



Breaking New Ground – Labour Law in Austria 2007

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1. General Overview and Governing Rules

1.1 Framework

Austrian Labour Law consists of numerous legal provisions regulating employment relationships, stipulated in many different laws. From a very general point of view labour law may be divided into law regarding provisions of employment contracts (individual labour law), industrial relations regulations (collective labour law), procedural labour law, and terms and conditions concerning health and safety at work. Labour law's primary objective is to offset the social imbalance between employees and employers. Austrian Employment Legislation has traditionally drawn a distinction between waged ("*Arbeiter*") and salaried ("*Angestellte*") employees. Senior executives and members of managing boards traditionally have a special position in labour law. Certain restrictions and protective laws do not apply to them to the same extent as to non-executive employees.

To be qualified as a salaried employee, employees must either perform office work only, or activities of a commercial nature, or non-commercial activities having a higher level of complexity and requiring specific training. Any other employees performing activities which are different from the above may be considered to be waged employees. Nevertheless, as far as statutory law is concerned, the distinction between salaried and waged employees has by now lost much of its significance. Particularly with regard to protection mechanisms, both groups of employees enjoy nearly the same standards. Distinctions between waged and salaried employees have consequences for the applicable social insurance system, the election of works councils, membership of trade unions, severance payment regulations, and the applicable notice periods. In the following, "employee" refers to salaried employees only.

1.2 Industrial Relations and Labour Law in Austria

Industrial Relations and Labour Law in Austria are significantly characterized by a high degree of centralization and a strong tendency towards compromise. The Austrian Federation of Trade Unions ("*ÖGB*") is the most influential Austrian employee representative organization. It negotiates nationwide and business-specific Collective Bargaining Agreements (CBA) and has considerable influence on Austrian wage and salary policies. The leaders of employer and employee organizations work in close collaboration, as a consequence hardly any strikes or lockouts occur in Austria. This so-called "social partnership" ("*Sozialpartnerschaft*") has gained a high reputation as an effective means of successful cooperation between employers and employees.

1.3 Statute Law and Collective Bargaining Agreements

As stated above, numerous statutes exist in Austria regulating labour relations. The Austrian Labour Constitution Act (*“Arbeitsverfassungsgesetz”*), regulating the interaction between employees and employers, provides an important framework. As a general overview, the most important fundamentals of Austrian Labour Law are:

- Employment Constitution Act (*“Arbeitsverfassungsgesetz – ArbVG”*)
- Act on the Adjustment of Labour Law (*“Arbeitsvertragsrechtsanpassungsgesetz – AVRAG”*)
- Working Hours Act (*“Arbeitszeitgesetz – AZG”*)
- The Working Rest Act (*“Arbeitsruhegesetz – ARG”*)
- Salaried Employees Act (*“Angestelltengesetz – AngG”*)
- Austrian Vacation Act (*“Urlaubsgesetz – UrlG”*)
- Act on Assignment of Employees (*“Arbeitskräfteüberlassungsgesetz – AÜG”*)
- Act on Employment of Foreign Nationals (*“Ausländerbeschäftigungsgesetz – AuslBG”*)
- Maternity Protection Act (*“Mutterschutzgesetz – MSchG”*)
- Paternity Leave Act (*“Väterkarenzgesetz – VKG”*)
- Trade Act (*“Gewerbeordnung – GewO”*)
- Decisions of the Austrian Supreme Court (*“Oberster Gerichtshof – OGH”*)
- various Collective Bargaining Agreements (*“CBA”*)

Almost all employers and employees are subject to Collective Bargaining Agreements. These CBAs are concluded between the employer and employee organizations of several individual service or industrial sectors. Based on the provisions as stipulated by law, they provide for a regulatory framework, dealing with most of the terms and conditions of employment contracts. They are legally binding upon the employers of each sector of the labour market. Accordingly, all employees covered by the scope of the applicable CBA may claim their rights arising under this agreement before the courts - equal to their rights as stipulated by law. Collective Bargaining Agreements may be concluded on either a nation-wide basis or for each of the nine federal provinces of Austria separately, setting out uniform minimum standards of employment conditions. They may contain e.g. longer notice periods which employers have to adhere to, additional holiday entitlements, and most importantly, minimum salaries and wages. Within the legal framework provided for by law, CBAs may contain a number of different regulations, as long as the matters concerned are (i) not exactly regulated or defined by law or (ii) more favourable for employees than the legal framework provisions.

Similar to CBAs, but on an individual company level, companies having a works council may set into force so-called “plant agreements” (*“Betriebsvereinbarungen”*).

These plant agreements are negotiated between the employer and the works council, and may freely regulate either areas of employment issues not already covered by law, or the applicable CBA, or (similar to the relation between law and the CBA's) may stipulate provisions more favourable to employees. They are legally binding for the contracting employer. If a legal entity operates several businesses or branch offices in Austria it may be subject to several plant agreements.

Works councils may be elected in every business with at least five employees or more. The employees' assembly in a business, in which all employees may participate, elects the works council. As a general rule, members of the works council must be employed in the business; only in larger companies some members may be union officials and not employed in the business. An employer is not obliged to establish a works council on a proactive basis, but has to tolerate such a step by his or her employees, if they wish to do so. The works council has a great variety of participation rights, including rights to demand information on certain matters, such as business sales or restructuring and related redundancies. The works council has to be actively notified by the employer in order to supervise certain issues, and to intervene or be consulted.

2. EU-Citizens and Foreigners

2.1 General

On January 1st, 2006, a new Foreigner's Act entered into force in Austria (*Fremdenrechtspaket 2005*). Changes became necessary due to certain political intentions of the Austrian Government and in order to implement EC-Directive 2003/86/EG relating to family-reunion. The Austrian legislator did not amend the existing Foreigners Act (*Fremdengesetz 1997*), but enacted two new, independent laws, the Foreign Police Act (*Fremdenpolizeigesetz 2005 FPG*), dealing mostly with asylum and visa matters, and the Residence Act (*Niederlassungs- und Aufenthaltsgesetz NAG*). The latter is of utmost importance for any foreign company wishing to post employees to Austria.

2.2 Residence and Work Permits

Non-EU citizens ("foreigners") may only be employed in Austria if the employer has either obtained a work permit ("*Beschäftigungsbewilligung*") or the employee has been granted a certificate of dispensation ("*Befreiungsschein*"). In case of violation of those prerequisites, the local employment office may levy fines upon the employer.

Work permits may be issued if there are no other important public or economic reasons to preclude employment of a foreigner. Public reasons include the possibility to fill the job which the foreigner applied for by using an Austrian employee. Thus, no equally

qualified and currently unemployed Austrian citizen should be registered with the Austrian Labour Market authorities, when requesting a work permit. In addition, the employee must prove his/her access to a means of accommodation that may be considered customary in that place.

2.3 Key Employees and Top Managers

For key employees (*Schlüsselkräfte*) obtaining a work permit is more easily. An employee might qualify as a key employee if he is specially educated and receives salary in a certain amount. Further criteria have to be met. A residence permit for a key employee may now be issued for up to 18 months and may be extended for several reasons. Such a residence permit also allows the key employee to bring his/her spouse and/or children to Austria, based on the key employee - permit. Obtaining a key employee-permit is usually linked to a quota regulation, limiting the total possible amount of permits issued per year. In order to obtain a key employee-permit, the employer must have a registered office in Austria.

According to the provisions of the NAG, family members of employees already lawfully working in Austria and who are not EU citizens may only acquire an Austrian residence permit derived from their relatives, if their relative's residence permit is of an unlimited nature. If a residence (and work) permit has only been issued for a limited period of time, relatives wishing to join the employees in Austria have to file a separate visa request as stipulated by the FPG (usually only admissible from outside of Austria).

Top Managers, their spouses/husbands and children as well and their support and household staff are exempt from the AuslBG. This category consists of executives of the board or management level of companies as well as international renowned scientists who receive a salary in a certain amount. Support and household staff consists of secretaries, assistants, etc. as long as they are employed by the executive.

2.4 EU-Citizens – Residence and Work in Austria

Citizens of the European Union (and Switzerland) may be employed in Austria easily. They do not need any special residence or work permit, however, the general regulations on notifying the Austrian authorities of their address in Austria still are applicable.

Employment of employees from new Member States is possible under certain circumstances in Austria. In general, within the transitional period starting from the date of joining the European Union, such employment is subject to specific restrictions. During the transitional period generally all citizens from the new Member States need a work permit (*Beschäftigungsbewilligung*) if they want to work in Austria. A work permit is usually difficult to obtain, particularly with regard to mandatory consent by the responsible Labour Market Service Austria ("*Arbeitsmarktservice – AMS*"). The

AMS is obliged to refuse its consent if Austrian employees would be equally suitable to work in the proposed position.

2.5 Assignment and Employment of New Member State Citizens within a Corporate Group (Lease of Employees)

Assignment of employees to Austria would be covered by the Act on Assignment of Employees (AÜG), the Act on Employment of Foreign Nationals and the applicable CBAs. Section 10 AÜG stipulates that the employees are entitled to adequate payment and working conditions. Likewise, the assigned employees will be entitled to the same minimum wages provided by the CBA to comparable Austrian workers. “Wage” includes also supplementary grants and other benefits, but no compensation for expenses or sick pay.

According to section 16 AÜG, foreign employers may send their employees to Austria in order to work under the directions of an Austrian company only if the Public Employment Service Austria (“*Arbeitsmarktservice - AMS*”) approves the lease of employees and confirms that

- these employees are significantly well-qualified for the proposed tasks (which would e.g. be the case if the employee has already had his specific position for a long period of time and therefore is “significantly well-qualified”, and
- employment is only possible by sending employees from foreign countries (e.g. no equally qualified Austrian employees are registered at AMS), and
- employment of those employees does not jeopardise payment and working conditions of (comparable) Austrian employees.

Applications for the assignment of employees undergo strict scrutiny of the Austrian authorities and therefore permits are issued seldom. However, the lease of employees European Economic Area does not require the prior permission of Austrian authorities according to section 16 AÜG.

Furthermore, the AÜG contains an important exception, concerning corporate groups: The requirements of the AÜG do not have to be met if employees are leased within a corporate group, if both, the assigning and the receiving company, have their seat in the European Economic Area. Thus, no permission according to section 16 is required, but provisions of Section 10 will remain valid if the Assignment exceeds a short-term period (13 weeks). Accordingly, employees, who have been sent from one corporate group member to another are entitled to adequate payment according to applicable CBAs and mandatory Austrian Law. Salary has to be adequate and must not differ from the comparable peer-group of Austrian employees.

Additionally, any lease of employees requires the agreement of the affected employee to being sent to another company or corporate group member in advance, even if employment is only planned for a short-term-period.

2.6 Assignment for Project-Work

Whereas working in Austria as an employee is limited as described above, providing services in general is not, although restrictions might apply due to trade law. That means that companies may perform “projects” in Austria. In any case, a foreign placement permit (“*Entsendebewilligung*”) issued by the local AMS office has to be obtained by the contracting party ordering the “project” (Austrian person or entity). Therefore the following two conditions have to be met: The “project” does not exceed 6 months and secondly the employee must not work in Austria more than 4 months during the whole project’s duration. If these conditions are not met a work permit (“*Beschäftigungsbewiligung*”) is required. At least one week before the “project-work” starts, the planned assignment of employees has to be notified to the local Coordination Office for Employment of Foreign Employees (“*zentrale Koordinationsstelle für die Kontrolle der illegalen Beschäftigung nach dem AuslBG*”). This notification has to contain the amount of the envisaged salary. As above, all requirements concerning equal payment according to mandatory Austrian law and the applicable CBAs have to be met. Building a “chain” of such “projects” to extend the time period would not be admissible under Austrian law. The courts would consider this an inadmissible circumvention of mandatory provisions.

Foreign employees from third countries working for a company which is situated in the EU are required to register with the AMS (*EU-Entsendebestätigung*), if they are assigned to a company with its seat in Austria. Such employees must have worked for the assigning company for at least one year or have concluded an employment contract for an unlimited period of time.

Concerning salary, Art 7 et seq AVRAG stipulates that if an applicable CBA for the business of the sending company exists in Austria, salary has to be at least the minimum salary as stipulated by the CBA. If no applicable CBA exists, the average salary of a comparable peer group of Austrian employees has to be taken into account.

3. Individual Employment Agreements

3.1 Employment Period

Employment agreements may either be concluded for (i) an indefinite period of time or (ii) for a certain limited period. The latter already contains a specific expiry date and ends on that date without any notice requirement. Regular termination of such an agreement is, in general, inadmissible. Nevertheless, in case the definite period exceeds a certain period of time the employment contract can provide for the possibility to give

notice during such term. The right to immediately dismiss an employee immediately because of serious grounds remains unaffected. Generally, the subsequent conclusion of employment relationships for a definite period of time is not permissible. As a consequence thereof, such a “chain” of employment contracts for a definite period (“Kettendienstvertrag”) would be considered as an employment for an indefinite period of time unless the subsequent conclusion of definite employments is subject to certain economical reasons. If an agreement is concluded without stating a definite or limited period of time, it is deemed to be concluded for an indefinite period of time.

A probationary period for employees, whereby each contracting party may terminate the employment agreement from one day to the next without stating any reason, is limited to one month under mandatory Austrian legislation.

3.2 Part Time and Full Time Employment – Working Hours

In Austria, the Working Hours Act regulates working hours. The maximum of admissible working hours is 50 hours a week and 10 hours a day. For several jobs, which include long stand – by periods, the maximum of admissible working hours can be extended to 60. The Working Rest Act stipulates a general entitlement to at least 36 consecutive hours of free time a week, which has to include Sundays. Exceptions, however, may be stipulated where there is an economic necessity. In addition, collective bargaining agreements frequently limit working hours and/or increase compensation for certain periods of working time (in particular for overtime). The standard working time/week is 40 hours, but certain industries have implemented 38.5 hours/week. The statutory provisions for working hours generally do not apply to employees in executive/management positions.

3.3 Overtime

Generally speaking, an employee works overtime, if the working hours exceed the regular weekly or daily working time. Basically, employees working overtime are entitled to a 50% premium or extra free time. Various CBAs provide for different, for the employee more favourable, regulations concerning overtime.

3.4 Salary

Statutory labour law does not provide for minimum wages and salaries. The Regulation of minimum wage and salary is primarily left to mandatory applicable CBAs and, in addition, to plant agreements. As a general rule, employers have few restrictions in the calculation of compensation as long as they comply with the minimum wage/salary as defined by CBAs. Minimum pay for salary earners depends on the type of work performed and, to a large extent, on seniority. Very roughly, minimum compensations for salaried employees range from about € 800,-- per month for junior and unskilled

employees to up to € 4,000,-- per month for senior and more qualified employees. Minimum compensations for waged employees regularly do not depend on seniority, but on the type of work performed. Minimum wages range roughly from € 7.00 to € 25.00 per hour. Nevertheless, considerable differences exist between the various trades. CBAs usually provide for a Holiday and Christmas remuneration (“13. und 14. Gehalt”) which is subject to a favourable tax regime.

3.5 Bonus

It is common practice, particularly for executives, to agree upon a (discretionary) bonus. Various regulations are possible: for example an employee may be entitled to a bonus in the amount of XX % of the last year’s gross income. Such bonus may be linked to variable performance criteria and will be due once a year. According to relevant Austrian legislation, a bonus-clause, even if explicitly dedicated in the agreement as not to become fixed part of the income, could be seen as a fixed part of the income by Austrian courts, if provided regularly over a lengthy period of time. Therefore, severance payments could have to be calculated from the monthly gross income plus the average amount of bonuses.

3.6 Severance Payments

Severance payments are extraordinary statutory payments paid upon termination of employment in order to mitigate the consequences of termination for the employee. However, severance payments are not due if either the employee prematurely resigns without giving serious reasons, is lawfully dismissed for good cause by the employer or terminates the employment relationship him/herself.

If an employment contract commenced before January 01, 2003, then its regular termination by the employer will automatically require statutory severance compensation. Such compensation ranges from a minimum payment of two months’ salary up to twelve months’ salary. For at least three years of service an employee is entitled to twice the monthly remuneration, including any pro rata share of special payments, overtime pay, bonuses, commission, etc. It increases to three monthly remunerations after five years of service, four monthly remunerations after ten years of service, six monthly remunerations after 15 years of service, nine monthly remunerations after 20 years of service and twelve monthly remunerations after 25 years of service.

Employment contracts commenced after December 31, 2002 fall within the scope of a new regulation. Employers are obliged to pay 1.53 percent of the monthly gross salary (plus special remunerations) of their employees to an individually defined Employee Provident Fund (“Mitarbeitervorsorgekasse”). Those Employee Provident Funds are now obliged to pay any lawfully acquired severance payments to employees in case of termination of the employment relationship provided that certain criteria are met (e.g.

after a certain waiting period). Moreover, transfers of already existing severance payment entitlements to the new system are permitted. The employee may either transfer the whole entitlements, or “freeze” the existing entitlements and make all future contributions to the fund. In order to transfer already existing claims, a mutual agreement between the employer and the employee is required.

3.7 Company Car

In certain branches or professions it is common practice for employers to provide for a company car for their employees. An entitlement to the (partially private) use of company cars is deemed to be a part of income under Austrian legislation. It amounts to a maximum of € 600 per month, depending on the actual asset costs of the car for the employer. With respect to claims an employee may have after termination of an employment agreement, these amounts have to be taken into account when calculating the employee's entitlements, in particular the severance payment.

3.8 Vacation and Public Holidays

According to the Austrian Holiday Act (“*Urlaubsgesetz*”), all employees are legally entitled to an annual paid vacation of 30 working days (5 weeks), increasing to 36 working days after 25 years of service. For this purpose Saturdays are counted as working days. Employees who are part-time workers are entitled to a pro-rated amount of vacation. Collective bargaining agreements, company agreements, or individual contracts may stipulate more vacation entitlement. Vacation may only be consumed following prior consultation between the employer and the employee. In addition, there are several public holidays in Austria, as stipulated in the Working Rest Act (“*Arbeitsruhegesetz*”). These public holidays do not affect an employee's vacation entitlement.

3.9 Non-Competition and Contractual Penalties

An employment contract may also contain a non-competition clause for the time after termination of the employment agreement. Such a clause is, in general, admissible under Austrian legislation under certain conditions: It is only valid if the last paid salary reaches a certain amount, does not last longer than one year and does not unduly complicate the professional advancement of the employee. Furthermore, a non-competition clause cannot be executed if either the employer immediately terminates the agreement without good cause, or the employee terminates the agreement for good cause. If the employer decides to terminate the agreement regularly without good cause, he may choose to execute the non-competition clause but is then obliged to continued payment for the duration of the non-competition period.

Contractual penalties concerning employees in Austria are, in general, admissible under the condition that the non-competition clause, whose breach is claimed by the

employer, is valid. Additionally, the amount of the penalty may be reduced by court with regard to the circumstances of each case. It may be noted that the amount of the contractual penalty excludes the employer's possibility to claim exceeding damage caused by the employee through his breach of the non-competition clause.

3.10 Code of Conduct, "Whistle-Blowing" and Privacy

In general, introducing a company's "code of conduct" or a similar policy is admissible in Austria. Nevertheless, some of the content of such codes of conduct merits specific attention due to termination protection and data protection provisions of Austrian law.

For the time being, no specific legislation or precedents concerning "whistle-blowing" exist in Austria. Generally, according to sections 96ff of the Austrian Employment Constitution Act (*Arbeitsverfassungsgesetz*), certain actions or provisions stipulated by the employer require mandatory consent of the Works Council. The latter therefore may deny such consent if the envisaged action endangers the rights of the employees. Works Council's consent may in some cases be substituted by a court decision. If there is a possibility to complain anonymously about "offences," this could lead to inadmissible disadvantages for employees, especially if dismissal is explicitly named as a possible consequence of "offence."

If during the "whistle-blowing" process the employer collects or processes any kind of personal data, the employee's prior consent must be obtained and can be withdrawn at any time. In case of withdrawal of the employee's consent, the employer would have to permanently delete all saved personal data collected in connection with a "whistle-blower" call. No data protection problems arise, if either no personal data of the whistle-blower is collected, or there is no technical possibility of tracking things back to the employee.

3.11 Employee Monitoring

Employee monitoring raises especially data protection implications. The recording of calls or emails without the employee's valid consent is illegal and - if done intentionally might be deemed as a criminal offence. To mitigate the risk consent should be obtained prior to any recording. On the day-to-day operational level, the employer shall conduct a due diligence prior to any recording and check whether all relevant employees have provided their valid consent and whether this consent covers the measure to be conducted. Consent to be given has to be an informed one.

To ensure that any consent obtained from a Data Subject is an "informed" one, the Data Subject must be provided with the following information prior to any collection, processing and/or use of Personal Data:

- the identity of the Data Controller (and/or its representative, if any);

- the purposes of collection, processing and/or use of the Personal Data;
- the intended recipients or categories of recipients and their location (insofar as the circumstances of the individual case provide no grounds for the Data Subject to assume that Personal Data will be transferred to such recipients);
- the categories of data concerned;
- the rights of access and rectification of incorrect Personal Data;
- any other information that might be relevant for the Data Subject's decision whether or not to give his consent; and
- insofar as the circumstances of the individual case dictate or at the Data Subject's request, the consequences of withholding consent.

Furthermore, the consent can be withdrawn at any time, without any cause and notice in writing. Even if the employee has consented and the employer strictly performs due diligence prior to any recording, the employer faces a residual risk based on the following reasons: It has not yet been decided under Austrian law whether an employee can validly consent to employee monitoring. Valid consent is contingent upon the employees' free decision to consent. A free decision requires (i) the absence of duress and (ii) knowledge of monitoring purposes as well as all relevant facts. Some Austrian commentators argue that employees cannot freely consent to employee monitoring because in their position as employee they always have to fear losing their job if they do not consent. These commentators argue that recording of calls may only be justified if:

- It is agreed upon in plant agreement between employer and works council;
- It is limited to sample survey without causing permanent duress on the employee and
- the employee has the possibility to stop the monitoring, particularly by telling his employer the time lines under which a recording shall not be conducted, by switching-off the recording at his discretion and by having his employer to warn him prior to the agreed recording taking place, or
- the employee is informed each time a call is going to be recorded and
- the employee can "opt-in" or "opt-out" at his discretion.

Furthermore from a labour law perspective the implementation of control measures which affect an employees' dignity is only admissible if a respective plant agreement with the works council was concluded. If no works council is established individual agreements with all affected employees are required. Otherwise any control measures are unlawful. The Austrian Supreme Court has qualified TV cameras, installed to monitor the employees as affecting the human dignity. Also whistleblower policies might be deemed to be inspection measures that are affecting the human dignity.

3.12 Disciplinary Issues

The introduction of disciplinary codes requires the prior consent of the works council. If there is no works council, disciplinary codes cannot be introduced.

Disciplinary codes, within the meaning of the law, usually provide for specific sanctions for particular punishable practices. Such a disciplinary code requires either a legal basis in the applicable CBA or a shop agreement. If there is no works council or provision in the relevant CBA, a disciplinary code cannot be introduced. Individual disciplinary measures (e.g. fines), based on the code, also require the prior consent of the works council in each individual case.

3.13 Data Protection

The Austrian Data Protection Act (DSG 2000) only protects “personal data”, i.e., information relating to identified or identifiable individuals or legal entities. According to the Data Protection Act a lawful transfer of personal data to other countries requires the processing of such data as well as the transfer to be permitted by Austrian law. In the event that the personal data is transferred to a country that is not a member state of the EU, such receiving country also needs to provide for a sufficient level of data protection. While in principle the processing or transfer of personal data is prohibited by Austrian law, the DSG 2000 permits the processing or transfer of personal data in various instances, such as the prior approval of the affected individual or entity as well as major prevailing interests of the processor or transferor.

Furthermore, employee records necessary for the employer in order to perform its business and/or fulfil mandatory requirements (e.g. social securities deductions, etc) may be collected, stored and processed. Specific issues occur if such data is to be transferred outside of the European Union (e.g. to the United States), or processed for a different purpose than it had initially been collected. Envisaged actions of transfer should have to be examined separately case by case.

4. End of Employment/Termination

4.1 Notice Period/Termination Date

Employment contracts concluded for an indefinite period of time may either end by (i) regular termination, (ii) immediate termination or (iii) a mutual termination agreement. Regular termination does not require any cause, however, statutory notice periods have to be observed. Notice periods for salaried employees vary depending on total years of service, ranging from six weeks up to five months after 25 years of service. Collective bargaining agreements or individual contracts may only extend these periods in favour

of the employee. With respect to waged employees, notice periods are typically governed by collective bargaining agreements, usually respecting a two-week minimum notice period.

Unless the employment agreement provides more beneficial conditions, the employment of salaried employees may only be terminated by the employer effective as of a calendar quarter. This rule may be changed by individual agreement so that employment may instead end on the fifteenth day or at the end of each calendar month. Unless otherwise agreed, the employee may terminate the employment at the end of any given month by adhering to a notice period of one month.

Furthermore, the employee may immediately terminate his/her employment contract if he/she becomes physically incapable of continuing work, or if the employer does not pay salary or fails to comply with health and safety obligations, or commits other fundamental or material breaches of the employees' terms and conditions of employment. It is important that the resignation takes place without undue delay. Otherwise, the employee may be deemed to have waived his/her right to terminate the employment without adhering to a certain notice period.

An employer, on the other hand, may immediately dismiss the employee for reasons of disloyalty and other types of gross misconduct, or in case of violation of the duty of good faith. If an employer issues a notice of dismissal, the employment will end immediately. In case that the employee successfully files a lawsuit under the rules for protection against unjustified dismissal, he or she will be entitled to either full payment for the notice period that would have applied to ordinary termination, or to have the dismissal set aside. Furthermore, a dismissal can be challenged before the labour court, if the employee was dismissed without good cause on unlawful grounds (e.g. membership in a trade union) or the dismissal is socially inadequate.

4.2 General Protection against Ordinary Termination

All salaried employees are entitled to protection against a socially inadequate termination, if the duration of the employment has already been longer than six months. In addition employees can challenge the termination before the labour court if the employee was terminated on unlawful grounds (e.g. membership in a trade union). This protection is limited to specific requirements. As a general rule, the works council – if any – may contest the termination by way of filing legal action with the Labour Court. If no works council exists and the company employs more than five employees, this right to contest the termination rests with each individual employee. If such action is successful, the termination is invalid and the employee may therefore be reinstated and entitled to full salary and benefits for the whole duration of the labour court proceedings.

If a works council exists, the employer must notify the works council of the intended termination, prior to giving notice of termination to the employee. The works council may then comment on the termination within five working days. Irrespective whether or not the works council accepts the intended termination, the employer may proceed after expiry of this period of five working days. However, if this pre-notification requirement is violated, any termination declared nonetheless is null and void.

4.3 Special Protection against Termination

Members of the works council, former members of the works council (generally until 3 months of the lapse of their term), pregnant employees, mothers/fathers on parental leave, employees doing military service/alternative civilian service, and disabled persons enjoy special protection against termination by law. These employees may be terminated only upon prior approval of the labour court or the committee for disabled employees (“*Behindertenausschuß*”). The labour court or the committee for disabled employees approves a termination only on the grounds laid down by law (e.g. closure or downsizing of the business, disability of the employee to perform services, insistent breach of duties by the employee). However, the labour court or the committee for disabled employees might not give approval of termination as long as the business is not shut down entirely and, therefore, the specially protected employee can be still employed although another employee has to be terminated instead of the special protected employee.

In practice, however, the employers seek to terminate the employment relationships of specially protected employees by mutual agreement. Therefore, however, additional voluntary severance payments might be necessary.

5. Business Transfers

5.1 Change of Control or Change of Assets

Austrian labour law provides several specific protection mechanisms concerning business transfers. The Austrian Act on Adaptation of Employment Contracts (AVRAG) is applicable whenever a “business-unit” (“*Betrieb*”) is transferred and such business simultaneously results in a change of the employer. As a confusing significance of Austrian labour law, the business unit may not be identical with a company as employer, i.e., even departments of one company may represent a business unit as defined in the AVRAG. As a consequence thereof, outsourcing issues always have to take into account the possible applicability of AVRAG provisions. Asset deals may very often fall within the scope of the AVRAG. According to the AVRAG, the

buyer of a business unit is automatically and by law deemed to be legal successor of existing employment contracts.

A share deal, on the other hand, does not trigger any consequences as stipulated in the AVRAG, because the employer (i.e. the legal person/company) remains the same, even if share ownership changes.

5.2 Objection against the Transfer – Extraordinary Termination

In case the new employer does not overtake the protection provided in the applicable CBA or existing company pension funds, an employee may object to his/her transfer to the new employer. The objection leads to the employment contract remaining unchanged.

If other circumstances result in a serious deterioration of the employee's working condition, he/she is entitled to a special right of terminating the employment relationship with the new employer. If the employee takes up this option, he/she will be entitled to the same benefits as if the employer had terminated the employment relationship.

6. Mass Redundancy

In the event of an intended mass redundancy of employees, the employer must notify the Austrian Labour Market Service (AMS) in writing of the intended action. This provision applies where, in a business with (i) more than 20 and fewer than 100 employees or at least five employees; (ii) more than 100 but fewer than 600 employees or at least five per cent of the employees; (iii) more than 600 employees or at least 30 employees, or (iv) in any business at least five employees aged over 50 are concerned.

Such notification must take place at least 30 days before the first termination notice is issued. Without timely notification, any declared termination would be invalid. During this period, no notice of termination or mutual termination agreement is admissible, unless the Public Employment Service Austria has declared its consent.

Furthermore, the employer must inform the works council prior to any intended mass redundancies within a reasonable time. "Reasonable time" means in particular, enough time for the works council to propose a so-called "social plan" ("*Sozialplan*"). Such a social plan aims at the mitigation or removal of possible negative effects for the employees of the company.

7. Safety, Health and Parental Issues

7.1 Social Security

In general, every employee working in or from Austria is subject to mandatory social security contributions. Under certain circumstances, foreigners who work in Austria may also be subject to such contributions.

The employer is generally also responsible to notify the local Austrian social security agency about the beginning of the employment, and then withhold income tax and social security contributions from the employee's salary. Those deductions have to be transferred directly to the social security agency or tax authorities and are usually handled by an Austrian payroll provider. Social securities contributions would include health, accident, pension and unemployment insurance.

An individual person may as well be employed on freelance basis (*“Freier Dienstvertrag”*). Accordingly, he/she would have to file the necessary data with the Austrian tax authorities himself (*“Einkommensteuererklärung”*). The employer's notice to the local Austrian social security agency and the obligation to deduct contributions, however, would be mandatory unless certain exemptions apply.

7.2 Maternity/Paternity Leave – Part Time Leave

Every female or male employee is entitled to paternity leave (*Karenzurlaub*) for up to two years from the child's birth. Special termination-protection rules apply to pregnant female employees. A female employee also is not obliged to disclose her pregnancy during her job interview(s). Under certain circumstances parents may share the time *“Karenzurlaub”* in order to take care of the child. In general, *“Karenzurlaub”* has not to be paid by the employer. However, termination is only possible with the prior consent of the competent labour court or due to a mutual agreement.

Female employees are entitled to part time leave, if she is employed in a company with more than 20 employees and employment relationship has already lasted longer than three years. In companies with less than 20 employees such an entitlement can be regulated by a plant agreement. A similar regime applies to male employees.

8. Discrimination Issues

The Austrian Equal Treatment Act (*“Gleichbehandlungsgesetz”*) prohibits discrimination on grounds of sex, marital status, race or ethnic background, religion or belief, sexual orientation or age. Any discriminatory differentiation, if direct or indirect, without objective justification is prohibited. Indirect discrimination may be

seen, if any provisions equally apply to women and men but a disadvantage arising thereof actually affects significantly more female employees (e.g. part-time agreements or similar). In particular discrimination in recruitment, pay, voluntary social welfare benefits, advanced vocational training, professional advancement, working conditions or termination.

A discriminated person may claim damages (financial loss) and additionally immaterial compensation for the personal indignity. Furthermore, termination on discriminatory grounds can be challenged before the labour court.

8.1 Handicapped Employees

The Austrian Act on Equal Treatment of Disabled Employees (*Bundes-Behindertengleichstellungsgesetz*) and the law concerning Employment of Disabled Employees (“*Behinderteneinstellungsgesetz-BEinstG*”) which implements the Directive EC/78/2000 into Austrian Law provide for non-discrimination of disabled employees. According to the BEinstG, every employer having more than 25 employees has to employ at least one disabled person (otherwise the employer would have to pay a compensation fee). There are several protection mechanisms stipulated in order to protect such disabled employees from unjust treatment. The new Articles 7a to 7r BEinstG can be summarized as follows:

First of all, non-discrimination provisions equally apply to employers having no registered office in Austria, for the duration of the Assignment in the event that they post employees to Austria. No disabled employee may suffer from any discrimination in recruitment, pay, voluntary social welfare benefits, advanced vocational training, professional advancement, working conditions or termination. If a disabled employee claims a violation of these provisions, the employer must witness that a non-disabled employee would have been treated in the same way and therefore no damage was caused to the employee. The employee on the other hand only needs to give proof that discrimination has occurred, irrespective of the damage caused as a consequence thereof. The BEinstG, just like the GIBG draws a distinction between direct and indirect discrimination. If a disabled employee suffers disadvantages in treatment as a consequence of his or her disability, this would be direct discrimination. If codes and orders issued by the employer at first sight would seem to treat all employees on an equal basis, but disabled employees might in fact be unable to meet all the obligations, contrary to non-disabled employees, this would constitute indirect discrimination. Indirect discrimination can also be unlawful barriers. No discrimination has occurred, if the removal of a barrier would be a disproportional expense for the employer or if a criterion, that a disabled employee is not able to meet, is an essential requirement for the job.

Furthermore, Article 7d stipulates that any harassment in respect of the employee’s disability is prohibited. Consequently, such obligation also applies if the employer fails

to counteract such harassment by other employees. Employers are also responsible for the correct and non-discriminating behaviour of their employees.

The BEinstG also provides for a special termination protection for disabled employees. According to Art 8 BEinstG a disabled person may only be terminated if the commission for disabled people (“*Behindertenausschuss*”) has given its prior consent to the termination. For the decision the situation of the employer and the disabled employee has to be taken into account. A termination without the consent of the respective commission is void.

8.2 Sexual Harassment

Section 6 and 7 of the Austrian Equal Treatment Act defines sexual harassment and gender-related harassment and regulates the consequences of such unlawful behaviour. Sexual harassment may be seen as any sexually related conduct negatively affecting a person’s dignity, whether such conduct is undesirable, inappropriate or in other ways indecent. A gender-related harassment is also such conduct but not necessarily belonging to the sexual sphere. Such behaviour must result in the creation of either an intimidating or humiliating working environment, or any similar disadvantages for the victim (e.g. as a consequence of rejection through others). Unlawful discrimination on the grounds of sex is also inadmissible, wherever a female or male employee suffers from sexual harassment during the employment relationship. A lawsuit has to prove demonstrably the discriminating situation the claim is based on.

9. Miscellaneous

9.1 Arbitration and Employment Agreements

Effective as of July 1, 2006 Austrian arbitration law was amended. The main purpose of the new Austrian Arbitration Act was to create a modern arbitration law, which incorporates the UNCITRAL model law on international arbitration.

Special provision is made for labour law disputes in sections 617 and 618 of the Austrian Code of Civil Procedure (*Zivilprozessordnung – ZPO*) as well as in sections 9 and 50 Labour and Social Court Act (*ASGG*).

Labour law disputes are generally not capable of being settled by arbitration, except some matters as defined in section 9 (2) ASGG. An agreement to arbitrate prior to the dispute arising is not valid in most cases. In order for the arbitration agreement to be enforceable it must be entered into after the dispute has arisen. Furthermore, it must be contained in a document which is personally signed by the employee and which must not contain any clauses other than the agreement to arbitrate.

The employee must be given full and comprehensive information in writing regarding the differences between arbitration and litigation.

9.2 Freelancer

Generally, freelancers are not subject to labour law although some provisions apply analogous. The most important criteria for defining, whether a contractual relationship dealing with employment issues represents an agreement for a (i) salaried employee or (ii) freelancer (*“Freier Dienstnehmer”*), is the actual dependence of the employee/freelancer towards the employer. Austrian courts draw a distinction based on the factual economic relationship between the contracting parties, irrespective of the labelling of the agreement or its content. Accordingly, if an employee may freely decide when to perform his/her services, he/she is not obliged to follow the employer’s orders there is a strong tendency towards an agreement for freelancer contractors. Whether or not his/her income (out of the contractual relationship) does represent the employee’s total income might also be taken into account. If on the other hand, the employee is obliged to perform his or her duties for one employer exclusively and/or has to strictly obey the employer’s orders, the contractual relationship will be considered as concluded for salaried employees.

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