

# Austria

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## Legislation and agencies

### 1 What are the main statutes and regulations relating to employment?

The main statutes and regulations relating to employment are:

- the Act on White-Collar Workers (*Angestelltengesetz*);
- the Labour Relations Act (*Arbeitsverfassungsgesetz*);
- the Employment Law Harmonisation Act (*Arbeitsvertragsrechtsanpassungsgesetz*);
- the Act on Working Time (*Arbeitszeitgesetz*);
- the Act on Rest Days (*Arbeitsruhegesetz*);
- the Act on Employee Liability (*Dienstnehmerhaftpflichtgesetz*);
- the Vacation Act (*Urlaubsgesetz*);
- the Act on Blue-Collar Workers (*Gewerbeordnung*);
- the Company Pensions Act (*Betriebspensionsgesetz*);
- the Employees' Severance Pay Act (*Betriebliches Mitarbeiter-vorsorgegesetz*);
- the Act on Maternity Protection and Father's Leave (*Mutterschutzgesetz/Väterkarenzgesetz*);
- the Act on Equal Treatment (*Gleichbehandlungsgesetz*);
- the Act on Foreign Workers (*Ausländerbeschäftigungsgesetz*);
- the Act on Employment of Disabled Persons (*Behinderteneinstellungsgesetz*);
- the Act on Professional Training (*Berufsausbildungsgesetz*);
- and
- the Employees' Safety Act (*Arbeitnehmerinnerschutzgesetz*).

### 2 Is there any legislation prohibiting discrimination or harassment in employment?

The Act on Equal Treatment prohibits any discrimination, direct or indirect, by an employer because of the employee's sex, ethnic background, religion, philosophy of life, age or sexual orientation in regard to hiring, compensation, fringe benefits, further education, promotion, working conditions and termination of the employment or because of membership of an employee organisation. The Act on Equal Treatment also prohibits sexual harassment by an employer, as well as the failure of an employer to prevent sexual harassment by third parties (eg, superiors). The Act on Equal Treatment further requires a gender-neutral job advertisement, unless sex is a compelling requirement for the particular job. The same principles apply to discrimination because of ethnic background, religion, philosophy of life, age or sexual orientation. An employee may sue his or her employer directly for damages for violation of the statute. In addition, an employee may immediately terminate the employment contract for good cause and still retain his or her entitlement to all payments normally granted to an employee whose employment contract has been terminated by an employer.

### 3 Is there any legislation protecting employee privacy or personnel data? If yes, what are an employer's obligations under the legislation?

The registration and processing of personal data of employees by the employer is regulated by the Act on Data Protection. Therefore, employees have a constitutional privacy right. The processing of personal data by the employer is permissible only if the employer has a legitimate and important interest in obtaining such data. In principle, the registration and processing of employees' personnel data is permitted only if it is absolutely necessary for the fulfilment of the employer's duties (ie, withholding of tax and social security contributions).

Furthermore, employees have a statutory right to be informed about the personal data collected by their employer. Accordingly, employees can have access to their personnel file upon request.

According to the Labour Relations Act, the works council (if any) has a control right and an acceptance right to measures concerning the use of personal data of employees by the employer.

### 4 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The primary government agency for the enforcement of employment statutes is the Labour Regulations Inspectorate (*Arbeitsinspektorat*), which controls, inter alia, the enforcement of security conditions in the workplace, compliance with the mandatory working time limitations and rest days and the enforcement of the Act on Foreign Workers.

## Worker representation

### 5 Is there any legislation mandating the establishment of a works council or workers committee in the workplace?

According to section 40 of the Labour Relations Act, in a business with at least five continuous employees, a works council shall be established. The number of members of the works council depends on the number of employees in the business.

The works council disposes of numerous mandatory information and consultation rights as well as participation rights. The employer has to inform the works council about economic and financial affairs and to confer these matters upon request. This applies, in particular, in the case of a transfer of business. Certain measures must not be introduced by an employer without the consent of the works council. Furthermore, the works council can enforce certain shop agreements (defined in the Labour Relations Act) at court.

With regard to stock corporations (or limited liability companies with a supervisory board), the works council is also entitled to delegate employee representatives to the supervisory board.

### Background information on applicants

- 6** Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

During the application process, an employer is not allowed to ask applicants questions that might infringe their privacy. Questions about an applicant's financial situation and criminal records, in principle, are not allowed. This is true particularly if convictions have already been deleted from the criminal records. It does not make any difference if an employer conducts its own checks or hires a third party.

- 7** Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

In general, questions by the potential employer as to the physical condition of an applicant shall only be admissible in relation to diseases which may be detrimental to other employees or which could restrict the applicant's ability to carry out the demanded activity (like carrying heavy stock). Unless the employer discriminates against the applicant, the employer may refuse to hire an applicant who does not undergo such examination.

- 8** Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

Drug and alcohol testing during the application process will, in general, infringe the applicant's privacy. It is only permitted in special cases (such as for a job as a pilot) or where the alcohol or drug abuse shows the characteristics of a disease. Again, unless the employer discriminates against the applicant, the employer may refuse to hire an applicant who will not undergo such examination.

### Hiring of employees

- 9** Are there any legal requirements to give preference in hiring to particular people or groups of people?

According to the Act on Employment of Disabled Persons, a minimum of one disabled person shall be employed for 25 employees in each business. This obligation may be redeemed by a payment in lieu to the Federal Ministry for Labour and Social Affairs, which for the year 2007 amounts to €209 per month and employee.

Other than those with disabilities, there is no other requirement to give preference to any particular person or group of persons when hiring.

- 10** Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

Generally, there are no specific statutory requirements regarding the form of a contract of employment (except for contracts with apprentices and some public sector employees). Therefore, an employment contract may either be written or oral. According to the Employment Law Harmonisation Act, however, an employer is required to give an employee a written statement

after the beginning of the employment if there is no written contract. This written statement (*Dienstzettel*) must summarise the essential terms of the employment agreement, including:

- the commencement date;
- the name and address of the employer and of the employee;
- the period of employment;
- the salary;
- the usual working place;
- the annual leave entitlement;
- the terms for the termination of employment;
- the working time;
- the applicable collective bargaining agreement (if any); and
- the severance payment fund.

- 11** To what extent are fixed-term employment contracts permissible?

Generally, there are no restrictions on the use of fixed-term employment contracts. Several fixed-term employment contracts in a row (so-called chain employment contracts) with the same employee without objective justification are considered to be an employment contract for an indefinite time. Fixed-term employment contracts can be terminated before the expiration of the contract either by mutual agreement or for important reasons. A termination of the contract without cause is only possible if it was agreed between the parties, whereas the notice period must be proportionate to the length of the contract.

- 12** What is the maximum probationary period permitted by law?

The maximum probationary period permitted by law is one month, during which time both parties can terminate the contract immediately without notice. This period may not be extended at the discretion of the employer. The probationary period can only be established at the beginning of employment. A probationary period longer than that permitted by law would be considered a fixed-term employment contract for the duration of the probationary period.

- 13** To what extent are covenants not to compete valid and enforceable?

A duty of non-competition extends beyond the termination of employment only if there is an explicit agreement in the employment contract. The clause is invalid if the employee was a minor when he or she entered into the agreement. Otherwise, the clause is valid only if, and to the extent that, it applies just to the business branch of the employer, does not exceed one year and does not impose restrictions on the employee which, compared with the business interest of the employer, inequitably impedes the employee's job opportunities. When the employment contract is terminated by the employer, a non-compete clause is only effective if the employee was dismissed for cause.

In the case of breach of such non-competition obligations, the employer may file for injunctive relief and claim damages. If a contractual penalty was agreed, the employer may neither claim further damages nor seek injunctive relief.

- 14** What are the primary factors that distinguish an independent contractor from an employee?

An independent contractor does not have to perform the work personally, is not integrated into the organisation and uses his or her own resources.

## Foreign workers

- 15** Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity to a related entity?

Citizens of countries within the European Union (EU) or the European Economic Area (EEA) do not need a work permit. They only have to notify the Labour Market Service, which issues an EU sending certificate. Citizens of non-EU countries within the EEA are entitled to settle in Austria under certain conditions. All other non-EU citizens who wish to work in Austria must obtain a residence permit and a work permit.

All residence permits are subject to quotas, which are approved annually by the Austrian Parliament.

According to the Act on Foreign Workers, foreign employees who are transferred from one corporate entity to another related entity within a joint venture for a period of six months do not need a work permit or a residence permit. Furthermore, foreign employees who are transferred for a traineeship for no longer than 50 weeks do not need a work permit or a residence permit if the headquarters of the international company group is in Austria.

- 16** Is spousal work authorisation available?

A spouse may apply for a 'certificate of dispensation' (*Befreiungsschein*) if he or she has been in Austria for 12 months.

- 17** What are the rules about having a work-authorised workforce and what are the sanctions if you do not?

An employer who infringes the Act on Foreign Workers can be fined up to €50,000 for each illegal foreign worker. In the case of repeated breaches of the Act on Foreign Workers, the employer might even lose its trading licence.

## Terms of employment

- 18** Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The regulation of working time and overtime work is governed by the Act on Working Hours. Standard working hours are up to eight hours per day and up to 40 hours per week. The maximum limits are generally 10 hours per day and 50 hours per week. An employee may not opt out of these limitations. A range of exceptions exists for various professional groups. If overall working hours exceed the statutory maximum, the employer and its representatives may incur administrative fines.

- 19** What categories of workers are entitled to overtime pay and how is it calculated?

In addition to regular salary, an employee (white-collar worker and blue-collar worker) is entitled to an overtime premium of 50 per cent of the regular salary per hour of overtime. Collective bargaining agreements often provide for a higher premium for overtime work and for work performed at certain times (eg, nights and weekends). Monetary overtime pay can be substituted by compensatory time off, the terms of which must be agreed between the employer and the employee.

Overtime work is sometimes compensated by a lump sum, agreed in advance, regardless of how many overtime hours have actually been worked. This is permissible as long as the overall

compensation exceeds the minimum salary set by the applicable collective bargaining agreement.

- 20** Is there any legislation establishing the right to annual vacation and holidays?

The Vacation Act provides that all employees (white-collar workers and blue-collar workers) are entitled to an annual leave entitlement of at least 25 working days and at least 30 working days after 25 years of service. Collective bargaining agreements may provide for additional paid vacation days on particular occasions.

For each year of employment, the employee is entitled to paid uninterrupted annual leave. In the first year of employment, the full leave entitlement accrues only after six months of service. During these first six months, however, the leave entitlement will increase in proportion to the time served with the company. From the second year of employment, the leave entitlement arises at the beginning of the year. The holiday year corresponds to the working year, unless it is agreed otherwise. This means that the chronological entitlement to annual leave depends on the date the employee commenced his or her employment.

- 21** Is there any legislation establishing the right to sick leave or sick pay?

In the case of illness or injury, employees are entitled to receive their full regular salary from their employer for a specified period of time, unless they rendered themselves unable to work intentionally or through gross negligence. The period of full pay depends on the duration of employment and ranges between a minimum of six weeks and a maximum of 12 weeks after 25 years of service. After that, the employee is entitled to compensation at one-half of his or her salary for an additional four weeks. After the period of sick pay from the employer, the employee is entitled to sick pay in the amount of one-half of the last salary from the Health Insurance System, up to a maximum of one additional year.

- 22** In what circumstances may an employee have the right to take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Employees are entitled to a certain period of paid leave for the care of close family members who are living together with the employee or for the care of a sick child. An employee is generally entitled to one week of paid leave per working year and to a second week of paid leave per working year only for the care of a sick child younger than 12 years who lives with the employee.

The Employment Law Harmonisation Act provides for special unpaid leave for the care of terminally ill immediate family members or the care of seriously ill children who live with the employee.

After three years of service, the employer and employee can conclude an agreement regarding unpaid leave for educational purposes.

A pregnant woman is entitled to a mandatory period of paid leave of 16 weeks, including eight weeks before the expected birth and eight weeks thereafter, during which she is not allowed to work at all, but is entitled to receive her regularly granted salary from the Social Security Authority. After the period of eight weeks, calculated from the birth day of the child, the woman may choose to take maternity leave until the second birthday of the child according to the provisions of the Maternity Protection Act. During this time, the employer does not have to grant any

payment; the mother will receive payments from the Social Security Authority. Fathers are also entitled to paternity leave until the second birthday of the child if the mother is not on maternity leave at the same time or if the mother is not entitled to maternity leave at all. Maternity and paternity leave can be divided between the mother and the father.

### 23 What employee benefits are mandated by law?

Austrian employees are automatically covered by the social insurance system, which includes health, accident, unemployment and pension insurance. The employer must notify each employee for registration with the social insurance system and must bear a part of the employee's social insurance (approximately 50 per cent) and directly withhold and forward the employee's contribution to the social insurance authority.

Under collective bargaining agreements, most employees are entitled to two additional monthly salaries, the so-called Christmas pay, due in November or December and the so-called holiday pay, due in June or July. For employees, whose employment relationship commences or terminates during a calendar year, those remunerations shall be paid on a pro rata basis.

Other benefits are not mandated by law.

### 24 Are there any special rules relating to part-time or fixed-term employees?

Part-time employees must not be discriminated against fixed-term employees unless objective reasons justify the unequal treatment. In the latter case, the employer bears the burden of proof.

## Liability for acts of employees

### 25 In which circumstances may an employer be held legally liable for the acts or conduct of its employees?

Under the Civil Code, employers are vicariously liable for the acts of their employees committed during their employment. Employers in turn can recover damages from the employee only if the respective act was committed at least negligently according to the regulation of the Act on Employee Liability. The court may mitigate such claims.

## Taxation of employees

### 26 What employment-related taxes are mandated by law?

Salaries paid to employees are subject to income tax, to be withheld by the employer and directly forwarded to the tax office. Income tax is assessed on a progressive basis.

## Employee-created IP

### 27 Is there any legislation addressing the parties' rights with respect to employee inventions?

The Austrian Patent Act foresees that employee inventions may only be claimed by the employer if agreed upon in writing and if the action which led to the invention is part of the duties of the employee. In cases where such written agreement was concluded, the employee must inform the employer of every invention except for inventions which are evidently not job-related. The employer must tell the employee within four months after receipt of such notice whether the employer will claim the invention as a job-

related invention for itself. If the employee fails to provide such notice, the employee shall be liable to the company for damages, including lost profits.

## Termination of employment

### 28 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

Under mandatory law, the employer (and the employee) can terminate an employment contract concluded for an indefinite period of time without particular reasons by respecting the mandatory provisions on periods of notice and the effective dates of termination. Employees who work in businesses which regularly employ at least five employees enjoy protection against termination of the employment contract: the employee (or the works council) may contest the termination of contract by filing a complaint with the Labour Court. If the action is sustained, the termination of contract is set aside and the employee will be reinstated and entitled to back pay for the time of the procedure. Essentially, only a small group of executive employees is not eligible for this sort of protection against termination of contract.

A termination without notice (dismissal) requires a cause, sufficiently important to make any further employment if only for the notice period unacceptable. Such reasons are specified in statutes and collective agreements.

### 29 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Only if a termination with cause (dismissal) is realised, no notice of termination must be given prior to dismissal but the employer can dismiss the employee with immediate effect. If the employment is terminated without cause, notice periods have to be respected, the length of which depends upon the years of service. All the duties out of the contract continue until the last day of the notice period. The employer, however, may release the employee from work until the end of the notice period during which the employer's obligation to pay salary continues.

### 30 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

An employer may dismiss an employee for cause without notice or payment in lieu of notice according to the reasons specified in the statutes or a collective agreement. According to the Act on White-Collar Workers, the following reasons enable the employer to dismiss an employee with immediate effect:

- the employee's disloyalty to the employer;
- the employee's acceptance of benefits or advantages from third parties without the employer's knowledge and consent;
- the employer's loss of confidence in the employee as a result of the employee's activities;
- the permanent incapacity of the employee to perform work;
- the employee's infringement of a non-competition clause;
- the persistent refusal of the employee to perform work; or
- the employee's physical assault, indecent assault and defamation of the employer, its representatives, relatives or colleagues.

### Update and trends

According to newly introduced section 2c of the Employment Law Harmonisation Act, a non-competition clause extended beyond the termination of employment will only be valid if the employee's last monthly salary exceeded €2,176 gross.

Under section 2d of the Employment Law Harmonisation Act, it may be agreed in writing that the employee shall reimburse the employer on a pro rata basis all expenditure for supplemental training which may be beneficial to the employee in other employment once he or she leaves the company.

Pursuant to a recent Supreme Court decision, the termination of a pregnant employee during the probationary period because of her pregnancy amounts to discrimination under the Act on Equal Treatment. The concerned employee can therefore challenge her termination at court within 14 days after the termination. The employer must then prove that the pregnancy was not the reason for the termination. If the action is sustained, the termination is set aside and the employee will be reinstated and entitled to back pay for the time of the procedure.

**31** Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

According to the provisions of the 'old regime' of mandatory severance payments, an employee having been employed for more than three years is entitled to a mandatory severance payment if notice is given by the employer. The amount of this severance depends on the duration of the employment and amounts to two up to 12 monthly salaries. The basis of the calculation is the most recent monthly salary of the employee including all regularly granted payments.

For all employment relationships beginning after 1 January 2003, the provisions of the 'new regime' of severance payments (*Abfertigung neu*) apply. Under these provisions, the employee is no longer entitled to mandatory severance in the case of termination of the employment contract but on a regular basis during the employment has to contribute 1.53 per cent of the monthly salary to special funds administering these payments (*Mitarbeiterversorgungskasse*). In the case of termination of the employment, the employee has a claim for payment or transfer of the accrued amounts only against these funds.

**32** Are there any procedural requirements for dismissing an employee?

If a works council is established, the employer must notify it in advance of any intended termination. The works council then has the opportunity to comment on the dismissal of the concerned employee within five working days by approving or objecting to the action or by refraining from any comment. Otherwise, the termination of employment is null and void.

Under certain conditions, the employee or the works council may contest the dismissal before the Labour Court within one week of the date that the employee receives the termination notice.

For employees with special protection against dismissal, the prior consent of the Labour Court or a governmental authority is necessary (see question 33).

**33** In what circumstances are employees protected from dismissal?

Special protection against dismissal applies in particular for:

- members of and candidates for a works council;
- expectant mothers until four months after giving birth;
- a mother or father who opted for unpaid maternity leave until four weeks after the end of the leave;
- mothers or fathers on parental leave;
- employees doing military service or community service in lieu of military service;

- apprentices; and
- disabled persons.

In all these cases, the employer must obtain the prior consent of the Labour Court or a governmental authority to be permitted to terminate the employment by giving notice. Such consent can only be obtained in special circumstances.

'Older' employees have an especially protected status insofar as long-term employment with the same employer and difficulties in finding a new job must be taken into consideration.

**34** Are there special rules for mass terminations or collective dismissals?

Pursuant to the Labour Market Act, the employer has to notify in writing the competent regional office of the Labour Market Service, if employment relationships:

- of at least five employees in undertakings with usually more than 20 and less than 100 employees;
- of at least five per cent of the employees of undertakings with 100 to 600 employees;
- of at least 30 employees of undertakings with usually more than 600 employees; or
- of at least five employees who have reached the age of 50; shall be terminated – by way of giving notice or by way of mutual consent – within a period of 30 days.

Such notification must be filed at least 30 days prior to the first declaration of a termination of an employment relationship. The termination of an employment contract shall be null and void if it takes place before the notification is received by the competent regional office of the Labour Market Service, or after receipt by said office, within the period of 30 days mentioned above without the prior approval of the competent provincial office of the Labour Market Service.

Furthermore, the employer has to inform the works council of the planned termination. Provided that in the respective company at least 20 employees work permanently, certain measures for the prevention, elimination or mitigation of the consequences of the termination may be adopted by shop agreement (the so-called 'social plan'). The social plan shall, in particular, take into consideration the interests of the older employees. If the parties do not reach an agreement, either one can refer the matter to a specific conciliation body at court (*Schlichtungsstelle*).

**35** May the parties agree to private arbitration of employment disputes?

Apart from contracts with the managing board or other leading executive staff, it is not permissible to agree on an arbitration



clause for the resolution of future disputes as part of the terms of the employment contract as the Labour Courts have exclusive competence. Parties may, however, agree on an arbitration clause for disputes which have already arisen.

**36** May an employee agree to waive statutory and contractual rights to potential employment claims?

During employment, the employee may not legally resign statutory employment claims. Contractual rights may be waived by an employee or modified by agreement.

**37** What are the limitation periods for bringing employment claims?

The general limitation period for bringing employment claims is three years. A claim for damages because of an unfair dismissal must be brought within six months after the dismissal. Several collective bargaining agreements provide for a general limitation period of six months for employment claims. If a dismissal is contested for being 'socially unfair', the respective action must be filed within one week after the dismissal.

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