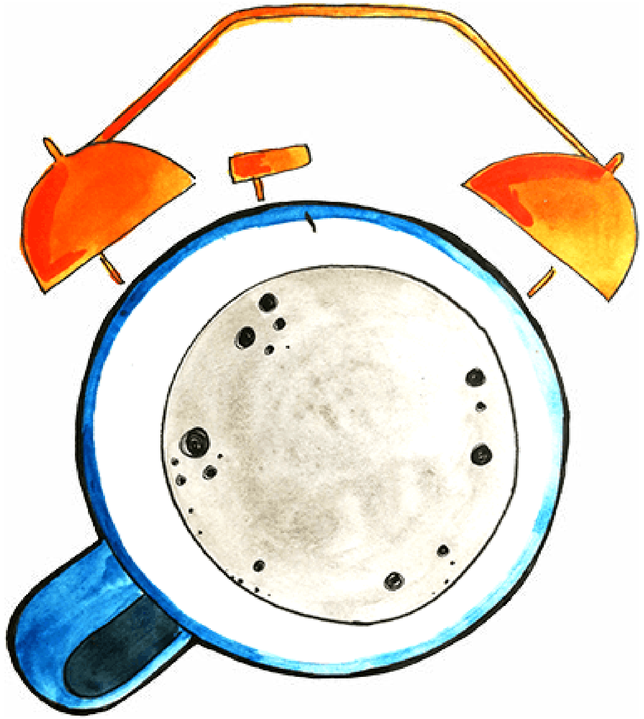
**Thursday, 15 April 2021**
**09:00 Central European Time**



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