Employment and Employee Benefits in Austria: Overview

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A guide to employment and employee benefits law in Austria.

This Q&A gives a high-level overview of the key practical issues including: the scope of employment regulation; employment status; background checks; regulation of the employment relationship (including unilateral changes by an employer to the terms and conditions of employment); minimum wage and bonuses; working time, holidays and flexible working; illness and injury of employees; rights created by continuous employment; provisions for fixed-term, part-time and agency workers; discrimination and harassment; termination of employment (including protection against dismissal and protected employees); resolution of disputes between an employee and employer; redundancy/layoff; employee representation and consultation; consequences of a business transfer; employer and parent company liability; employer insolvency; employers' health and safety obligations; taxation of employment income; intellectual property; restraint of trade; and relocation of employees.

Scope of Employment Regulation

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

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

Laws Applicable to Foreign Nationals

Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I) applies to contractual obligations in any situation involving a choice between the laws of different countries. Under Article 8 of Rome I, any contract of employment is generally governed by the law of the country in which the employee habitually carries out their work. Therefore, the Austrian laws that regulate the employment relationship apply to foreign nationals working in Austria.

At the national level, labour law is enshrined in the Austrian Constitution, certain laws, and the regulations derived from them.

The most important legislation regulating employment relationships in Austria includes the:

- Labour Constitution Act (*Arbeitsverfassungsgesetz*) (ArbVG).
- Salaried Employee Act (*Angestelltengesetz*) (AngG).
- Working Hours Act (*Arbeitszeitgesetz*) (AZG).
- Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) (ABGB).
- Leave Entitlement Act (*Urlaubsgesetz*).
- Act on Continued Remuneration During Illness (*Entgeltfortzahlungsgesetz*).

Further, many aspects of employment relationships are also governed by collective agreements.

Laws Applicable to Nationals Working Abroad

Article 2 of Rome I states that "Any law specified by this Regulation shall be applied whether or not it is the law of a member state". Therefore, foreign laws apply to Austrian nationals if they habitually carry out their work abroad under Article 8 in conjunction with Article 2 of Rome I. However, section 6 of the Austrian Act on International Private Law (*Bundesgesetz über das Internationale Privatrecht*) (IPRG) and Article 21 of Rome I contain a reservation clause (*ordre public*). The reservation clause stipulates that foreign provisions will not be applied if their application will produce results that are incompatible with the fundamental values of the Austrian legal system. In this case, the Austrian provision applies.

Employment Status

> 2.Does the law distinguish between different categories of worker? If so, what are the requirements to fall into each category, the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

Categories of Worker

Employee/worker. Apart from a few exceptions, the Austrian labour law applies only to workers and employees. The following requirements must be met in order to be categorised as a worker or an employee:

- Continuous obligation over time.
- Personal (and economic) dependence.
- Valid legal commitment (such as a contract).

(Section 1151, ABGB.)

The characteristics for an employee's/worker's personal dependence are as follows:

- Integration into the operational organisation.
- Submission to the operational rules.
- Requirement to observe instructions.
- Monitoring of compliance with rules and instructions.
- Disciplinary responsibility.
- Duty to carry out the work individually.

The characteristics for an employee's/worker's economic dependence are their reliance on the operating materials and the know-how of the employer. Where personal dependence is established, economic dependence is presumed.

If the requirements of section 1151 of the ABGB are met, a person is qualified as an employee if that person is carrying out any of the following:

- Commercial services.
- More demanding, non-commercial services.
- Office services.

In all other cases the person is qualified as a worker. Workers typically perform manual work or skilled labour.

Generally, different rules apply to workers and employees in certain fields. Despite efforts to apply the same labour law standard to both employees and workers, differences still exist (for example, different periods of notice and different rules regarding special payments apply).

Independent contractor/self-employed. The lack of personal dependence is what distinguishes an independent contractor from an employee or worker. The type of activity usually does not provide any distinction concerning whether the work is performed in personal dependence or not. Employees or workers are organisationally tied to working hours, place of work and control by the employer, while independent contractors are mostly independent concerning when and where they work, provided that they fulfil their contractual obligation. Not all defining characteristics of personal dependency must be present, personal (in)dependency may take different forms and the classification depends on which characteristics predominate overall. The legal qualification of a contract also does not depend on the will of the contracting parties or on the term they may have chosen for the contract, but rather on the factual circumstances.

Misclassifying an employee as an independent contractor may lead to further costs for the employer, such as holiday compensation, overtime pay, holiday pay, severance pay, and also incidental wage costs. Further consequences for an employer misclassifying an employee as an independent contractor may include retroactive payments to the tax authorities and the Austrian Health Insurance Fund.

In addition, members of the board of directors of a joint-stock company are generally considered self-employed. However, it is possible to regulate this through contractual agreements, allowing certain provisions of employment law to apply to the board members. In the case of managing directors of a limited liability company (GmbH), the classification depends on whether they are also shareholders. If the managing directors hold shares exceeding 25%, they are considered self-employed. Conversely, managing directors holding fewer than 25% shares, as well as external managing directors, are classified as employees.

Entitlement to Statutory Employment Rights

Statutory employment rights generally only apply to workers and employees. In relation to entitlement to statutory employment rights, the general principle of the Austrian labour law is "all or nothing". Exceptions to this rule relate only to quasi-subordinate/ para-subordinate employees (*arbeitnehmerähnliche Personen*), where economic dependence is present but personal dependence is missing and if certain rules are applied. An example is a person working on a service contract basis in the operating facilities of the customer. In such cases, some rules of Austrian labour law apply, such as the Employee Liability Act (*Dienstnehmerhaftpflichtgesetz*) or the Equal Treatment Act (*Gleichbehandlungsgesetz*) (GlBG).

Over the last few years, there has been a gradual alignment between workers and employees. The differences between workers and employees in Austria have diminished significantly due to legislative changes and labour law reforms.

The main differences between workers and employees concern the following (among other things):

- There are still differences (though these are minor) between workers and employees regarding the reasons for premature termination of the employment contract (section 27, AngG; section 82, Industrial Code 1859 (*Gewerbeordnung* 1859) (GewO 1859)).
- Under the ArbVG, separate works councils must be set up for both workers and employees if both groups fulfil the requirements for a works council (section 40, ArbVG).
- In social law, there are differences in the eligibility requirements for a disability/incapacity work pension.

Workers often have employment contracts based on hourly rates or specific projects, whereas employees typically have fixed employment contracts that often stipulate regular working hours and a fixed salary. Some differences can also be found in the collective agreements that apply to workers and employees.

Time Periods

Temporary contracts are permitted if the termination of the employment contract is pre-determined by either:

- A specific date/period.
- The occurrence of a specific, objectively determinable event.

There is no maximum duration concerning how long a temporary contract can last. A temporary contract with a condition whose realisation is uncertain is classified as an open-ended employment contract. This is the case if the occurrence of the condition is dependent on the employer, third parties or coincidence.

Chain contracts of employment (*Kettenarbeitsverträge*) describe the conclusion of several consecutive temporary contracts and are only permitted if a justification on the grounds of economic or social reasons is given: otherwise, the contract in question is treated as an open-ended employment contract.

When starting a new employment, individuals are usually required to undergo a probationary period. During this time, the employment relationship can be terminated at any time without notice or a specific deadline. Additionally, there is no requirement to provide a reason for termination. The probationary period for employees must not exceed one month. Some collective agreements may specify a shorter probationary period, and in such cases, it cannot be extended through individual agreement.

Background Checks

3. Are there any restrictions or prohibitions on carrying out background checks in relation to applicants?

Restrictions/Prohibitions on Conducting Background Checks

Generally, under the principles of the EU General Data Protection Regulation (*(EU) 2016/679*) (GDPR), among other things, data must be collected for specified, explicit and legitimate purposes. This means that an applicant's data can only be processed if it is necessary and adequate for the recruitment decision.

An employer can generally check and process personal data which is manifestly made public by the data subject (Article 9(2)(e), GDPR). Data on publicly accessible internet websites are manifestly made public. However, the use of information from social networks can be restricted if the information has nothing to do with the applicant's suitability for the position (for example, political views or sexual orientation). The requirement of a clearance certificate is lawful in some cases. Background checks outside of these limits or background checks at the former employer are generally only lawful if the applicant has given consent for them.

Questions regarding an applicant's past or criminal record are permissible if the information is necessary to determine an applicant's suitability for the position. However, questions about previous convictions which have already been deleted from criminal records are not permissible. Questions about health can also be permissible if the information is necessary to determine an applicant's suitability for the position, but should be treated with caution since the employer can be at risk of indirectly discriminating in the recruitment process by asking such questions.

Background Checks by Third Parties

The same rules as outlined above apply if the actions are being taken or performed on behalf of the employer by a third party.

Background checks by third parties about applicants are no longer the exception in Austria, and conducting research on applicants has become its own (controversial) business model.

There is no universally accepted or even legally defined concept of "background checks". In practice, it usually involves a thorough examination of applicants using documents, the internet, references, or other third parties and external sources.

In terms of privacy protection, such background checks are not unlimitedly permissible. Prior to conducting background checks that go beyond a search for publicly accessible information on the internet, the applicant's consent must always be obtained. Whether a declaration of consent can justify a background check in any specific case requires a case-by-case assessment: as with consent declarations in labour law, the pressure on the applicant involved in the situation must be considered. Furthermore, sensitive data (such as sexual preferences, racial origin, or political beliefs) must be excluded from a background check, unless the applicant has made such sensitive data publicly accessible. There are no universally applicable regulations for delineating the permissibility of any particular background check. Employers conducting background checks therefore operate in a legally grey area.

Regulation of the Employment Relationship

4. How is the employment relationship governed and regulated?

Written Employment Contract

Even though it is recommended for the purposes of legal clarity, a written employment contract between the employer and employee is not necessary. In an oral or written employment contract, the employee commits to personally perform a job for the employer in personal dependence. A remuneration is not necessarily a prerequisite for the employment contract. In the case of doubt, an appropriate remuneration is owed (section 1152, ABGB). However, the employer must provide the employee with a written statement of the essential contractual terms no later than one month after the commencement of employment.

There is no legal requirement for the employment contract to be drafted in a specific language. However, it is advisable to formulate the contract terms in a language understandable to all parties involved in order to avoid potential misunderstandings.

Implied Terms

There are legally prescribed regulations that automatically become part of the employment contract and cannot be altered to the detriment of the employee. These may include provisions on minimum wage rates, working hours, vacation entitlements, and notice periods. These legal provisions can vary depending on the industry and type of work.

Implied terms will apply if either:

- The employment contract has not governed certain points.
- The mandatory rules override the provisions of the employment contract.

Mandatory labour provisions that form part of an employment contract can be either:

- Mandatory for one party only, as a deviation is only possible in favour of the employee (for example, collective or company agreements).
- Mandatory for both parties, as no deviation at all is possible (for example, employee/worker protection provisions).

Where an employment contract has not governed certain non-mandatory employment law rules, these too may form part of the employment relationship (for example, section 1155 of the ABGB stipulates that the employee is entitled to receive remuneration for services not performed where the employee was willing to perform such services but was unable to do so as a result of circumstances created by the employer).

Collective Agreements

Under section 11 of the ArbVG, collective agreements are legally binding within their corresponding professional, geographical, and personal scope on employers/employees. Collective agreements are concluded by the respective interest groups representing both sides of the employment contract (employers and employees) and are binding on all parties (whether or not the respective employer/employee was personally involved in concluding the collective agreement). They create a balance of interests between employees and employers by establishing minimum working conditions that must be satisfied. Collective agreements are negotiated between unions or employee representatives and employers and apply only to those employers who are members of the relevant employers' association or who voluntarily commit to applying the collective agreement.

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

The employer cannot unilaterally change the terms and conditions of the employment contract, unless explicitly stated otherwise in the contract (and agreed on in advance). If there is a desire to change individual conditions of an employment contract but the employer and employee cannot reach an agreement on this, dismissal with the option of altered conditions of employment is also a possibility. While this does terminate the employment contract, the employee also receives an offer to continue the employment relationship based on different conditions. If the employee does not accept this offer, then the termination of the employment contract stands.

Minimum Wage and Bonuses

6. Is there a national (or regional) minimum wage? Is it common to reward employees through contractual or discretionary bonuses?

Minimum Wage

There is no national or regional minimum wage in Austria. Instead, the minimum wage or minimum salary for employees is set out in the respective collective agreements. The collective agreement that applies typically depends on the industry in which the employee is employed. There are no set salary caps or mandatory payment methods at the national level. If no collective agreement applies, the remuneration is based on the employment contract. If no remuneration has been agreed on, section 1152 of the ABGB states that an appropriate remuneration is owed.

Bonuses

It is common to reward employees through discretionary bonus payments, but these payments are primarily a matter of individual agreement between the employer and employee, as well as the company's practices. Bonuses granted on a discretionary basis can be revoked at any time by the employer and cannot be claimed by the employees. However, to ensure that it is a real discretionary bonus that cannot then be subject to a claim for damages, the employer must explicitly indicate

that the payment is made at the employer's discretion, and must not indicate any target amounts or set up a bonus scheme (*betriebliche Übung*).

In the banking sector, bonuses cannot be awarded if the bank has not made a profit or accepts government assistance.

Working Time, Holidays and Flexible Working

7. Are there restrictions on working hours, and if so, can an employee opt out? Is there a minimum paid holiday entitlement? Is there a statutory right for employees to request to work flexibly?

Working Hours

Restrictions on working hours. The maximum working day is eight hours (or ten hours including overtime) and the maximum working week is 40 hours (or 50 hours including overtime), unless otherwise stated in law (section 3, AZG). To make working hours more flexible, effective from 1 September 2018, the legislator provided the possibility to increase the maximum amount of working time allowed (including overtime) from ten to 12 hours per day and from 50 to 60 hours per week if a substantial amount of this working time is standby duty (for example, physicians in their night shifts) and the collective agreement or the collective bargaining agreement provides for this exception. Employees are free to refuse overtime without stating any reasons if the overtime hours exceed the ten-hour working day or 50-hour working week. Employees cannot opt out of the maximum working hours and other regulations of the AZG which are aimed at protecting employees, unless otherwise stated in the AZG. Any provision violating the law is invalid under section 879 of the ABGB (OGH 4 Ob 12/63).

Overtime pay. Under section 10 of the AZG overtime must be paid at a 50% surcharge above the contractual remuneration for every overtime hour worked. Employees can choose whether they want cash, or time off in lieu, or both: the surcharge applies in both cases (for example, the overtime pay for ten hours of overtime work can result in 15 hours of time off in lieu, or ten hours of time off in lieu plus five hours of overtime payment in cash).

Special restrictions applicable to shift workers. The normal daily working time for shift work is higher with a maximum of nine hours. If the shift worker has a regular four-day week, a daily maximum of ten hours can be agreed upon. In the case of continuous multi-shift work with shift changes, the normal working hours can, in certain cases, be extended up to 12 hours. Furthermore, normal working hours can be extended up to 12 hours by means of a collective agreement. The normal working time can also be extended not only with regard to shift workers, but also, for example, in cases of standby duty or in the case of recreational opportunities.

Rest Breaks

Rest breaks during the working day. The legal framework for rest breaks is the AZG and the Working Rest Time Act (*Arbeitsruhegesetz*) (ARG). If the total duration of the daily working time exceeds six hours, the working time must be interrupted by a rest break of at least half an hour. If it is in the interests of the company's employees or necessary for operational reasons, instead of a half-hour rest break, two rest breaks of 15 minutes each, or three rest breaks of ten minutes each, may be granted. The rest break is unpaid unless otherwise agreed.

Rest periods between working days. After the working day has ended, employees must have a rest period of at least 11 hours of continuous rest. Further, the employee is entitled to an uninterrupted rest period of at least 36 hours in each calendar week, including Sundays (weekend rest). On public holidays, the employee is entitled to an uninterrupted rest period of at least 24 hours, which must start at the earliest at 12 am and at the latest at 6 am of the holiday.

Special provisions for night/shift work. The relevant provision for shift workers is section 4a of the AZG. In the case of shift work, the normal weekly working time within the shift cycle must not exceed an average of 40 hours or the weekly maximum defined in the applicable collective agreement. The daily normal working time must not exceed nine hours, unless a longer normal working time is permitted under a collective agreement. In a continuous multi-shift operation with shift changes, the daily normal working time can be extended to 12 hours on weekends (if this is regulated by a company agreement or if it comes with a shift change). The collective agreement can allow the normal weekly working hours to be extended to 56 hours in individual weeks. Further, it can allow the daily normal working time to be extended to 12 hours on the condition that the working time extension for the activities in question is examined by an occupational physician and declared safe for health. At the request of the works council, or in companies without a works council, at the request of the majority of the employees concerned, another occupational physician must be consulted in this regard.

Holiday Entitlement

Minimum paid holiday entitlement. The relevant provisions can be found in the Holidays Act (*Urlaubsgesetz*) (UrlG). An employee is entitled to an uninterrupted paid holiday during the working year (section 2, UrlG). The employee is entitled to 30 working days of paid annual leave, and after 25 years of service, the employee is entitled to 36 working days paid holiday (section 2, UrlG). This entitlement (that is, 30 or 36 working days of paid annual leave) only applies if the employee's working week is Monday to Saturday (the typical full-time working week in Austria is Monday to Saturday). If the employee is working a five-day week (Monday to Friday) the employee is entitled to 25 working days of paid annual leave, which is then extended to 30 working days of paid annual leave after 25 years of service.

Public holidays. Employees are entitled to an uninterrupted rest period of at least 24 hours on public holidays (which must start at the earliest at 12 am and at the latest at 6 am of the public holiday) (section 7, ARG). Public holidays must be provided and paid in full (section 9, ARG). Public holidays are not included in the annual leave entitlement. There are 13 public holidays in Austria, as follows:

- 1 January (New Year).
- 6 January (Epiphany).
- Easter Monday.
- 1 May (National Holiday).
- Ascension Day.
- Whit Monday.
- Corpus Christi.
- 15 August (Assumption of Mary).
- 26 October (National Holiday).
- 1 November (All Saints' Day).
- 8 December (Immaculate Conception).

- 25 December (Christmas Day).
- 26 December (Saint Stephen's Day).

Therefore, in addition to the 25 days of paid holiday guaranteed in the UrlG, employees who observe a five-day week have a total of 38 holiday days paid in full throughout the year. There are no legal provisions regulating unpaid holidays. However, the contracting parties can agree on unpaid leave.

Flexible Working

There is no statutory right for employees to work flexibly. The AZG regulates working time conditions and includes provisions that provide employees with the opportunity to establish flexible work arrangements. Employees have the right to negotiate various models of flexible working hours with the employer, such as flextime, part-time work, or flexible working hours within the framework of time accounts.

It is important to note that the specific provisions and options for flexible working time arrangements can be determined by collective agreements, works agreements, or individual agreements between the employer and the employee.

If there is no collective agreement/collective bargaining agreement stipulating such rights, employees may reach an agreement with the employer to work flexibly. However, mothers have a legal right to part-time work within the conditions set out in section 15h of the Maternity Protection Act (*Mutterschutzgesetz*). Fathers have the same entitlement under the conditions set out in section 15e of the Paternity Leave Act (*Väterkarenzgesetz*) (VKR).

Illness and Injury of Employees

> 8. What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Who pays the sick pay and, if the employer, can it recover any of the cost from the government?

Entitlement to Paid Time Off

Both workers and employees are entitled to paid sick leave in the event of illness or injury for a limited time. Under section 2 of the Sick Pay Act (*Entgeltfortzahlungsgesetz*) (EFZG) and section 8 of the AngG, employees are entitled to the full wage for up to six weeks. Entitlement to full remuneration increases to:

- Eight weeks, if the employee has been employed for one year without interruption.
- Ten weeks, if the employee has been employed for 15 years without interruption.
- 12 weeks, if the employee has been employed for 25 years without interruption.

After the period of paid sick leave expires, the employee is entitled to a further four weeks on half-pay.

An employee is also entitled to continued payment of wages for a proportionately short period for other important personal reasons, such as:

- Wedding (their own wedding and the wedding of a close relative).
- Birth of a child (applies to the father).
- Relocation.
- Summons to authorities.
- Doctor's visit.

In addition, employees are entitled to caregiver leave for up to one week per working year with continued payment of wages.

Entitlement to Unpaid Time Off

The contracting parties can agree on unpaid leave. In this case, the employment relationship continues, but the duty to perform work and the payment of the salary are suspended.

Recovery of Sick Pay from the State

Under section 53b of the General Social Insurance Act (*Allgemeines Sozialversicherungsgesetz*) (ASVG), employers can receive subsidies from the accident insurance funds to partially compensate for the sick pay expenses paid to employees who are accident-insured with the General Accident Insurance Institution (or the Insurance Institution for Railways and Mining). For the employer to qualify for the subsidy, the following conditions must be met:

- The employer regularly employs fewer than 51 employees in their business.
- The relevant employee is insured with the General Accident Insurance Institution.
- The relevant employee either:
    - had an accident after 30 September 2002; or
    - was prevented from working due to an illness that occurred after 31 December 2004.
- The inability to work lasted for either:
    - more than three consecutive days (due to an accident); or
    - more than ten consecutive days (due to an illness).
- The employer submitted a subsidy application.

Subsidies generally amount to 50% of the relevant employee's wages, including special payments.

Provisions Concerning COVID-19

To avoid unemployment, the Austrian Government put in place specific provisions concerning the COVID-19 pandemic that enabled employers to subject their employees to a short-time working scheme. On 1 October 2023 these COVID-19 specific measures were replaced by new regulations for short-time work which are no longer fully comparable with the original provisions concerning COVID-19 related short-time work. Since that date, the requirements to apply short-time work have become stricter. Still, certain regulations have remained the same and COVID-19 can still be a valid reason for the introduction of short-time work. Employers are granted a short-time working allowance if the following legal requirements are met:

- The employer's operation is affected by temporary, non-seasonal economic difficulties caused by plausible external factors (which are presumed in the case of a lockdown).
- The Labour Market Service (*Arbeitsmarktservice*) (AMS) has been notified of the employer's circumstances, and a following consultation between the AMS and the employer has not resulted in finding a better solution than subjecting the employees to a short-time working scheme.
- Equivalent vacancies in the region are not available.
- An agreement between the employers and the employees' collective bargaining bodies has been concluded, which stipulates (among other things):
    - the remuneration during short-time work;
    - the detailed conditions of short-time work; and
    - the maintenance of the employees' employment status.

The employer's allowance can be reclaimed by the AMS if the employment contracts of the employees who were sent into short-time work are subsequently terminated. The remuneration of an employee sent into short-time work ranges between 80% and 90% of their normal salary (depending on the employee's gross remuneration), while the working hours can be reduced down to as much as 30% during that time. The duration of the allowance is initially limited to a maximum period of six months, but this can be extended to a maximum of 24 months under special circumstances.

Rights Created by Continuous Employment

> 9. Does a period of continuous employment create any statutory rights for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

Statutory Rights Created

A period of continuous employment creates a right to the following benefits:

- Notice period for dismissal: the statutory notice period for terminating employment increases from six weeks up to a maximum of five months according to the length of time worked (see *Question 12, Notice Periods*).
- Holiday entitlement: the holiday entitlement (see *Question 7, Holiday Entitlement*) increases to 36 working days after 25 years of service (assuming a six-day working week).
- Loyalty bonuses: certain collective agreements allow loyalty bonuses for employees with a long period of service (typically 20 years). Further, collective bargaining agreements or individual agreements can stipulate loyalty bonuses.
- Severance claims: employees are entitled to severance pay after a minimum of three years' uninterrupted work.
- Paid sick leave: the legal entitlement in the event of illness or injury is extended from the original six weeks to up to 12 weeks as the period of service continues.

Consequences of a Transfer of Employee

Employees transferred to a connected (subsidiary/parent) company retain their continuity of service and the same benefits that they previously enjoyed.

Fixed-Term, Part-Time and Agency Workers

10. To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?

Temporary Workers

Temporary workers are entitled to the same rights and benefits as permanent employees unless different treatment can be objectively justified, under section 2b of the Austrian Act amending the Labour Contract Law (*Arbeitsvertragsrecht-Anpassungsgesetz*) (AVRAG).

There is no limit on the duration of a fixed-term contract or a time limit after which the employee is deemed to be a permanent employee. Only in cases where several temporary contracts (*Kettenarbeitsverträge*) (see *Question 2, Time Periods*) are concluded without justification on economic or social grounds can a temporary contract be re-classified as an open-ended employment contract.

It is easier to terminate an open-ended employment contract because temporary contracts can only be terminated before the agreed term for cause, or by agreement between the parties. Consequences for the employer can arise if mandatory labour law rules are neglected due to the misqualification of a permanent employee as a temporary worker.

Agency Workers

If the collective agreement of the company for which the agency worker provides their services has better rules governing wages than the collective agreement under which the agency worker would normally fall, then the provisions of the collective agreement of the company will apply to the agency worker. Concerning working time and leave entitlement, the binding rules of the company for which agency workers provide their services apply. Therefore, the provisions of both collective agreements and company agreements apply to agency workers.

Agency workers and part-time workers can be employed and paid by another company and not the company for which they are providing services. In this case, the agency/part-time worker is entitled to appropriate payment, which must be determined in view of the company (and its employees) for which they are providing services (section 10, Temporary Work Act (*Arbeitskräfteüberlassungsgesetz*)). Therefore, the wages of the agency worker/part-time worker are compared with the wages of employees of the company the agency worker/part-time provides their services for, set by the respective collective bargaining agreements, collective agreements or individual employment contracts. The comparison helps to determine whether the payment of the agency worker/part-time worker is appropriate or not.

Part-Time Workers

Part-time workers are entitled to the same rights and benefits as permanent employees, unless different treatment can be objectively justified. Agency workers and part-time workers can be employed and paid by another company and not the company for which they are providing services.

On the consequences for an employer who misclassifies workers as fixed-term, temporary, or independent contractors, when they are actually employees, see *Question 2*, *Categories of Worker*.

Discrimination and Harassment

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

Protection from Discrimination

The general principles of labour law prevent employers from treating any of their employees worse than the other employees in a comparable situation, unless an objective reason is given for any difference in treatment. Further, the GlBG and the Disabled Persons Employment Act (*Behinderteneinstellungsgesetz*) (BEinstG) contain specific non-discrimination provisions. Depending on the type of discrimination, different legal consequences are envisaged, such as the following:

- Entitlement to compensation.
- Provision of the omitted benefit, such as:
    - payment of the whole remuneration;
    - voluntary social benefits;
    - in the case of no promotion, compensation for financial loss and personal impairment;

- grant of education and training;
- contestability of the termination of the contract; or
- compensation for financial loss and personal impairment.

There is no specific regime that protects against discrimination based on gender orientation or identity (such as for transgender individuals), race or disability, but discrimination on any of these grounds will fall under the remit of the GlBG and the BEinstG.

There are different qualifying periods depending on the actual discrimination or harassment experienced and the context within which it is experienced (for example, if the discrimination or harassment occurred during the recruitment process or factual employment), and these qualifying periods generally range from six months up to three years.

The GlBG has been shaped by EU legislation and its respective directives (such as the Equal Treatment Framework Directive (*2000/78/EC*) and the Race Directive (*2000/43/EC*)).

Protection from Harassment

The GlBG also includes provisions protecting against harassment. Harassment is deemed to be a form of discrimination (see above, *Protection from Discrimination*) and is therefore treated in the same manner as other acts of discrimination. However, in cases of sexual harassment, typically compensation must be paid.

Termination of Employment

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

Notice Periods

The notice periods for employees are set out in section 20 of the Employees Act (*Angestellten-gesetz*). The notice period for employees and workers has now been aligned. The notice period that the employer must give to employees/workers depends on the employee's length of service:

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

All employees must give at least one month's notice, regardless of their length of service. The notice period can be increased up to six months subject to contractual agreement.

Severance Payments

Employees who entered into a new employment relationship on or after 1 January 2003 are entitled to a severance payment. Employers must pay contributions to a severance payment fund for these employees at a rate of 1.53% of their gross monthly salary. The amount of the severance payment depends on:

- The duration of the employment.
- The investment result of the severance payment fund.
- The wage development of the employee during employment.
- The administrative costs of the severance payment fund.

Before 1 January 2003, another severance payment regime was in force and the employee would receive approximately one annual salary after 25 years of employment. Under the current regime the severance payment of one annual salary is more likely to be received after more than 25 years of employment. Employees are entitled to a severance payment unless the employment relationship is terminated by:

- Dismissal of the employee for misconduct.
- Lawful redundancy.
- The employee withdrawing from the employment relationship (exceptions to this include retirement and termination for good cause).

Procedural Requirements for Dismissal

Generally, any unlimited employment relationship can be terminated without the employer stating a reason. However, the notice period and termination date must be observed. If the company has a works council, the employer must inform the works council before terminating an employment relationship. The works council will then comment on the planned dismissal within a week. The works council can agree or oppose to the dismissal or make no statement (abstain from comment).

The employee's right to appeal against the dismissal depends on the vote of the works council (section 105, Labour Constitution Act) (see *Question 13, Protection Against Dismissal*). The dismissal is void if the procedure outlined above is not followed.

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

Protection Against Dismissal

Grounds for dismissal. For any dismissal, the notice period and termination date must be observed. Generally, there are no specific grounds for dismissals and an employer can terminate an employment relationship without stating a reason. However, for certain people dismissals are only permissible on certain grounds (for example, for a planned company shutdown). Furthermore, dismissals with regard to fixed-term contracts are only possible if the termination is for good cause or the employment contract contains other grounds allowing for the termination. Employees have a right to appeal against a dismissal if the company has a works council, or does not have a works council but should have one under the rules in the ArbVG.

Employers can dismiss employees for good cause when the employee has committed an act of misconduct (for example, theft). When an employment contract is terminated for good cause, there is no requirement to observe any notice period or termination date and the employment contract is terminated with immediate effect. However, if the employee takes legal action against the dismissal, the employer must prove that the dismissal was for a valid reason.

Employees can claim that a dismissal is either unfair on social grounds or was made for inadmissible reasons (for example, if it was discriminatory) if the works council objects to the dismissal or abstains from comment. If the works council agrees to the dismissal, the employee can only appeal against the dismissal if it was made for inadmissible reasons. If no works council is required by the ArbVG the employee can appeal against a dismissal only if the dismissal is immoral.

Procedural requirements for dismissal. Dismissals generally have no formal requirements, but in certain cases procedural requirements must be observed. For example, where a works council is established a preliminary proceeding must be observed in which the works council must be notified. The works council can then object to the dismissal, abstain from comment or approve the dismissal. Depending on the statement made by the works council, either the works council or the dismissed person may appeal against the dismissal.

Disabled employees who fall under the regime of the Disabled Persons Employment Act (*Behinderteneinstellungsgesetz*) (BEinstG) can only be dismissed if the disability committee has agreed to the dismissal after hearing from the works council.

Dismissals for good cause must take effect immediately after the employee has committed the act of misconduct entitling the employer to terminate the employment contract. If the company has a works council, the employer must inform the works council after the dismissal has taken place, as the dismissal is immediately effective as dismissal with good cause is a termination of the employment contract without notice, and the employee is not entitled to compensation.

Mass dismissals require a notification to be made to the AMS 30 days in advance before the first dismissal. Whether a dismissal of employees is considered a mass dismissal depends on the size of the company (for example, if five people are to be dismissed of a company with more than 20 but less than 100 employees, this is considered to constitute a mass dismissal).

Prerequisites to qualify for protection against dismissal. There are no special prerequisites required of employees to qualify for the usual employment protections afforded to employees/workers. However, certain protection provisions only apply to particular categories of employees (for example, pregnant women).

Protected Employees

The following categories of employees are subject to special employment protection:

- Members of the works council.
- Parents on parental leave.
- Pregnant employees (only if the pregnancy is known to the employer).

- Apprentices.
- Community servants.
- Disabled persons.

For these persons, the legal validity of a dismissal is subject to the approval of the court or the relevant committee that represents them (if any). Further, the dismissal also requires a valid reason (such as dismissal due to a planned closure of the employer's undertaking).

Resolution of Disputes Between an Employee and Employer

14. Is there a governmental or independent organisation to which employees can refer complaints in the event that there is a dispute between the employee and the employer?

The Chamber of Labour (*Arbeiterkammer*) is an Austrian institution that takes care of workers'/employees' interests (as the Chamber of Commerce does for employers) which is financed by mandatory contributions paid by the employer for every employee/worker. Any employee/worker is entitled to counselling (face-to-face or via telephone) and legal representation at no cost in the case of disputes between an employee/worker and the employer. Before initiating legal proceedings, the employee/worker can demand the Chamber of Labour to intervene via telephone or in writing with the employer. After counselling the employee/worker can decide to proceed with legal action against the employer, in which case the employee/worker will be usually represented by the Chamber of Labour. The Chamber of Labour can deny the legal representation, among other things, if there are no prospects of success (for example, in cases of clear jurisprudence). If that is the case, the employee/worker can file a complaint against this decision to the Legal Protection Commission of the Chamber of Labour.

The website address of the Chamber of Labour (*Arbeiterkammer*) is: *https://www.arbeiterkammer.at/index.html* (available in German). The contact details depend on the respective federal state and can be found at: *https://www.arbeiterkammer.at/ueberuns/kontakt/index.html* (available in German).

Redundancy/Layoff

15. How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?

Definition of Redundancy/Layoff

Generally, there are no specific grounds for dismissals (see *Question 13*). An employer can therefore dismiss an employee when the employee is no longer needed due to the shutdown of certain businesses, or changes to the organisational structure. In any case, the employer must observe the notice periods for terminations of the employment contract (see *Question 12*).

Procedural Requirements

Apart from the procedural requirements outlined above (see *Question 13*), the works council must also be informed beforehand about any planned business changes (business shutdown, relocation of a business and so on), enabling the works council to assess the possible effects of the planned measures in detail and to issue an opinion on the planned measures. The works council can make suggestions for the prevention, elimination or mitigation of negative consequences of these measures for the employees, while also considering the economic needs of the company. In companies with more than 20 employees, collective bargaining agreements may be concluded (with special attention to the interests of older employees). If no collective bargaining agreement is concluded, an arbitration board may be appointed upon request to do so.

Redundancy/Layoff Pay

Redundancy/layoff pay may be part of a social plan which is contained in an applicable collective bargaining agreement, as outlined above. Apart from redundancy/layoff pay, provisions concerning interim aid (or, for example, the retention of company-owned apartments for employees) may also be stipulated in a social plan.

Collective Redundancies

Employers must notify the regional competent offices of the AMS in writing if they intend to dismiss a certain number of employees, depending on the total number of employees in the relevant company. Employers must notify the regional competent offices of the AMS in writing if they intend to dismiss at least:

- Five employees, in companies with more than 20 and fewer than 100 employees.
- 5% of employees, in companies with between 100 up to 600 employees.
- 30 employees, in companies with more than 600 employees.

The employer must consult with the works council (if any) about the planned dismissals and provide evidence in the notification to the regional competent office of the AMS that such consultation has taken place. A breach of the obligation to inform the AMS results in the unlawfulness of the dismissals and provides the affected employees with the opportunity to take legal action against the dismissals.

Employee Representation and Consultation

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

Management Representation

The works council, which is elected by the workforce, has participation rights in personnel, social, and economic matters. In larger companies, there is often a supervisory board that can represent the interests of employees. There are specific regulations to ensure that employees are adequately represented on the supervisory board. In companies above a certain size, employees may have the opportunity to be directly appointed to the supervisory board or receive other forms of participation.

Consultation

On economic matters the works council has, among other things, the right to be consulted in the case of transfers, proposed legal separations or mergers of undertakings. Further, the works council must be consulted about planned business changes which can, in theory, include share deals.

Major Transactions

In addition to the works council's consultation rights, in companies with more than 200 employees, the works council can raise objections against certain decisions of the management (including the relocation of the company, mergers or certain decisions that it considers are not beneficial to the employees).

It is important to note that the exact regulations may vary depending on the size of the company and the industry. In any case, adequate information and consultation with employees are essential components of co-determination in Austrian companies.

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

Remedies

An employer's obligation to consult the works council can be enforced at the Labour and Social Court. However, the employer's failure to conduct its consultation duty has no legal consequence and it does not affect the validity of the asset or share deal in question. If the employer and the works council conduct consultation but cannot come to an agreement, an arbitration committee must be consulted. The arbitration committee's decision is binding on both parties and deemed a company agreement.

Employee Action

Employees cannot take action to prevent any proposals going ahead.

Consequences of a Business Transfer

18. Is there any statutory and/or common law protection of employees on a business transfer?

Automatic Transfer of Employees

The buyer of a company or business automatically takes over all the rights and obligations under existing employment contracts on a transfer of the business (section 3, AVRAG).

Protection Against Dismissal

Dismissals before or after a transfer are legally invalid if they are exclusively or primarily due to the transfer. The employee can appeal against the dismissal within six months of the date of the dismissal.

Harmonisation of Employment Terms

Generally, the buyer of a company or business takes over all the rights and obligations under existing employment contracts at the time of the transfer (section 3, AVRAG). The aim of this rule is to protect the rights and entitlements of the employees when a business or undertaking, or part of one, is transferred to a new employer. This rule also applies to the seller's collective agreements (section 4, AVRAG). However, if the terms of the buyer's collective agreements are better for the employees transferred, then the rules of the buyer's collective agreements will apply to the transferred employees. As a buyer's collective agreements can be better or worse in part than the seller's collective agreements and exceptions can apply (among other things) to payments and pension terms, each case must be examined in thorough detail.

Employer and Parent Company Liability

19. Are there any circumstances in which:

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

Employer Liability

Employers can be liable for the acts of their employees under sections 1313a or 1315 of the ABGB. An employer is liable for any damage caused by their employees' negligent acts to a client or any third party with whom the employer has a contractual relationship (section 1313a, ABGB).

If no contractual relationship exists between the employer and the third party claiming damages, the employer is only liable if they have either:

- Knowingly or unknowingly employed a person incapable of performing their duties.
- Knowingly employed a dangerous person (for example, a person convicted several times of assault).

(Section 1315, ABGB.)

Parent Company Liability

Generally, only the employer is liable for the acts of their employees. Therefore, parent companies are not usually liable for the acts of their subsidiaries' employees.

Employer Insolvency

20. What rights do employees have on the insolvency of their employer? Is there a state fund which guarantees repayment of certain employment debts?

Employee Rights on Insolvency

In Austria, the insolvency of an employer does not automatically result in the termination of employees' employment contracts. Instead, the employer's insolvency administrator may continue the employment relationships, especially if the company's operations are ongoing or if it is necessary for the insolvency proceedings. Under section 25 of the Insolvency Code (*Insolvenzordnung*), employment can be terminated prematurely by the employee with immediate effect in the case of insolvency, provided that the closure of the company is certain. This right must be exercised within one month after the start of the insolvency procedure. An employment contract can also be terminated by the insolvency administrator, observing the statutory, collective agreement, or permissibly agreed shorter notice period, and taking into account the statutory restrictions on termination.

State Guarantee Fund

The Insolvency Remuneration Fund established under the Insolvency Remuneration Guarantee Act (*Insolvenz-Entgeltsicherungsgesetz*) covers (among other things) the payment of remuneration, certain compensation claims and other claims against the employer (for example, reimbursement claims).

Health and Safety Obligations

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

An employer's obligations regarding the health and safety of their employees can be divided into three categories:

- Protection from danger (technical protection). For example, employers must provide the necessary work equipment (such as helmets for miners) or escape routes.
- Rules protecting certain groups of individuals (including children, women and young parents). For example, employees under the age of 18 must not work for more than eight hours per day or 40 hours per week and women must not (or only under certain conditions) conduct work which, taking into account the nature of the work, may cause a specific risk to women (such as lifting heavy loads).
- Adherence to the working time rules (see *Question 7*).

The Workers Protection Act (among other things) contains provisions regarding workplace requirements (including health checks) and the provision of escape routes. Furthermore, the employer is obliged to carry out a continuous evaluation of hazards in the workplace and to prevent these hazards in accordance with the principles of risk prevention (sections 4 and 7, Health and Safety at Work Act (*ArbeitnehmerInnenschutzgesetz* 1995) (ASchG).

Taxation of Employment Income

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

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

Foreign Nationals

Under section 1 of the Income Tax Act (*Einkommensteuergesetz*), any natural person based or habitually resident in Austria is subject to Austrian income tax, which encompasses both domestic and foreign income. A natural person is based in Austria if that person has an apartment that the person will keep and use in Austria. The apartment does not usually have to be the focus of that person's life's interests. However, persons with apartments in Austria and another country are usually taxed where the focus of their life's interests is under most double tax treaties. A natural person is habitually resident in Austria if the facts show that the person is not only staying temporarily in Austria (which is presumed if the actual stay in Austria is longer than six months). Persons who are not based or resident in Austria can be subject to Austrian income tax only for their Austrian income, subject to any applicable double tax treaties.

Nationals Working Abroad

The taxation principles mentioned above apply to nationals working abroad (see above, *Foreign Nationals*). Nationals working abroad can only be subject to Austrian income tax for their Austrian income, and subject to any applicable double tax treaties which may further reduce their tax liability.

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

Rate of Taxation on Employment Income

The income tax rates are staggered progressively and are charged against income as follows:

- Income up to EUR12,816: 0%.
- Income of more than EUR12,816 up to EUR20,818: 20%.
- Income of more than EUR20,818 up to EUR34,513: 30%.
- Income of more than EUR34,513 up to EUR66,612: 40%.
- Income of more than EUR66,612 up to EUR99,266: 48%.
- Income of more than EUR99,266 up to EUR1,000,000: 50%.
- Income of more than EUR1,000,000: 55%.

Social Security Contributions

Employers must enrol their employees with social security and bear social security contributions based on the employees' salaries (the employer's social security contributions amount to 21.03% of the employee's monthly gross wages and the severance payment fund contributions amount to 1.53%). Employees must pay contributions to social security at a rate of 18.12% of their monthly gross wages.

Intellectual Property (IP)

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

Without any specific agreement to the contrary (for example, provisions within an employment contract), the employee automatically owns the IP rights in works created by the employee in the course of employment. Typically, the employer will include provisions in the employment contract (for patents collective agreements can also include such provisions) which either give the employer exclusive rights for the use of IP rights created during employment, or in the case of patents give the employer the right to own the employee's invention.

Restraint of Trade

> 25. Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Restriction of Activities

Restriction of activities during employment. The AngG and the GewO 1859 include provisions which restrict employees' and workers' activities during employment. Employees must not operate an independent commercial enterprise, or engage in trading activities, on their own or on someone else's behalf, in the employer's line of business without the employer's consent (section 7(1), AngG). Workers must not take part in activities that compete with their employer (such as operate harmful secondary businesses), while they have a valid employment contract, without the employer's consent (section 82, GewO 1859).

Breaches of these provisions entitle the employer to terminate the employment contract. However, further-reaching employment contract provisions restricting an employee's activities may be declared invalid for being unethical and their lawfulness must be examined on a case-by-case basis.

Restriction of activities after termination of employment. See below, *Post-Employment Restrictive Covenants*.

Post-Employment Restrictive Covenants

Clauses which restrict the activities of an employee (section 36, AngG) or a worker (section 2c, AVRAG) after the employment ends are allowed, provided that all of the following conditions apply:

- The individual is not a minor at the time the employment contract including the clause is concluded.
- The restriction relates to the activity of the individual in the employer's line of business.
- The maximum term of the clause does not exceed one year.
- The restriction does not imply an undue limitation on the individual's progress.

The employer does not have to pay compensation to the employee for the duration of the prohibition for the contractual prohibition to be binding on the employee.

Relocation of Employees

26. Can employers include mobility clauses in employment contracts, or take any other measures, to ensure that employees are obliged to relocate?

Mobility clauses can be included in employment contracts. Within the place of employment under the contract, the employer can unilaterally specify the place of work by instruction. However, relocations must be reasonable; therefore, employers must take into consideration factors such as:

- Traffic connections to the relocated place of work.
- Distance between the employee's home and relocated place of work.
- Benefits resulting from the job relocation.
- General circumstances concerning the employee's personal life.

Depending on the performance owed under the contract, mobility clauses can also require relocation to another country. Employers are generally not under any legal obligation to provide a relocation allowance, but such a provision can be included in the employment contract. While the employer is not obliged to provide relocation assistance to relocated employees, this can serve as an argument in favour of the reasonableness of a relocation.

The permissibility of transfers must be assessed from two different points of view. First, the question arises as to whether the transfer is covered by the employment contract. Second, the works council has certain rights of participation in the case of transfers.

If a transfer is included in the job description in the employment contract, the employer does not need the employee's consent for the transfer. If it is a new workplace that is not included in the job description, the employee's consent must be obtained in advance.

In companies where a works council has been established, further requirements must be met for a permanent transfer. Employers must inform the works council in the event of a transfer that is likely to be longer than 13 weeks, regardless of whether the transfer is covered by the employment contract. If the transfer is accompanied by a reduction in pay or any deterioration in other working conditions, the works council must agree to the transfer in advance. Where a works council has been established, a transfer made without the consent of the works council is invalid, even if it was made with the consent of the employee.

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