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Published by

Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

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First published 2006
Sixteenth edition
ISBN 978-1-83862-680-8

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



Labour & Employment 2021

Contributing editors

**Matthew Howse, K Lesli Ligorner, Walter Ahrens,
Michael D Schlemmer and Sabine Smith-Vidal**
Morgan, Lewis & Bockius LLP

Lexology Getting The Deal Through is delighted to publish the sixteenth edition of *Labour & Employment*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria, Hong Kong, Hungary, Mauritius, Romania, Singapore and Taiwan.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Matthew Howse, K Lesli Ligorner, Walter Ahrens, Michael D Schlemmer and Sabine Smith-Vidal of Morgan, Lewis & Bockius LLP, for their continued assistance with this volume.



London
April 2021

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This article was first published in May 2021
For further information please contact editorial@gettingthedealthrough.com

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LEGISLATION AND AGENCIES

Primary and secondary legislation

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

The main statutes are the:

- Act on White-Collar Workers;
- Labour Constitution Act;
- Employment Law Harmonisation Act;
- Act on Working Time;
- Act on Rest Days;
- Act on Employee Liability;
- Vacation Act;
- Act on Blue-Collar Workers 1859;
- Company Pensions Act;
- Employees' Severance Pay Act;
- Act on Maternity Protection;
- Act on Father's Leave;
- Act on Equal Treatment;
- Act on Employment of Foreign Workers;
- Act on Employment of Disabled Persons;
- Act on Professional Training; and
- Employees Safety Act.

Protected employee categories

2 | Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The Act on Equal Treatment prohibits any discrimination, direct or indirect, by the employer because of the employee's sex, religion, ethnic background, philosophy of life, sexual orientation or age in regard to hiring, compensation, fringe benefits, further education, promotion, working conditions and termination of the employment or because of the membership of an employee organisation.

The Act on Equal Treatment also outlaws sexual harassment by the employer, as well as the failure of the employer to prevent sexual harassment by third parties (eg, superiors). It 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 in court for damages due to violation of the statute.

Enforcement agencies

3 | 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 controlling, inter alia, compliance with the mandatory working time limitations and rest days, the enforcement of security conditions and nature at the workplace, and the enforcement of the Act on Foreign Workers.

Other major agencies responsible for monitoring compliance with employment statutes are the Social Security Agency and the financial police, who are in particular responsible for wage dumping and non-payment of the minimum wage.

WORKER REPRESENTATION

Legal basis

4 | Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

According to section 40 of the Labour Constitution Act, in a business with at least five continuously employed employees, a works council shall be established (however, establishing a works council is not mandatory). The number of members of the works council depends on the number of employees in the business.

Powers of representatives

5 | What are their powers?

The works council contains numerous mandatory information and consultation rights as well as (in few cases) participation rights. The employer must 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 (eg, profound monitoring measures). Furthermore, the works council can enforce certain shop agreements (defined in the Labour Constitution Act) at court.

In the case of termination of employees, the works council has to be informed before notice is given, otherwise the termination is invalid. In the case of deteriorating dislocation within the company the works council has to agree to the dislocation, otherwise the dislocation is invalid.

In stock corporations (or limited liability companies with a supervisory board) the works council is also entitled to delegate employee's representatives to the supervisory board.

BACKGROUND INFORMATION ON APPLICANTS

Background checks

- 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?

From an employment law perspective, background checks are permitted. However, data protection laws (in particular GDPR) place certain restrictions on the nature and amount of data that can be used. As a general rule, only such data may be collected that are necessary for the position to be filled (principle of proportionality).

In principle, it makes no difference whether an employer conducts its own checks or hires a third party. Should an employer make use of a third party, a data processing agreement in accordance with the General Data Protection Regulation (GDPR) has to be concluded.

Medical examinations

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

Medical examinations as a condition of employment are only permissible if and insofar physical fitness is necessary for the employment in question (eg, for employees operating heavy machinery). In such a scenario, it could be valid to refuse to hire an employee who does not submit to an examination. However, in 'regular' jobs medical examinations cannot be demanded from employees.

Drug and alcohol testing

- 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 privacy of the applicant and is only permitted in special cases (eg, for pilots). Unless the employer discriminates against the applicant for other reasons, he or she may refuse to hire an applicant not submitting to an examination in such special cases.

HIRING OF EMPLOYEES

Preference and discrimination

- 9 | Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

Employers with at least 25 employees are required to employ a disabled person (degree of disability of at least 50 per cent) per each 25 employees. Non-compliance with that requirement requires the employer to pay compensation. This is calculated as a certain sum (currently €271–€404 a month), multiplied by the number of disabled persons that should have been employed.

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

There are no specific statutory requirements regarding the form of a contract of employment, except for the employment of apprentices and some employees of the public sector. Therefore, an employment contract may be either in writing or oral. However, according to the Employment Law Harmonisation Act the employer is required to give the employee a written statement after the beginning of the employment if there is no written contract. This written statement (a *Dienstzettel*) must summarise the essential terms of the employment agreement, such as the name

and address of the parties, the beginning date, the period of employment, the salary, the usually working place, the working time, the entitlement of vacation per year, the termination terms, the applicable collective bargaining agreement (if any) and the severance payment fund.

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

There are no restrictions of the extent of fixed-term employment contracts in terms of duration. Fixed-term employment contracts can be terminated before the expiration of the contract either by mutual agreement or for important reasons. Termination of the contract without cause is only possible if it was explicitly agreed between the parties, whereas the notice period must be in an adequate relation to the length of the contract.

It can, however, be invalid to link several fixed-term contracts together, in particular if there is no objective reason to do so. In this case, an employment relationship of indefinite duration is constituted.

Probationary period

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

The probationary period can only be established at the beginning of the employment and may only last 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.

Classification as contractor or employee

- 13 | What are the primary factors that distinguish an independent contractor from an employee?

The most important distinction is that an independent contractor is not subject to instructions with regard to when and where he or she has to perform his or her works. Furthermore, an independent contractor is not obliged to perform the work personally, is not integrated into the corporate organisation, and uses his or her own resources.

Temporary agency staffing

- 14 | Is there any legislation governing temporary staffing through recruitment agencies?

The Act on Personnel Lease governs temporary staffing. In particular, it stipulates several obligations of the (temporary) employer (eg, regarding employee safety or equal treatment with permanent staff) and the information rights of the leased employees.

FOREIGN WORKERS

Visas

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

There are no numerical limitations on work permits (visas in general only entitle to travel, not to work). There is no specific work permit for intra-group transfers; however, such employees may apply for a general work permit (EU/EEA nationals do not require a work permit).

Spouses

- 16 | Are spouses of authorised workers entitled to work?

Spouses of employees with an Austrian work permit are entitled to apply themselves for a permit that entitles them to take up work in Austria.

General rules

- 17 | What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

Employers are only allowed to employ employees who either are exempt from work permit regulations (EU/EEA nationals) or have the necessary permits. Violation of such regulations results in administrative fines to be imposed on the employer (which are higher the more employees are concerned).

Resident labour market test

- 18 | Is a labour market test required as a precursor to a short or long-term visa?

Yes, the most common types of work permit (eg, the Red-White-Red Card) require a labour market test. In the course of that process, the employer has to show that there are no unemployed persons available in Austria who are equally qualified and willing to take up the job. The employer may even be required to conduct interviews with applicants referred by the labour market agency.

TERMS OF EMPLOYMENT

Working hours

- 19 | 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 Time. Standard working hours are up to eight hours per day and up to 40 hours per week. The maximum limits are generally 12 hours per day and 60 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.

Overtime pay

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

In addition to regular compensation, an employee (white-collar and blue-collar workers alike) 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 or weekends, or both). Monetary overtime compensation can be substituted by compensatory time off, the terms of which must be agreed between the employer and employee.

- 21 | Can employees contractually waive the right to overtime pay?

No, that is not possible.

Vacation and holidays

- 22 | Is there any legislation establishing the right to annual vacation and holidays?

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

Sick leave and sick pay

- 23 | 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 compensation 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 compensation depends on the duration of employment and ranges between a minimum of six weeks to 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 additional four weeks.

Leave of absence

- 24 | In what circumstances may an employee 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. The employee generally is 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 terminal care for immediate family members or the care of seriously ill children who live with the employee.

Mandatory employee benefits

- 25 | What employee benefits are prescribed by law?

Austrian employees are automatically covered by the social insurance system, which includes health, unemployment, accident and pension insurance. The employer must notify each employee for registration with the social insurance 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 holiday pay, due in June or July. For employees whose employment relationship commences or terminates during a calendar year, remuneration shall be paid on a pro rata basis.

Part-time and fixed-term employees

- 26 | Are there any special rules relating to part-time or fixed-term employees?

Part-time employees may not be discriminated against compared to full-time employees on the grounds of part-time work, unless objective reasons justify different treatment. Voluntary social benefits must be granted at least in the same ratio as the ratio of the (reduced) regularly worked hours to the statutory normal working hours. Part-time employees have to be informed if there is an internal job opening that entails more working hours.

Public disclosures

- 27 | Must employers publish information on pay or other details about employees or the general workforce?

Every employer who permanently employs more than 150 workers is obliged to disclose an income report every two years vis-à-vis the works council or the employees (but not the public). The report has to show the income levels separated according to gender in an anonymised form.

POST-EMPLOYMENT RESTRICTIVE COVENANTS

Validity and enforceability

28 | To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Such post-termination covenants are valid if they do not unreasonably impede the employee (this determination has to be made on a case-to-case basis.) The maximum period is one year. Additionally, post-termination covenants are invalid if the employee does not reach a certain income level (the exact amount is stipulated each year; in 2021 €3,700/month).

Post-employment payments

29 | Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

No, in general that is not necessary. However, post-employment restrictive covenants are not enforceable if the employer terminates the employment relationship. In such a case, the employer can demand compliance with such covenant (only) if he or she continues to pay the employee's salary for the duration.

LIABILITY FOR ACTS OF EMPLOYEES

Extent of liability

30 | In which circumstances may an employer be held liable for the acts or conduct of its employees?

Employers are vicariously liable for the acts of their employees committed in the employment relationship under the Austrian Civil Code. 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

Applicable taxes

31 | What employment-related taxes are prescribed by law?

Salaries paid to employees are subject to income tax, to be withheld by the employer and directly forwarded to the tax office.

EMPLOYEE-CREATED IP

Ownership rights

32 | Is there any legislation addressing the parties' rights with respect to employee inventions?

The Austrian Patent Act stipulates that employee inventions may only be claimed by the employer if agreed upon in writing and if the action that led to the invention is part of the employee's duties. If such a written agreement was concluded, the employee is obligated to inform the employer of every invention except for inventions that are evidently not job-related. The employer must tell the employee within four months of receipt of the notice whether it will claim the invention as a job-related invention for itself. If the employer fails to provide this notice, the employee shall be liable to the company for damages, including lost profits.

Trade secrets and confidential information

33 | Is there any legislation protecting trade secrets and other confidential business information?

The Act on Unlawful Competition stipulates that any person who unlawfully acquires, uses or discloses trade secrets is liable vis-à-vis the trade secrets' owner for any damages incurred.

DATA PROTECTION

Rules and obligations

34 | Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

Employee data is protected on EU level by the General Data Protection Regulation (GDPR) and on national level by the Data Protection Act. The employer is obliged to safeguard employee data and to only use data to the necessary extent and for specific reasons (eg, data necessary for payroll).

35 | Do employers need to provide privacy notices or similar information notices to employees and candidates?

Under article 13 GDPR, any person (including employees) has to be informed of any data being processed about him or her.

36 | What data privacy rights can employees exercise against employers?

Employees have the right to information, correction and deletion (articles 15 and 19 GDPR).

BUSINESS TRANSFERS

Employee protections

37 | Is there any legislation to protect employees in the event of a business transfer?

The Employment Law Harmonisation Act stipulates an employee's right in the event of a business transfers, in particular, special protection against termination, information rights and, under certain conditions, a right to object.

TERMINATION OF EMPLOYMENT

Grounds for termination

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

Immediate dismissal without observing notice periods is only possible for cause. 'Cause' can be anything that makes continued employment until the next termination date justifiably unacceptable for the employer.

Notice

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

Should there not be cause for dismissal, notice is mandatory. Pay in lieu of notice is not possible.

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

Immediate dismissal is possible for cause. 'Cause' for dismissal can be anything that makes continued employment until the next termination date justifiably unacceptable for the employer (eg, theft, falsified time records).

Severance pay

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

Employment relationships that started prior to 2003 are subject to the Old Severance Payment Scheme. Such employees are entitled to severance pay upon termination of employment (if they did not terminate themselves). Severance pay is calculated as a multiple of the monthly salary and depends on the years of service (12 monthly salaries after 25 years of service).

Employees who started in 2003 or later are not entitled to severance pay as such, but the employer pays 1.53 per cent of their monthly gross salary to a fund. Any payment claims have to be determined between that fund and the employee.

Procedure

42 | Are there any procedural requirements for dismissing an employee?

If a works council is established, it has to be informed at least one week prior to termination. Failure to comply results in the invalidity of the termination.

Mass terminations have to be notified to the labour market agency at least 30 days prior; any termination within that 30-day period is invalid.

Employee protections

43 | In what circumstances are employees protected from dismissal?

Austrian law stipulates a number of circumstances in which an employee enjoys special protection against termination. The most relevant are employees on maternity leave or parental part-time, works council members, disabled employees (degree of disability of at least 50 per cent) and employees on military or civil service.

Mass terminations and collective dismissals

44 | Are there special rules for mass terminations or collective dismissals?

Mass terminations have to be notified to the labour market agency at least 30 days prior; any termination within that 30-day period is invalid.

Class and collective actions

45 | Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

For the most part, there are no class or collective actions in Austrian employment law. A works council can, however, demand a ruling on the existence or non-existence of rights if those rights concern at least three employees.

Mandatory retirement age

46 | Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

It is, in general, possible to terminate employment upon reaching the statutory retirement age (currently 65 years). However, in specific cases this could be construed as age discrimination, for which reason a case-by-case assessment is recommended.

DISPUTE RESOLUTION

Arbitration

47 | May the parties agree to private arbitration of employment disputes?

Private arbitration is only possible in relation to individual rights (not for any rights pursuant to the Labour Constitution Act) and can only be agreed if the dispute has already occurred (not in advance).

Employee waiver of rights

48 | May an employee agree to waive statutory and contractual rights to potential employment claims?

Austrian law is rather restrictive with regards to waiver of employee rights. As a general rule, as long as the employment relationship is still ongoing, a waiver of employee rights is invalid. Upon or after termination of employment such a waiver is possible, as long as there is no undue duress on the employee (either economically or otherwise).

Limitation period

49 | What are the limitation periods for bringing employment claims?

The general limitation period is three years after the claim in question came due. However, several collective bargaining agreements reduce that period for all or certain claims (typically, to three to six months). Claims in connection with a premature termination (without observing the notice period) have to be filed within six months.

UPDATE AND TRENDS

Key developments of the past year

50 | Are there any emerging trends or hot topics in labour and employment regulation in your jurisdiction? Are there current proposals to change the legislation?

As a consequence of the covid-19 pandemic, working from home (WFH) has clearly increased in importance. It is to be expected that this trend will continue even after the pandemic has abated. Therefore, in April 2021 a law regulating several aspects of WFH (eg, accidents at home, compensation for expenses or tax consequences) came into effect. The government chose not to create a comprehensive WFH law but to add or amend certain provisions in a variety of different laws. The most notable new provision is section 2h of the Employment Law Harmonisation Act, which defines that WFH for the purposes of Austrian law means an employee regularly performing work from home (but not, for example, from co-working or public spaces).

Coronavirus

51 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The predominant instrument to address the pandemic in an employment-law context is short-time work, whereby the working hours are reduced to a certain amount (eg, 10 per cent) and the employer only pays the salary for such reduced working hours, but the employee receives 80–90 per cent of the salary he or she had prior to short-time work. The difference between the actual (reduced) working hours and the guaranteed salary level is borne by the government.

The short-time work scheme has been in place already before the pandemic, but in the course of 2020 and 2021 it has been continuously amended and adapted. While short-time work is a suitable instrument to avoid terminations, it necessitates significant administrative effort on part of the employer. It should therefore be ensured that the internal administrative process is up to date at all times with the short-time work scheme currently in place.

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| Aviation Liability | Financial Services Litigation | Merger Control | Shareholder Activism & Engagement |
| Banking Regulation | Fintech | Mining | Ship Finance |
| Business & Human Rights | Foreign Investment Review | Oil Regulation | Shipbuilding |
| Cartel Regulation | Franchise | Partnerships | Shipping |
| Class Actions | Fund Management | Patents | Sovereign Immunity |
| Cloud Computing | Gaming | Pensions & Retirement Plans | Sports Law |
| Commercial Contracts | Gas Regulation | Pharma & Medical Device Regulation | State Aid |
| Competition Compliance | Government Investigations | Pharmaceutical Antitrust | Structured Finance & Securitisation |
| Complex Commercial Litigation | Government Relations | Ports & Terminals | Tax Controversy |
| Construction | Healthcare Enforcement & Litigation | Private Antitrust Litigation | Tax on Inbound Investment |
| Copyright | Healthcare M&A | Private Banking & Wealth Management | Technology M&A |
| Corporate Governance | High-Yield Debt | Private Client | Telecoms & Media |
| Corporate Immigration | Initial Public Offerings | Private Equity | Trade & Customs |
| Corporate Reorganisations | Insurance & Reinsurance | Private M&A | Trademarks |
| Cybersecurity | Insurance Litigation | Product Liability | Transfer Pricing |
| Data Protection & Privacy | Intellectual Property & Antitrust | Product Recall | Vertical Agreements |
| Debt Capital Markets | | Project Finance | |
| Defence & Security Procurement | | | |
| Dispute Resolution | | | |

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