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I. GENERAL

1. Introductory Paragraph

Like most Member States of the European Union, Austria’s cultural outlook towards employment policy and civic responsibility fosters a legal environment that provides broad protections and entitlements for employees. The current legal regime governing Austria is composed of a complex combination of (listed in order of decreasing breadth of applicability) overlapping European Union and Austrian legislation, broad collective bargaining agreements, shop agreements, and individual employment agreements. Like many other industrialized European nations, there is no single, inclusive statute that governs Austrian employment law. Rather, Austria’s framework of employment legislation consists of an assembly of specific statutes. For example, separate statutes extend protections for maternity leave, data protection, equal treatment under the law, working hours, and vacation entitlements. While there have been deliberations to codify these many specific statutes into one cohesive legal code, the sheer scope of the task has consistently proved to be an insurmountable obstacle.

2. Key Points

- There is no statutory minimum wage in Austria. However, more than 90% of all employment relationships are covered by a collective bargaining agreement.
- Any overtime worked above the statutory maximum of forty hours per week will incur a 50% wage increase by law. Overtime payment is also subject to employment agreement, collective bargaining agreement and works council agreement.
- There is almost a total absence of strikes and lockouts in employment relations.
- There are no severance payments for employment agreements created on or before December 31st, 2002.
- In the case of transfer of a business all employment contracts that are part of the affected business are automatically transferred to the purchasing party.

3. Legal Framework

1. SCOPE OF EMPLOYMENT AND SOCIAL SECURITY LAW

The basic function of Austrian labour law is to compensate for the historic disparity in bargaining power between an employer and employee. In the past, and before the current labour law regime, the Austrian economy applied the broad civil right of freedom of contract to every employer-employee contract. However, this relatively laissez-faire approach had negative consequences for the weaker party to the contract - namely the employee. Therefore, contemporary employment law came into being to ameliorate the disparities in economic conditions between employer and employee and ultimately protect the employee. Employment law’s scope covers employees, who are defined as people who perform work in a state of personal dependence and under the leadership and control of another person, and those employees’ relationship with their employer.

The Austria employment law regime uses separate statutes to regulate separate classes of employees. For example, there are distinct regulations regarding blue-collar employees, white-collar employees, foreign employees, domestic workers, and public employees. Despite the broad range of applicable employment law, Austria has very few legal actors within its employment law system. Legal actors in Austrian employment relations include individual employers, works councils, the Austrian Trade Union Federation, The Austrian Chamber of Commerce, a few sector-specific employers’ organizations, and the government. The small number of legal actors within the Austrian system allows the government to take a hands-off approach to matters such as employee remuneration. While Austria’s current legal regime at first blush seems like an amalgamation of piecemeal statutes, it functions effectively to create a stable, transparent, and predictable employment environment. To support this claim, it is notable that Austria has among the lowest rates of working days lost due to industrial legal disputes. There is almost a total absence of strikes and lockouts in employment relations, because disputes are almost always settled by

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consultation or informal mediation in the spirit of social partnership.²

Social Security law is technically an independent and separate body of law from employment law although issues from the two fields of law often get intertwined. Social Security law protects employees not from their employers, per se, but from the disadvantages and dangers, both physical and economic, that may present themselves within the sphere of employment relations. Social Security primarily protects employee’s wellbeing during times of illness, unemployment, old age, childbirth, occupational hazards, and other unforeseen family burdens. Social Security laws’ primary effect is to extend compulsory insurance and welfare services to

2. STRUCTURE OF THE AUSTRIAN COURT SYSTEM

Austria has a system of lower courts (called District Courts) and subsequent appeals courts of increasing magnitude, as established by the Organization of the Courts Act. After launches of new cost-cutting plans in the public sector as of 1 July, 2014 there are one hundred and sixteen District Courts, twenty Regional Courts, four Regional Courts of Appeal, and the Supreme Court. For general civil and criminal matters, the District Courts are generally the courts of first instance. However, Austria has a specific court system for labour and social security matters, which the Act of Labour and Social Courts reorganized in 1986. Within this system, each Regional Court has a specialized chamber for labour and social welfare matters that acts as the court of first instance for labour issues (with the exception of Vienna, which has its own, freestanding Labour and Social Court). These labour courts have jurisdiction over disputes concerning employment-like contractual relationships, unfair dismissal, and the settlement of disputes between employers and employee representative bodies.

The labour section of one of the four regional courts of appeal may hear any appeals of decisions from the labour courts of first instance. Subsequently, a special labour section of the Supreme Court may hear appeals from those regional courts of appeals.³

4. New Developments

CASE LAW:

- The Austrian High Court held that giving notice by sending a message via Whatsapp does not fulfill the written form requirement stipulated by a collective bargaining agreement (OGH 28. 10. 2015, 9 ObA 110/15i). In justifying its ruling, the court said that in order to fulfill the written form requirement the employee must have the ability to gain access to a physical copy of his termination notice. If a termination notice is only submitted to a smartphone via Whatsapp, obtaining a copy of the termination notice (e.g. for the purpose of review or handing it over to a lawyer) is highly complicated or even impossible without the necessary technical equipment or knowledge.

- The Austrian High Court held that an employment contract with an employee cannot be terminated because a disabled employee lied about his disability during his application process, and ruled that such a termination is discriminatory (OGH 26.11.2015, 9 Ob A 107/15y). The employee did not inform the employer about his disability during his application process as a welder, he even signed a statement that he did not have any diseases or illnesses. According to the High Court, in this case the interest of the employee of obtaining work outweighs the interest of the employer to receive all the necessary information, because the particular disability does not reduce the work capability of the employee.

- For the first time the Austrian Administrative Court held that, when an employer based in another member state of the EU or the EEA posts an employee to work in Austria, a notice must be provided to the Central Coordination Office for the Control of Illegal Employment (Zentrale Koordinationsstelle, ZKO) of the Federal Ministry of Finance, regardless if the employer has a branch office in Austria. According to the court a branch office does not constitute a “stand-alone” seat of the employer in Austria, the employer is still considered to be based abroad (VwGH 14. 12. 2015, Ra 2015/11/0083).

• Pursuant to section 14 of the Austrian Employee Act, employees with variable income components are entitled to a check of the books of their employer to verify the extent and calculation of their salary. In a recent ruling (OGH 27.1.2016, 9 ObA 162/15m) the Austrian High Court held that the employee can seek the professional advice of an accountant for such an inspection. However, the employee must bear the accountant’s fee.

• In Austria an employee can challenge a termination under certain conditions. If such an employee wins his case, he is entitled to his full remuneration since the termination date. However, if he already found a new job during his court case, all new earnings have to be taken into account to reduce this remuneration. In a recent decision the Austrian High Court held that, when such a new job also results in higher travel expenses (in comparison to the old job) such expenses have to be taken into consideration for the benefit of the employee (OGH 15.12.2015, 8 ObA 61/15a).

LEGISLATION:

• On January 1st, 2016 a package of changes of Austrian Labour Law entered into force. Among other things, the maximum work time of ten hours can be extended to 12 hours, if an employee is driving a vehicle to a site, which is not the usual workplace (active travelling time). The maximum permissible working hours for apprentices (above the age of 16) is 10 hours.

• For more transparency in the employment contract the monthly gross salary must be declared in accordance with the applicable collective agreement. For employment relationships without collective agreement, the level of base salary should be “customary in the employee’s field of business”. Furthermore, the employee must be notified in writing of any changes of basic salary.

• Part-time employees must be informed about free positions with higher working time in their company. A breach of this obligation may result in the imposition of administrative fines.

• For all employment contracts entered into effect after December 31, 2015 an employer can reclaim training costs, if the other requirements for such a reimbursement are met, only if the employment relationship is terminated within a recovery period of four years after completion of such training (previously five years). Furthermore, these training costs must be recovered in monthly pro rata sums.

• Non-compete clauses now must be limited to a time span of one year and are only valid for employees who earn a minimum salary of € 3.240 gross per month (amount for 2016; special payments are excluded). Penalty clauses for a breach of such a non-compete clause are subject to a cap of 6 monthly salaries.
II. HIRING PRACTICES

In Austria it is undisputed that an employer can collect and process all the necessary work-related information to make a decision regarding the future employment of an applicant. However, the applicant’s privacy also has to be considered. Therefore, under Austrian employment law pre-employment checks must comply with the Austrian Data Protection Act 2000 (Datenschutzgesetz 2000 “DSG”) and other applicable legislation.

EDUCATIONAL CHECKS/EMPLOYMENT HISTORY: Employers are allowed to ask for and verify any information related to applicants’ education and personal qualifications. However, employers are not allowed to ask questions, which could be considered discriminatory according to the Austrian General Law on Equal Treatment (“Gleichbehandlungsgesetz – GfBG”), e.g. asking a female applicant if she plans to get pregnant in the near future. In general, all discriminatory questions regarding sex, race, religion, age or ethnicity fall under this statute. Also not allowed are questions regarding disabilities. The applicant does not have to provide truthful answers regarding such questions and the employer can be obligated to pay penalties for asking such questions or not considering certain employees because of such information.

MEDIA CHECKS: In Austria an employer has the right to collect and process all information, which is publicly available to him. This means he can collect, process and verify information from personal web pages or public profiles from social media sites, but not from profiles to which the access is restricted and which therefore are considered private.

CRIMINAL CHECKS: For most employment positions prior criminal convictions preclude an applicant from being hired. Therefore, it is considered reasonable for employers to ask individuals for details on criminal convictions or to demand a current police record from an applicant. For example, in Austria, a bank would have the right to ask applicants if they have a previous finance-related conviction. However, although the employer has the right to ask such questions, an applicant is not obliged to answer them nor can he be forced to provide a current police record. Consequently, the applicant will most certainly not be hired, but he has no right to contest this decision, which still lies in the discretion of the employer. If an employee has given false information during the application process, the employer may have the right to dismiss the employee prematurely or terminate the employment relationship by giving notice depending on the individual case.

So-called “spent” convictions or convictions with restricted obligation to provide information also have to be considered. Under Austrian criminal law negative effects related to a conviction must lapse after a certain amount of time by erasing this conviction from the police record of a person. The amount of time depends on the seriousness of the offence and amounts to at least three years. An employer is prohibited from questions regarding such “spent” convictions or such convictions with restricted obligation to provide information. If an applicant gives an untruthful answer regarding such convictions he cannot be dismissed prematurely and, if certain criteria are met, he can contest a termination based solely on such grounds.

CASE LAW: In Austria an employment relationship can be terminated in general without providing a reason, only termination date and notice period have to be considered. If certain criteria are met, an employee can contest such a termination. In one instance, a sales representative who lied about a drug conviction was terminated. He challenged his termination. The Austrian High Court held that the termination was justified, because a sales representative has a certain position of trust and also represents his employer. On the basis of this ruling a court would come to the same conclusion in regards to the termination of a bank employee who handles hard cash or has budgetary sovereignty over large amounts of money and has lied about his criminal convictions during his application process.

CREDIT CHECKS: For bank employees, for example, financial checks certainly are justifiable – a bad credit rating could indicate problems with handling money or a proneness to committing financial crimes. However, an applicant still can make false statements regarding his credit standing. It depends on the individual case if the employer has the right to dismiss the employee prematurely or terminate the employment relationship by giving notice if the truth comes out.
III. EMPLOYMENT CONTRACTS

1. Minimum Requirements

The following information has to be provided to an employee either in the employment contract or on a service note (“Dienstzettel”):

- name and address of the employer
- name and address of the employee
- commencement of the employment relationship
- end of the employment relationship (in case of limited duration)
- notice period, termination date
- regular place of work
- classification in a general scheme (CBA)
- description of tasks
- starting salary, due date
- amount of vacation
- regular working hours (amount, allocation)
- applicable collective regulations (e.g. CBA)
- name and address of the employee benefit fund

2. Fixed-term/Open-ended Contracts

Fixed term employment contracts are permissible in Austria. An employment agreement will be considered “fixed term” if the length of the contract is clearly defined in the terms of the agreement, or if the agreement contains an explicit termination date.

Generally, there is no premature termination. If agreed upon, the premature termination must be reasonable with regard to the limitation.

Using fixed term employment contracts restricts the employer’s right to terminate an employee with notice. However, the fixed term nature of the contract does not influence the employer’s right to summarily dismiss the fixed term employee.

Consecutive fixed-term contracts will only be held valid in special social or economic cases, else the linked fixed-term contract will be considered as an indefinite employment contract, and the employee will be afforded all of the associated protections and entitlements of that contract.

3. Trial Period

Both parties to an employment agreement may add a probationary period to the outset of the agreement for a limited period of time. This probationary clause allows either the employer or the employee to terminate the employment agreement at any time during the probationary period without the requirements of notice. This probationary option is not assumed, and must be explicitly included in the employment agreement. Furthermore, this probationary period must be no longer than one month in duration.

4. Notice Period

As an alternative to the stringent requirements of the termination by notice procedure, an employer and employee may agree upon a termination date, and thereby bypass the notice requirements. In this case, the employee is still entitled to his statutory severance payments and may not legally waive those rights.

§ 20 of the Salaried Employees dictates that employers must provide at least a six-week notice period before they terminate an employee’s contract. The notice period increases to two months after the employee’s second year of employment, three months after the fifth year, four months after the fifteenth year, and five months after the twenty-fifth year. Giving notice of termination does not require a concrete cause. Conversely, an employee may file notice and, regardless of the number of years of service, must do so one month before her intended termination date.

The employer must inform the works council at least seven days before providing an employee with notice of termination. After the employer notifies the works council, the council has seven days to deliberate on the termination and provide a response. During this period of deliberation, the works council must decide

\[4\] Widner. See supra note 16.
whether it will explicitly approve the termination, object to the termination, or refrain from any comment. The position that the works council chooses to make has no bearing on the process of the termination proceeding itself. The decision is only relevant to post-termination matters, like a legal contest of termination. However, any termination by notice that takes place without the works council being informed is void.

In addition to the notice requirements, standard termination procedures must also abide by specifically enumerated termination dates. Termination dates are the statutorily or contractually pre-designated days that an employment agreement must terminate. This is independent from the requirement of the notice period, and usually operates to extend employment from the last day of the notice period to the termination date. The Salaried Employers Act mandates that termination dates must fall on the last day of a calendar quarter, but allows for CBAs to modify this requirement to allow termination dates to fall on the fifteenth or last day of each month.

<table>
<thead>
<tr>
<th>years of service</th>
<th>white-collar</th>
<th>blue-collar</th>
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</thead>
<tbody>
<tr>
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<td>6 weeks</td>
<td>up to 4 weeks</td>
</tr>
<tr>
<td>2-5</td>
<td>2 months</td>
<td>up to 4 weeks</td>
</tr>
<tr>
<td>5-15</td>
<td>3 months</td>
<td>up to 4 weeks</td>
</tr>
<tr>
<td>15-25</td>
<td>4 months</td>
<td>up to 4 weeks</td>
</tr>
<tr>
<td>more than 25</td>
<td>5 months</td>
<td>up to 4 weeks</td>
</tr>
</tbody>
</table>
IV. WORKING CONDITIONS

1. Salary

Austria has no nationwide minimum wage, and instead relies on industry-specific guidelines according to each CBA. Employee salaries must be compliant with CBA stipulations regarding industry-wide minimum salaries. The CBA-stipulated minimum salary is an inalienable regulation. An individual employment agreement that stipulates a lower salary than that stated in the relevant CBA is considered void from inception. However, the parties may agree on a higher salary than the minimum salary.

Yearly employment salaries are paid out in fourteen installments. There are twelve standard monthly installments, and then two special payments called “vacation” and “Christmas” payments. The amount of these special payments depends on the terms of the relevant CBA.

In certain circumstances, fringe benefits like stock options may be included in the calculation of an employee’s salary. For the calculation of social insurance contribution and income tax payment, the fringe benefits’ value is added to the employee’s gross salary, and then the contribution and tax payment are calculated as a percentage of that total. The value of fringe benefits may also be considered for the calculation of termination claims such as statutory severance pay and reimbursement for unconsumed vacation time.

2. Maximum Working Week

The Working Hours Act is the primary statute regulating the hours an employee may work. The act provides for a maximum workweek of forty hours, with each workday not to exceed eight hours. However, most collective bargaining agreements impose a shorter maximum workweek of thirty-eight and a half hours. If a daily working period consists of more than six consecutive hours, an employee is entitled to a break of at least thirty minutes.

The Working Time Act added a degree of flexibility to maximum working hours. This act made it possible for works councils and employers to make shop arrangements concerning working hours at a factory-level. The only caveat is that these shop agreements must be expressly allowed by the controlling CBA.

Therefore regular working hours amount to 8 hours/day, which comes to 40 hours/week. Maximum working hours are 10 hours per day and 50 hours per week. However, executive employees are exempt from working time provisions.

3. Overtime

Overtime work is generally permitted in Austria. Blue-collar workers are the most frequent recipients of overtime payments. The overtime payment scheme is usually agreed to on a CBA-by-CBA basis, but where there is no mention of overtime in an employment agreement, the Working Time Act applies. The Working Time Act enacts a 25% wage increase on overtime pay given in consideration for hours worked greater than those agreed to in the employment agreement, but less than the statutory maximum of forty hours per week. Additionally, any overtime worked above the statutory maximum of forty hours per week will incur a 50% wage increase. Finally, overtime performed on Sundays, public holidays, or between midnight and six o’clock in the morning will incur a 100% wage increase.

Statutory overtime payment clauses are alienable, and employees may enter into employment agreements that, for some consideration, waive their right to overtime payment. For example, an employee may agree that a certain number of overtime hours are inherently covered by their regular salary, or the employee may agree on an “all in” agreement. In the former case, such an agreement will be upheld if the agreed-upon salary is sufficiently higher than the minimum salary dictated by the relevant CBA, the duration of the agreement is stipulated for a definite period, and the employee’s average monthly overtime work is equal to or lower than the overtime work agreed upon.

In the case of an “all in” agreement, the employee agrees that all overtime work, regardless of the number of hours, is covered by their regular salary. The courts will generally allow this overtime scheme if the monthly
salary, divided by the actual number of hours worked, produces an hourly wage above the CBA-dictated minimum hourly wage.

Overtime can be accrued 10 hours per week and 320 hour per year at the maximum.

4. Holidays

Vacation time, like working hours, is similarly mandated through a top down approach. The Austrian Vacation Act mandates that employees are entitled to a minimum of twenty-five paid vacation days a year, or thirty days if the employee has been employed for twenty-five years or more. Furthermore, employees are entitled to be paid for public holidays, except when those holidays fall on a Sunday. Full entitlement for these paid vacation days vests with the employees after they have been employed for six months. Before that period, they accrue vacation time on a pro rata basis. Accrued vacation time has a shelf life of two years. After that period of time, the employees are no longer entitled to their accrued paid vacation unless they have an agreement with the employer stating otherwise.

Employees have a claim of at least 5 weeks (25 working days)/work year. There are 13 statutory holidays per year. However, if these statutory holidays fall on a weekend, there are no compensation days.

5. Employer’s Obligation to Provide a Healthy and Safe Workplace

There are many protection standards, especially with respect to legislation on occupational safety and health. This legislation principally applies to all employees in Austria. Its legal basis is provided by the Health and Safety at Work Act, which is valid for a large part of Austrian employees.
V. ANTI-DISCRIMINATION LAWS

1. Brief Description of Anti-Discrimination Laws

In Austrian legal history there have been special provisions for ethnic minorities (especially Croatians and Slovenians) and for handicapped people as well as the Prohibition Act criminalizing national socialist activities.

Presently, there are various antidiscrimination laws on a federal and also on a provincial level. The core of Austrian Antidiscrimination law can be found on a federal level in the Equal Treatment Act ("Gleichbehandlungsgesetz" - GlBG). It applies to discrimination in the field of private employment on the grounds of sex, sexual orientation, ethnic origin, religion and belief, and age. Moreover, it prohibits discrimination with respect to access to goods and services provided by private persons, companies and the federal state on the grounds of ethnic origin. The rights given to persons under this Act can be enforced at court. There is also the possibility free of charges and costs to ask for a – non-binding – decision of the Equal Treatment Commission.

Austria is divided into 9 provinces. All of these have implemented the directives. In all provinces, discrimination on the grounds of sex, sexual orientation, a disability, ethnic origin, religion and belief, and age is prohibited with regard to employment. Discrimination concerning the access to goods and services is prohibited in all provinces on the grounds of ethnic origin. Some provinces include all the grounds mentioned above, others some of them.

To enforce these acts it is necessary to file a complaint with the Federal Social Welfare Authorities. If a dispute cannot be settled within three months an action can be filed at court.

2. Extent of Protection

The Austrian Equal Treatment Act for the private sector forbids the following acts of discrimination:

In employment:

- Unequal treatment of women and men,
- Unequal treatment on the grounds of ethnic belonging, religion or belief, age and sexual orientation,

In the field of goods and services, education, social protection and social advantages:

- Unequal treatment on the grounds of ethnic belonging

This act also requires that employers provide equal pay for equal work, and establishes a commission of ombudsmen to ensure compliance with the principle of equal treatment. The Adjustment of Employment Contracts Act ("Arbeitsvertragsrechts-Anpassungsgesetz") of 2011 extends the protections against discrimination to encompass employees involved in trade union activities. This statute incorporates the public policy goal of insulating employees who exercise their statutorily guaranteed representative rights on works councils from retribution.

Affirmative action promotes equal opportunities for women and men by means of specific measures, e.g. policies aimed at the promotion of gender equality – through laws, statutory regulations, collective agreements, works agreements etc. – do not infringe the equal treatment principle, even if they appear to constitute unequal treatment.

The Equal Treatment Act protects employees against gender-based discrimination, irrespective of whether they are working full time, part time or holding marginal jobs. Apprentices, foreign-national employees or persons completing a trial period in an enterprise also enjoy protection under the Act. Besides, the Act also applies to employment-assimilated persons. Persons with a status assimilated to employment hold the middle ground between dependently employed and self-employed individuals. The Act also applies to home workers and persons posted to Austria by non-
Austrian employers within the framework of labour subcontracting loan work.

The Equal Treatment Act also protects against discrimination in the run-up to employment, entitling persons to claim compensation if they are discriminated against in the course of the application procedure. Persons discriminated against with regard to access to vocational counseling, basic or other advanced vocational training and retraining measures are also entitled to compensation. In the event of discriminatory job advertisements in or outside an enterprise, job applicants can institute administrative penal proceedings by lodging a claim with the competent district authority (municipal authorities).

**The Equal Treatment Act distinguishes between the following forms of discrimination:**

- **Direct discrimination:** a person, on the grounds of one or more of the protected characteristics, is, was, would be treated less favourable than another person in a comparable situation.

- **Indirect discrimination:** a regulation, which seems neutral, specifically discriminates against persons with one or more of the protected characteristics vis-à-vis persons who lack such protected characteristics. This kind of unequal treatment can be justified under the condition that the goal pursued by the employer by means of unequal treatment is legitimate and sufficiently important to have priority over the equal treatment principle. The unequal treatment is commensurate with and necessary for achieving the goal. To justify the discriminatory arrangement, both requirements must be fulfilled. Indirect discrimination must be substantiated with the aid of statistical data or proven by other suitable means, such as employees' surveys.

- **Sexual harassment:** This occurs if sex-related conduct by a person is subjectively undesirable to the person concerned (it being completely irrelevant whether or not another person considers this conduct harassing) and if this conduct has negative effects on the situation at the workplace. The prohibition of sexual harassment is addressed to colleagues and superiors as well as to employers (whether the latter commit harassment themselves or negligently fail to take action against harassment by third persons). Sexual harassment also occurs if committed by third persons, such as customers, in connection with the employment relationship. The employer’s negligent failure to take remedial actions against sexual harassment also constitutes discrimination.

- **Gender-related harassment:** This is a type of harassment through gender-related – for example misogynic – behaviour that is not related to the sexual sphere and is subjectively unpleasant to the person concerned. This may include verbal comments, gestures or the writing, displaying and circulation of texts or images. This conduct must have a grave character and create a disturbing and/or hostile work atmosphere. Gender-related bullying also constitutes a form of gender-related harassment.

- **Instruction to commit acts of discrimination**

- **Protection against victimisation:** persons combating discrimination by bringing an action or serving as witnesses are protected. Therefore summary dismissal, notice of dismissal or other unfavourable treatment of complainants and witnesses by employers are prohibited.

3. **Protections Against Harassment**

Persons who suffered disadvantages due to discrimination or harassment based on the grounds stated above are entitled to claim for compensation at court. In addition to the actual damage a compensation for the humiliation (immaterial compensation) can be asserted.

In proceedings to assert compensation, reversal of evidence does apply, which means that the person concerned only has to show prima facie evidence of a discrimination or harassment, whereas the defendant has to prove that none of the motives stated above was the basis for the discriminative treatment.

4. **Employer’s Obligation to Provide Reasonable Accommodations**

Discrimination on the ground of a disability is prohibited by the Disabled Persons Employment Act ("Behinderteneinstellungsgesetz" - BEinstG) and the Disabled Persons Equal Opportunities Act ("Behindertengleichstellungsgesetz" - BGStG). They are applicable to private and federal employment as well as all contracts and all legal relations governed by federal law.
Further special groups of employees are:

- member of works council
- protected parents
- military/social service
- apprentices

For nearly every group there is a specific act regarding special employees’ rights as well as obligations of the employer, e.g. for apprentices these provisions can be found in the vocational training act ("Berufsausbildungsgesetz").

5. Remedies

Under the Equal Treatment Act, employers cannot be forced to enter into an employment contract with any specific individual.

The individual affected by discrimination can involve the Equal Treatment Commission, but may also take court action to enforce her/his claim for equal treatment.

The Equal Treatment Commission is an institution of the state. In contrast to judicial proceedings, this procedure does not conclude with a (legally enforceable) judgment but with a non-binding expert opinion where the Commission explains and gives reasons for its decision on whether or not discrimination has occurred.

Women and men, who are discriminated against or harassed at work, whether directly or indirectly, are entitled to be compensated for the damage from the employer and/or any other person responsible for such discrimination (e.g. private education facility, colleague, customer). If the court finds that the complainant has been discriminated against because of gender or marital status, she/he may lodge a claim for material compensation and compensation for the personal injury suffered.

If successful, claims of discrimination may entitle the plaintiff-employee to a compensatory financial award. These financial awards are generally fairly small. Therefore, in the interest of justice, courts can, in addition to ordering a financial award, order the employer to withdraw or amend their discriminatory policies.

An individual suffering from discrimination can sue for:

- achievement of a non-discriminatory state (e.g. adjustment of future pay to that received by colleagues doing equivalent work; inclusion in future vocational training measures, modeling the working conditions on those enjoyed by colleagues in a better position);

AND/ OR

- compensation for the financial loss suffered in the past (e.g. compensation for the wage differential for, at most, the past three years, or of the loss suffered in earnings as a result of non-inclusion in vocational training).

AND

- compensation for the personal injury suffered (e.g. personal affront by discrimination)

In general, compensation for a loss suffered due to discrimination does not depend on the individual guilt of the person committing the discrimination. Even employers who are not aware that, e.g., special benefits granted in their enterprise will discriminate indirectly against women are required to amend this unequal treatment and grant compensation for the loss thus suffered.
VI. SOCIAL MEDIA AND DATA PRIVACY

1. Can the employer restrict the employee’s use of Internet and social media during working hours?

An explicit regulation does not exist in Austria. The use of emails or the Internet during working hours for non-work related purposes as well as the control of Internet use by the employee is regulated in the norms of Austria’s Labour Law, Copyright Law and Data Protection Law, respectively. The employer cannot prohibit the use of Internet and social media on private devices, such as smartphones, tablets, or laptops. But he can prohibit the private use of Internet and social media on devices belonging to the company. Unless stated otherwise in an employment contract, a moderate private use of the Internet on a company PC is permitted. The private use of smartphones or tablets during work cannot be prohibited, but there are a few restrictions nonetheless. At any rate, the job performance must not be affected.

A) THE EMPLOYER PERMITS THE INTERNET USE:
The employer can expressly permit the private use of the Internet. The permission can be given in the form of an explanation, a company agreement, a directive or it can be stated in the contract of employment. However, this does not mean that an uninhibited use is allowed. The employee may not neglect his duties towards the employer and job performance must not be affected. If the efficiency of the employee is affected or if the private use results in excessive costs for the company, this will not be covered any more by the permission.

B) RESTRICTIONS:
The employer can limit the use to certain times (e.g. 20 minutes per day) or he can forbid certain Internet activities (e.g. the use of Skype, Facebook and YouTube). However, a private use of the Internet is permissible in spite of a ban if there is strong and justifiable reason to use the Internet – e.g. for arrangements of doctor’s appointments, official matters or in cases where an employee needs to get in contact with his children’s school.

C) THE EMPLOYER IMPOSES A COMPLETE BAN:
The employer can impose a workplace ban on private Internet use and social media. This includes all company-owned property, so not only the company PC but also the company mobile phone or tablet. This can happen in form of a directive to the employee, a practical arrangement in the employment contract, but also in the form of a company agreement. Employees must keep to this ban.

D) CONSEQUENCES PERTAINING TO AUSTRIA’S LABOUR LAW IN CASE OF A DISREGARD OF THE BAN:
Disregarding an explicit ban of utilization can lead to immediate termination of employment. However, the employment can only be terminated if repeated disregards have occurred and the employer has given advance warning. Nevertheless, a dismissal would have to have led the way a repeated disregard of an explicit ban of utilization and therefore an instruction and an occurred reminder, so that the grounds of dismissal of the trust unworthiness or the persistent breach of duty could be given.

Occasional surfing in the Internet does not constitute grounds for dismissal without preliminary warning. With the unregulated private use of “new media” using the Internet during work hours will only be considered as grounds for dismissal if the working hours were used excessively for private purposes or if company-owned electronic devices were used by the employee. Also the general criteria to Labour law of the unreasonableness of the maintenance of the employer-employee relationship are to be applied by the instant dismissal up to the next date for giving notice. Hence, the decision needs to be taken on a case-by-case basis, whereby certain criteria such as duration of use, intransigence and stubbornness of the employer need to be taken into consideration.

2. Employee’s use of social media to disparage the employer or divulge confidential information

A) DIVULGE CONFIDENTIAL INFORMATION:
Due to the employee’s duty of loyalty he is sworn to secrecy. Whoever betrays trade secrets risks his job. The Austrian High Court has ruled in his decision from Nov 27th 2014 (9 ObA 11/14k) that an indiscretion on
Facebook is evaluated as grounds for dismissal. Already a negligent breach of the confidentiality obligation constitutes untrustworthiness. The concrete case was about a former cashier. He had been discontinued because under his aegis as a head cashier 15,000.00 Euros had disappeared. The man had found out that in his neighborhood rumors circulated claiming that he had embezzled the missing money. Hence, he resolved to ask a colleague whether the money had appeared again. He did this, however, with a public posting on Facebook. Thus in the opinion of the court he damaged the commercial interests of the company. The subsequent deletion of the posting changed nothing in the opinion of the court. Therefore, the bank was justified in its decision to have the right to dismiss the employee immediately.

B) DISPARAGE THE EMPLOYER:
The Austrian High Court has ruled in its decision from May 27th 2013 that even a works council member can be dismissed immediately for leaving negative comments on social networks. However, the dismissal requires the approval of the Labour court, as the following case demonstrates:

An employee posted a photo on Facebook, which was taken during a celebration of his long-term service for the company. On this photo, he was surrounded by members of the workers council, the division manager and the managing directors. A Facebook friend and workers council member, a politically conservative person, commented on that photo by saying that the employee was “surrounded by red socks” (= members of the social democratic Union).

After the employee had asked him to remain polite, the works council member started to become insulting and offensive. Both managing directors felt personally attacked and offended by the commentary on Facebook as well as the insults hurled towards them by the employee. The court affirmed the substantial defamation and granted approval of the immediate termination of the workers council member.

C) RESULT:
To summarize, employers need to take caution before posting statements on social networks. Even colleagues who comment affirmatively on insults on Facebook must count on consequences pertaining to Labour law.
Whether or not you are allowed to work in Austria depends on your nationality, the kind of work you would undertake and – for nationals of third parties – also on the kind of residence permit. Nationals of Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Germany, Hungary, Finland, France, Greece, Ireland, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden, Spain, Cyprus, United Kingdom or Switzerland are allowed to work in Austria without any further permit (e.g. work permit) being required. Croatian nationals still need a work permit for gainful employment due to transitional arrangements that run until 2020. If you carry out a job that is not subject to the regulations of the Austrian Act Governing the Employment of Foreign Nationals, you do not need a work permit. Activities which are not subject to the regulations of the Austrian Act Governing the Employment of Foreign Nationals are: activities in the framework of exchange or research programmes of the European Union or activities in academic teaching and research.

1. Austrian Immigration and Foreign Workers Laws

SETTLEMENT AND RESIDENCE ACT OF 2005
The Settlement and Residence Act (NAG) covers issuance, denial and withdrawal of residence titles for aliens residing or wishing to reside on the Federal Territory for more than six months, and the documentation of right of residence under EU law. Stays for up to six months are governed by the provisions of the Aliens Police Act.

ALIENS POLICE ACT 2005
The Alien Police Act (FPG) regulates the issuance of visas for temporary stays of up to six months within Vienna. Since Austria is a party to the Schengen Agreement, foreigners from certain countries can travel to Austria and stay there for a short time without having to apply for a visa. In addition to short-term, Schengen-type visas, FPG covers working visas that may allow a foreigner to reside in Austria for up to six months in order to enable short-term work activities.

The Alien Police Act also establishes the procedures and defines the competent authorities that will administer these visas. The competent authority, which is usually a foreign Austrian embassy or consulate office, may deny an application for a visa on any number of grounds, including; a cognizable threat to the public interest, refusal of entry by another Schengen state, if there is doubt that the applicant will leave Austria after the visa expires, or if it can be assumed that the applicant will seek to wrongfully obtain work during their stay.

ALIENS EMPLOYMENT ACT OF 1975
While the preceding laws regulate the ingress and egress of foreigners into Austria, and those foreigners’ residence within Austria, this act regulates the employment of foreigners within Austria. In order to legally work in Austria, a foreigner must comply with the regulations of this act and obtain an employment permit, a work permit, an exemption certificate, or a Red-White-Red Card. The Red-White-Red Card procedure and policy is depicted in more depth below.

2. Work Permit Policies and Restrictions

An Austrian employer may recruit a foreign national for employment within Austria, but to do so he/she must apply for approval and an employment permit from the regional employment office (AMS – Arbeitsmarktservice).

This employment permit allows the potential foreign employee to work in the specifically designated position for the applying employer for a period no longer than one year. The employment office will deliberate on whether or not to issue the employment based on three criteria:

1. The first criteria will involve an analysis of the current labour market and whether the state of the market will benefit from employing a foreigner.
2. Second, the office will determine whether issues of public policy sway against issuing the employment permit to the foreigner, taking into account the specific circumstances of the employment contract.

3. Finally, the employment office will evaluate the employer and determine whether the employer is compliant with applicable working conditions, minimum wage requirements, and the social security act.

However, the work permit is only given for foreigners who already own a residence permit.

**RED-WHITE-RED CARD SYSTEM**

Austria has recently added a specific avenue to its immigration system to create an easier route into its industry for high-qualified foreign employees. Austria implemented this system, called the Red-White-Red (RWR) Card on July 1, 2011. This system created two different options to gain access to the Austrian labour market, the RWR Card and the RWR Card Plus. The former entitles a foreigner to residence and employment with a specific employer for 12 months. The latter entitles a foreigner to residence and unlimited labour market access.

The RWR Card is available to highly qualified workers, skilled labourers in fields that the Chamber of Commerce has deemed to be in high demand, and graduates of Austrian universities and colleges. The RWR Card is available to skilled workers in shortage professions on nearly the same basis as highly qualified workers. They must also have an offer of employment, and meet the minimum requirements of the applicable point schedule. If any of these workers successfully obtain a RWR Card, they are entitled to bring their spouses, registered partners, and unmarried minor children (under eighteen years of age) along with them into Austria. Interestingly, the family members of highly skilled workers, or other workers who apply for the RWR Card are entitled to a RWR Card plus if the primary applicant is granted a RWR Card. Therefore, family members of the initial applicant will have unlimited labour market access in Austria.

**EUROPEAN UNION BLUE CARD**

Third-country nationals may be granted an EU Blue Card, if they

- have completed a course of study at a university or other tertiary educational institution with a minimum duration of three years,
- have received a binding job offer for at least one year in Austria and the employment corresponds to the applicant’s education,
- will earn a gross annual income of at least one and a half times the average gross annual income of full-time employees (in 2016: at least € 58,434 which is about € 4,174 gross monthly income plus special payments),
- and the labour market test shows that there is no equally qualified worker registered as a jobseeker with the Public Employment Service (AMS) available for the job.

A points system is not used for the EU Blue Card. Applications for an EU Blue Card may either be filed by the applicant in person with the competent Austrian representation (embassy or consulate) in the applicant’s home state or country of residence or, on the other hand, by the potential employer with the competent residence authority in Austria local Provincial Governor’s Office or the duly authorised district administration bodies. An employer’s declaration has to be submitted along with the application. Persons who are entitled to enter Austria without a visa or already have a valid residence title may also file the application themselves with the abovementioned competent residence authority in Austria.
VIII. TERMINATION OF EMPLOYMENT CONTRACTS

1. Grounds for Termination

The majority of Austrian employment agreements are for an indefinite period. This type of employment agreement is created when an employer agrees to employ an employee and does not affix a specific length to the term of the contract. This agreement only ends upon the employee’s retirement or death. However, there are many options available to end an employment agreement:

- either party to the contract provides notice of termination without cause,
- termination of a probationary employment,
- a consensual termination of employment,
- or a summary dismissal for substantial reasons.

**TERMINATION BY NOTICE:**

The Salaried Employees Act § 20 dictates that employers must provide at least a six-week notice period before they terminate an employee’s contract. The notice period increases to two months after the employee’s second year of employment, three months after the fifth year, four months after the fifteenth year, and five months after the twenty-fifth year. Giving notice of termination does not require a specific cause. Conversely, an employee may file notice and, regardless of the number of years of service, must do so one month before her intended termination date.

The employer must inform the works council at least seven days before providing an employee with notice of termination. After the employer notifies the works council, the council has seven days to deliberate on the termination and provide a response. Any termination by notice that takes place without the works council being informed is void.

**TERMINATION OF PROBATIONARY EMPLOYMENT**

Both parties to an employment agreement may add a one-month probationary period to the outset of the agreement. This probationary clause allows either the employer or the employee to terminate the employment contract at any time during the probationary period without the requirement of notice. However, this probationary period must be explicitly included in the employment agreement.

2. Collective Dismissals

“Employers with more than 20 and fewer than 100 employees and intending to make at least 5 employees redundant or between 100 and 600 employees and intending to make at least 5 % of the employees redundant or more than 600 employees redundant or more than 600 employees and intending to make at least 5 employees older than 50 years redundant, within a 30-day term are to notify the local employment offices at least 30 days prior to giving notice to the first employee. The 30-day notice period may be extended by a collective bargaining agreement. Redundancies and consensual termination agreements made without notifying the local employment office and prior to the expiration of the 30-day period are null and void.

3. Individual Dismissals

Immediate termination without notice, or a “summary dismissal”, is another available alternative to the notice procedures for termination. In the case of a summary dismissal the employer unilaterally and immediately terminates the employment agreement for substantial cause. This type of termination is available in situations where the work environment becomes such that it is impossible or inappropriate for employment to continue through the necessary notice period. Examples of substantial cause include, but are not limited to, breaches of a non-compete clause, blatant disobedience or disloyalty to the employer, or serious dereliction of reasonable duties. After the employer recognizes a substantial cause for summary dismissal, they must terminate employment without undue delay. This requirement prevents an employer from preserving the right to summarily dismiss an employee for an extended period of time, which would effectively create an at-will employment scheme.
While the employer must inform the works council of the summary dismissal, the employer is not required to do so before the actual dismissal. Unlike the procedures for standard termination by notice, informing the works council is not a precondition to the dismissal’s validity. The employer must inform the works council within three days following the dismissal, and the works council may then take a stance to either approve or object to the dismissal.

A. IS SEVERANCE PAY REQUIRED?

In case the employer validly terminates the employment, the employee is not entitled to any statutory severance pay.

4. Separation Agreements

A. IS A SEPARATION AGREEMENT REQUIRED OR CONSIDERED BEST PRACTICE?

As an alternative to the stringent requirements of the termination by notice procedure, an employer and employee may agree upon a termination date, and thereby bypass the notice requirements. In this case, the employee is still entitled to their statutory severance payments and may not legally waive those rights.

Any further payments are subject to the negotiations between the parties. If the employee, in the course of the negotiations for a consensual termination, requests to deliberate with the works council, if any, a consensual termination cannot be validly agreed upon within the following two working-days.

B. WHAT ARE THE STANDARD PROVISIONS OF A SEPARATION AGREEMENT?

Between employer and employee’s it is agreed either verbally or in writing that they are entitled to terminate the employment agreement without observing notice periods or termination dates. However, it is recommended that they be made in writing.

C. DOES THE AGE OF THE EMPLOYEE MAKE A DIFFERENCE?

If employees are still underage, a consensual termination is only valid if a legal instruction from the Labour and Social Court or the Austrian Chamber of Labour about the protection against dismissal was given to the employee before.

D. ARE THERE ADDITIONAL PROVISIONS TO CONSIDER?

The consensual termination of the employer-employee relationship with expectant mothers as well as with mothers or fathers in parental leave must occur in writing. Also the resolution with people in military or civil service and education servant has to occur in writing and is only valid, if a legal instruction from the Labour and Social Court or the Austrian Chamber of Labour about the protection against dismissal was given to the employee before. The requirements of written form as well as the legal instruction apply to apprentices as well. In addition, for underage apprentices the approval of both parents (or a legal representative) is necessary.

5. Remedies for employees seeking to challenge wrongful termination

If the employer has appropriately adhered to the notice procedure requirements, then the employee’s options for challenging the notice of termination or for appealing termination are dependent upon the works council’s stance. If the employee has the right to challenge the termination, they must do so in front of the Labour and Social Court. In this court, a challenge will only be successful if the court finds that the termination was either based on unlawful motives or if it is socially unjustifiable.

If the works council agrees to the notice of an employee’s termination, then they effectively bar the employee from contesting on the grounds that the termination was socially unacceptable. In this case, the employee may only contest the notice based on a subjective finding of unlawful motive and has the responsibility of filing the challenge.

For an employer to show that the notice of termination was valid, they may show that reasonable business interests make the employee’s continued employment with the company impossible. If the employer is making broad cutbacks on its workforce, the court will not analyse the underlying financial reasons for making those cutbacks, but will determine whether or not the employer exhausted all reasonable avenues to avoid having to layoff the appealing employee. Furthermore,
an employer may rebut the employee’s claim of social unacceptability by showing that the employee was unable to perform their duties due to physical or psychological deficiencies, or if the employee committed a breach of duty.
IX. RESTRICTIVE COVENANTS

1. Definition of Restrictive Covenants

There are two different kinds of non-competition clauses in Austria:

• the prohibition of competition and
• the non-competition clause.

The term prohibition of competition refers to an employee’s duties towards his employer for the entire duration of the employment. The term non-competition clause governs the post-contractual state.

PROHIBITION OF COMPETITION:

Neither blue-collar nor white-collar workers are allowed to compete with their employer during employment by holding an additional occupation. This general prohibition of competition remains in effect up to the day of a termination of employment. This timeframe also includes the notice period as well as times of paid garden leave taken during the notice period.

The prohibition of competition is governed in specific rules for white-collar workers. Accordingly, without the employer’s consent, salaried employees may neither run an independent commercial business nor enter into transactions on their own account or on the account of third parties in the specific trade of the employer. Nevertheless, it should be noted that the employer could renounce the total or partial observance of the prohibition of competition expressly or tacitly.

2. Types of Restrictive Covenants

A. NON-COMPETE CLAUSES

An employment contract may also contain a non-compete clause, which goes into effect after termination of the contract. The purpose of this post-contractual non-compete clause is to prohibit an employee from working for a competitor of the former employer and hence from competing with him. However, this non-compete clause of the employment contract will only be valid if it meets three statutory requirements:

• First, the employer may not be a minor at the time that they enter the agreement.
• Second, the clause may only limit the employee’s participation in business within the specific field of the trade of the employer for a period not exceeding one year.
• Finally, the non-compete clause may not constitute an unreasonable restriction on further professional advancement of the employee in relation to the employer’s business interests.
• Additionally, the employee must earn a minimum salary of 3,240,00 Euros gross per month (amount for 2016; special payments are excluded).

In case of a legal dispute on the validity of a non-compete clause, a court will compare the interest of the employer in the compliance with the non-compete clause and the interest of the employee to freely pursue their business in order to clarify whether it poses undue hardship on the employee’s career. Usually, the court will order an expert’s opinion on this matter.

Generally, a non-compete clause that extends beyond the period of employment is not valid in the case where the employer unilaterally terminates employment or if the employee terminates the employment agreement due to the employer’s breach of contract. There is an exception to this rule when the employer terminates an employment agreement with immediate effect for cause, or when the employee terminates his or her own employment agreement without cause. The employer does have the option of terminating employment while maintaining the validity of the non-compete clause by continuing to pay the employee’s salary throughout the agreed, one-year, non-competition period.

B. NON-SOLICITATION OF CUSTOMERS

In the employment-agreement, the employer may also include a non-enticement clause—which is a special kind of the competition clause. It concerns an arrangement, after which the employee may not enter into business relationships to any or all customers of the employer after the ending of the employment relationship. Such clauses are most common in the area of independent professions (lawyers, auditors and civil engineers).
C. NON-SOLICITATION OF EMPLOYEES

Apart from these two demonstrated clauses, the employer may also include a non-enticement clause, which prohibits the employee for a certain period of time after ending of the employer-employee relationship from working together with employees of the former company. This does not only refer to active or even accusable poaching of employees, but also to a mere cooperation between an ex-employee and his former colleagues.

3. Enforcement of Restrictive Covenants—process and remedies

PROHIBITION OF COMPETITION:
The breach of the prohibition of competition has different legal results: First, a breach of the prohibition of competition constitutes grounds for dismissal and entitles the employer to immediately terminate the employment. In addition, the employer can also assert compensation claims, demand the assignment of payment claims toward third parties, or require the restitution of all gains made in the business transaction. It is important to note, however, that the employer’s claims laps either within three months from the day he had knowledge of a business transaction; or in any case, five years after the conclusion of a deal.

For working-class employment, comparable grounds for dismissal are given if the worker pursues a side-line business, which is not permitted, beside his commercial activity.

CONTRACTUAL PENALTY:
Employer and employee can also agree upon a contractual penalty for cases of breach of non-competition agreements. If such a contractual penalty has been agreed upon, the employer can no longer insist on the post-contractual non-competition clause, meaning that the former employee is free to compete with the ex-employer after paying a contractual penalty.

It is therefore recommended that the employer does not include a contractual penalty clause in the employment contract. After all, an employer is always less interested in financially penalizing his former employee, than in making sure that knowledge obtained while the employee was still working for the company remains with the company.

There is no need to prove the extent of a damage caused by a breach of non-competition clauses when a contractual penalty is paid. However, those contractual penalties must be subject to judicial mitigation. A judge can determine the level of the penalty on a case-by-case basis. Different factors need to be taken into consideration when deciding on the level of the penalty. The judge can lower the contractual penalty fee if the employer cannot prove that damage was in fact caused by an employee’s actions; when a payment of conventional penalties by the employee is economically unreasonable due to the financial situation of the employee and if an employee has very little fault in the breach of a contract.

On the other hand, an employer can never claim a level of contractual penalty that is higher than the actual damage caused.

Since the 1st of January 2016 the height of a conventional penalty is limited. The agreed conventional penalty may not exceed six net month remunerations excluding special payments.

4. Use and Limitations of Garden Leave

Garden leave is an arrangement which an employer can use to help protect himself against possible mischief by an employee during the notice period when the employee has resigned or been dismissed. The employee must stay away from work during the whole or part of the notice period but continues to be employed and to receive pay and benefits.

While a person is on garden leave he is usually forbidden to contact any of his employer’s customers or fellow employees. Suppliers are sometimes off limits as well. People on garden leave are normally denied access to their employer’s computer system and are often required to return their company car, laptop, smartphone, e.g.

They are, however, expected to be available to provide their employer with information and support as and when it is required. Whilst on garden leave, an employee must observe the implied duty of fidelity in his employment contract as well as any express restrictions in the contract on competing or doing a second job whilst an employee. In practice, he will probably not be allowed to work for himself or anyone else whilst on garden leave.
X. RIGHTS OF EMPLOYEES IN CASE OF A TRANSFER OF UNDERTAKING

The European Council Directive 77/187/EEC is the broadest source of employee protections during transfers of business. This directive was meant to guide “the laws of the Member States relating to safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of businesses”.

Austria adopted the terms of this directive with the Adjustment of Labour Law Act in 1993. This law states that, generally, in the case of a transfer of business all employment contracts that are part of the affected business are automatically transferred to the purchasing party. This transfer of employment contracts includes all unsettled claims of any employees against the previous employer, even if the underlying facts of those claims occurred before the transfer of business.

A transfer of business is defined as the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger. In order to determine whether a transfer of business actually took place, a court will consider a specific set of criteria, not all of which need be met in order for the transaction to legally qualify as a transfer of business. These criteria include:

- the transfer of tangibles,
- transfer of intangibles,
- takeover of principal staff,
- transfer of clientele,
- level of similarity between pre and post transfer business activities,
- and duration of interruption.

1. Employees’ Rights

   • Right to object the Transfer of Employment:

   “As a matter of general principle, Austrian law does not provide for a general right of employees to object to the automatic transfer of their employment agreement in case of a transfer of business. However, an employee may object to a transfer of the employment agreement to the purchasing entity when the new owner does not take over any provisions on protection against termination as set forth in a collective bargaining agreement applicable before the transfer of business or, any pension commitment of the selling entity.

   Furthermore, Austrian Supreme Court case law and scholars take the position that certain groups of employees have a special right to object, for example and subject to further restrictions, members of the works council, apprentices and disabled persons.”

   • Right to Give Notice of Termination:

   “Under subsection 3 (5) AVRAG, employees may give notice of termination in the event of a transfer of business provided the collective bargaining agreement or the shop agreements applicable after the transfer substantially worsens their working conditions. In this case, the termination employee has the same claims as if notice of termination had been given by the employer; that is, entitlement to, inter alia, severance pay as defined by statute.”

   • Termination by the employer:

   Furthermore the Austrian courts, in accordance with the relevant European Council Directive, have held that neither the transferor nor the transferee may use the transfer of business, or the proximate effects of a transfer of business, as grounds for termination.

   When disputing their termination in this context, an employee must show both a temporal and causal connection between their dismissal and the transfer of business. Therefore, the employee must show that they were dismissed “because of the transfer”.

   Their argument will carry more weight the closer that the dismissal occurred to the transfer of business. This restriction on employee dismissal does not materially

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6 Laimer. See supra note 1.
7 Laimer. See supra note 1, page 75.
8 Laimer. See supra note 1, page 75f.
limit the employer from dismissing an employee for acceptable reasons, like an employee’s unacceptable conduct. They simply must be ready to show evidence of that conduct to refute the presumption that they dismissed the employee because of the transfer.

2. Requirements for Predecessor and Successor Parties

• Obligation to Inform and Consult with the Works Council:

Austrian law states that an employer must notify the works council of the planned transfer of business, and of the implications of the transfer on the collective agreements of the employees prior to the transfer. If no works council exists, the employees are to be informed individually before the transfer takes place.

“Although there is no strict time limit for this, the employer is to notify the works council timely so that the members may thoroughly discuss the proposed transfer. Under subsection 92 (2) Labour Constitution Act, the works council is entitled to request a representative of the competent trade union to join the consultations. Thus, the employer is to inform the works council timely enough prior to the transfer taking place to make sure that such representative is available. The extent to which the works council is to be informed is not governed by law. However, the information is to be detailed enough to allow for a thorough consultation with the works council. Under subsection 92 (2) ArbVG, the works council is entitled to request copies of documents as far as this is necessary for the consultation. In the consultation process, the works council may propose measures to prevent any negative consequences for the employees arising out of the transfer. When more than 20 employees belong to the transferred business and the transfer is detrimental to all or substantial part of those employees the employer and the works council may agree on a social plan in order to avoid such detrimental consequences for the respective employees. When the employer and the works council do not agree on a social plan, the works council may address a special conciliation body at the competent labour court. When that occurs, the arbitration body is entitled to draft a social plan after hearing the employer and the works council on that matter.”

However, this is a lex imperfecta, because the law does not apply any legal penalties when the transferring entity fails to comply with the notification requirement. In response to the notification of a transfer of business, the works council may propose specific measures to prevent any negative consequences for the employees. If the transferring entity does not agree with these measures, the works council may submit the proposal to a conciliation board at the labour courts for a final determination.

According to the law, the employee is to be informed in writing on the following issues prior to the transfer:

• the point in time when the transfer is intended to take place,
• the reason for the transfer,
• the legal, economical, and social consequences of the transfer for the affected employees and
• all measures that have been taken with regard to the employee.

Finally, there are specific regulations concerning the application of CBAs in transfer of business proceedings. Generally, if a transferor is party to a CBA, and the transferee is not, then the CBA that applied to employees under the transferor will remain in application after the transfer of business. If both the transferor and the transferee are parties to different CBAs, then generally the transferee’s CBA will apply once the transfer of business takes place. However, a new CBA and employment agreement may not reduce an employee’s remuneration (including special payments) following a transfer of business.

9 Laimer. See supra note 1, page 77f.
XI. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

1. Brief Description of Employees and Employers Organizations

In Austria trade unions have a long tradition and are politically influential. It is a truly commonplace in Austria that this institution is termed ‘social partnership’. Accordingly, the four main interest associations involved, namely the Austrian Trade Union Federation (Österreichischer Gewerkschaftsbund [ÖGB]), the Austrian Federal Economic Chamber (Wirtschaftskammer [WKO]), the Federal Chamber of Labour (Arbeiterkammer – AK) and the Conference of Presidents of the Austrian Chambers of Agriculture (Präsidentenkonferenz der Landwirtschaftskammern Österreichs).

2. Rights and Importance of Trade Unions

Trade unions represent the employees’ political, economic and social interests vis-à-vis employers, the government and the political parties. The tasks of the Austrian Trade Union Federation include for example:

- negotiation of collective agreements
- inter-enterprise co-determination in the context of the economic and social partnership
- implementation of social improvements
- safeguarding social standards
- safeguarding real wages
- legal service for members

The result of the generally well-balanced relations between the major players, that is, the government, employers and trade unions, which are founded on the social partnership between employee and employer representative organizations, is in a distinctively low incidence of industrial disputes in Austria as compared to most other European countries. Accordingly, through collective bargaining rather than open industrial confrontation in the form of strikes, these players have had a decisive influence on the lasting industrial peace in Austria.

Membership in the Chambers of Labour is mandatory for most employees in the private sector and represents some three million employees throughout Austria and co-operate closely with the Austrian Trade Unions. Also the counterpart, the organization for employers, the Federal Economic Chamber’s membership is compulsory.10 Trade union members are also entitled to legal advice and legal representation in court as well as many other benefits.

3. Types of Representation

Employees in Austria have the right of freedom of association and the right to engage in union activity. However, there is no direct trade union representation in the workplace. Instead, employees are represented by the works councils, which are statutorily elected.

10 Laimer. See supra note 1, page 15.
XII. OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

Employees are in principle represented in the firm or plant by works councils. A works council may be established where the size of the business consistently exceeds five employees. The employees of a business elect the works council. While trade unions are generally active above the level of the single business, the works council is active on the level of the business itself (plant-level). The primary role of the works council is to represent the employee’s vis-à-vis the business owner. There may be different works councils for white-collar and blue-collar workers when each of these groups satisfies the prerequisites necessary in order to set up the respective works council.

1. Number of Representatives

The works council has to represent the interests of the workforce towards the owner of the business. If the above-mentioned minimum number of all employees of the business is reached, they can form a works assembly, consisting of all employees of the business. It is to be noted in this context that certain groups, such as members of the management or of the board of a legal entity as well as executives, do not qualify as employees. The number of persons to be elected to the works council increases with the number of employees:

<table>
<thead>
<tr>
<th>Number of Employees</th>
<th>Number of Representatives</th>
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<tbody>
<tr>
<td>5 to 9 employees</td>
<td>1</td>
</tr>
<tr>
<td>10 to 19 employees</td>
<td>2</td>
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<tr>
<td>20 to 50 employees</td>
<td>3</td>
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<tr>
<td>51 to 100 employees</td>
<td>4</td>
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<tr>
<td>101 to 999 employees</td>
<td>(per every 100 employees) +1</td>
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<td>&gt; 1001 employees</td>
<td>(per every 400 employees) + 1</td>
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</table>

2. Appointment of Representatives

The works council is established for a term of 4 years and is elected by way of a secret vote. With regard to the passive suffrage, employees may be elected as members to the works council if they are 18 years of age and already employed in the company for at least 6 months. The employer is generally not allowed in any way to constrain or discriminate against the actions of the employees involved in representation of the workforce. Additionally, their dismissal is possible only after obtaining the prior consent of the appropriate labour and social court.

3. Tasks and Obligations of Representatives

The works council is entitled to supervise compliance with the laws relating to employees within the business. For this purpose, the works council may inspect the records kept in the business on the remunerations of employees and the calculations thereof, as well as all documents concerning employees. Once every quarter year, or once a month if the works council so requests, the owner shall deliberate with the works council, informing it on important matters of the business. In larger businesses, the owner has to submit to the works council a copy of the financial statements once a year. The works council can request the owner to remove irregularities and carry out the necessary measures. There are many ways of participation in different types of matters:

- Participation in social matters:

The works council may participate in the management of in-house trainings, educational facilities and welfare facilities. Form and scope of these participation rights may be agreed upon in a shop agreement.

Laimer. See supra note 1, page 35.
• Participation in personnel matters:

In personnel matters the works council has a voice, for example, in connection with the recruitment of new staff, determination of remuneration in a particular case, relocations, disciplinary measures, allocation of company-owned residence and promotion.

• Other fields of participation:

Probably the most important field in which the employer is to work together with the works council is the termination of the employment. Basically, the employer is to notify the works council, if any, prior to giving notice to an employee. Within one week of the receipt of the notice, the works council is to provide its position on the proposed termination of employment. Depending on the respective reaction of the works council, the employee does have different opportunities to challenge the termination. Any redundancy made without notifying the works council, or still within the one-week notice period, when the works council has not provided a respective statement, is null and void.

Shop agreements are agreements entered into between the works council and the owner; they are to be in writing and may regulate matters, which either the law or collective bargaining agreements specifically reserve to shop agreements.

The owner is to oblige to notify the works council of a proposed alteration within the company timely enough for the works council to deliberate on the alteration. Included alterations are: limitation of operation, shutdown or relocation of the company, mass redundancies, merger with other companies or change of the business purpose or organisation.

Generally, disciplinary measures are aimed at maintaining or restoring order in the workplace. Some of these disciplinary measures may only be implemented with the explicit consent of the works council by way of a shop agreement.12

4. Representation in Management

Rather strict limits are imposed on the works council’s participation in economic matters; under certain circumstances, the works council may take one third of the seats in the supervisory boards of stock corporations. In companies with limited liability with more than 300 employees, a supervisory board is mandatory, thus allowing participation of the members of the works council.

In undertakings consisting of several businesses, the members of the works councils established in these businesses form the works council assembly, which is to elect the central works council from among its members by way of a secret ballot. The central works council represents the interests of the staff of the whole undertaking vis-à-vis the management. In groups of companies, that is where legally independent undertakings are merged to form a group under uniform economic management, a group representative body may be set up to safeguard the common interests of employees working in this group. For this purpose, works councils must exist in more than one undertaking. The group representative body is set up on resolutions adopted by the central works councils of the individual undertakings.

12 Laimer. See supra note 1, page 39f.
XIII. SOCIAL SECURITY / HEALTHCARE / OTHER REQUIRED BENEFITS

1. Legal Framework

Austria pursues comprehensive social policies based on a wide range and dense network of duly coordinated social benefits and services. Social insurance is based on the principles of mandatory insurance, solidarity and autonomy. It is primarily financed by employers’ and employees’ contributions under the pay-as-you-go system. Therefore, pensions paid out within a year are financed by the contributions of the same year. This system is also called intergenerational agreement. The working generation and the means provided by that generation covers the pensions of the current retirees by paying contributions and taxes from which the Austrian state subsidies are funded in order to keep federal social insurance properly financed.13

Social insurance in the stricter sense is composed of three schemes:

- pension insurance
- health insurance
- work accident insurance.

A total of 22 social insurance institutions provide health, pensions and work accident insurance cover. They are organized by the “Main Association of Austrian Social Insurance Institutions” (Hauptverband der österreichischen Sozialversicherungsträger). This umbrella organisation is responsible for safeguarding general social security interests and for representing the social security institutions in matters of common concern (e.g. concluding contracts with doctors, hospitals, etc.). The social insurance institutions are organized according to fields of activities, occupational groups and/or regions. The most important institutions are the pension insurance institution (Pensionsversicherungsanstalt – PVA); the nine regional health insurance funds (Gebietskrankenkassen – GKK); the general work accident insurance institution (Allgemeine Unfallversicherungsanstalt – AUVA) and several work-specific insurance institutions.14

The statutory insurance system is regulated by the following federal laws:

- Allgemeines Sozialversicherungsgesetz (ASVG: General social security law) – for employees, apprentices, freelancers who are treated as employees for insurance purposes
- Beamten-, Kranken- und Unfallversicherungsgesetz (B-KUVG: Health and accident insurance law for civil servants/public sector workers) – for persons in posts subject to Austrian public law or who are in receipt of benefit as a result of retirement from such an occupation
- Gewerbliches Sozialversicherungsgesetz (GSVG: Law on statutory insurance for persons working in commerce and industry) – for independent entrepreneurs.
- Bundesgesetz über die Sozialversicherung freiberuflich selbstständig Erwerbstätiger (FSVG: Federal law on the statutory insurance of self-employed professionals) – physicians, pharmacists and patent attorneys
- Bauern-Sozialversicherungsgesetz (BSVG: Law on the statutory insurance of farmers) – for self-employed persons working in agriculture and forestry.

2. Required Contributions

Benefits provided by The Austrian State social security system are primarily financed by contributions of the insured persons. All contributions are calculated on the basis of the total remuneration earned by the insured person, capped at EUR 4,860 gross per month (EUR 9,720 gross per year for special remuneration) only. Various risks (age, health status, number of dependents etc.) are not taken into account for the purpose of calculating statutory insurance contributions.15

Both employees and employers contribute to the financing of the social security system. White- and blue-collar worker have different rates of contribution:

13 Laimer. See supra note 1, page 103.
15 Laimer. See supra note 1, page 104.
### White-Collar-Worker

<table>
<thead>
<tr>
<th></th>
<th>Employee</th>
<th>Employer</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Health</td>
<td>3.87 %</td>
<td>3.78 %</td>
<td>7.65 %</td>
</tr>
<tr>
<td>Pensions</td>
<td>10.25 %</td>
<td>12.55 %</td>
<td>22.80 %</td>
</tr>
<tr>
<td>Accidents at work</td>
<td>None</td>
<td>1.30 %</td>
<td>1.3 %</td>
</tr>
<tr>
<td>Unemployment</td>
<td>3 %</td>
<td>3 %</td>
<td>6 %</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>17.12 %</strong></td>
<td><strong>20.63 %</strong></td>
<td><strong>37.75 %</strong></td>
</tr>
</tbody>
</table>

### Blue-Collar-Worker

<table>
<thead>
<tr>
<th></th>
<th>Employee</th>
<th>Employer</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
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<td><strong>Total</strong></td>
<td><strong>17.12 %</strong></td>
<td><strong>20.63 %</strong></td>
<td><strong>37.75 %</strong></td>
</tr>
</tbody>
</table>

In addition to these contributions, both white- and blue-collar employees pay a Chambers of Labour contribution at a rate of 0.5 %. Employer are additionally charged under the Insolvency Compensation Act at the same rate of 0.5 %. Those on very low incomes are exempt from the obligation to contribute towards health and pension insurance (low-income threshold for 2016: EUR 415.72 gross per month or EUR 31.92 gross per day.

3. **Insurances**

Austrian social security system covers the following: Prevention, sickness, incapacity for work/invalidity, maternity, unemployment, old age, death of a person liable to provide maintenance, survivors’ pensions, nursing care and social need. It is evident that the structure of social protection systems in Austria has a wide range to cover all these issues, such as: 16

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16 Federal Ministry of Social Affairs; March 2014.
<table>
<thead>
<tr>
<th>Social insurance</th>
<th>Social pension, health and work accident insurance</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Unemployment insurance</strong></td>
<td>Primarily covers unemployment benefits, unemployment assistance and active labour market politics</td>
</tr>
<tr>
<td>(under the responsibility of the public employment service)</td>
<td></td>
</tr>
<tr>
<td><strong>Universal schemes</strong></td>
<td>Primarily include minimum income levels under the pension insurance scheme (equalisation supplements), unemployment assistance under unemployment insurances</td>
</tr>
<tr>
<td>(benefits granted to the entire resident population irrespective of current and former income and activity status)</td>
<td></td>
</tr>
<tr>
<td><strong>Unemployment schemes</strong></td>
<td>Special pensions law</td>
</tr>
<tr>
<td><strong>Social compensation systems</strong></td>
<td>Primarily for victims of war, military service, crime and vaccination-induced disabilities</td>
</tr>
<tr>
<td><strong>Protection under labour law</strong></td>
<td>e.g. continued payment of wages in case of illness</td>
</tr>
<tr>
<td><strong>Occupational pension schemes</strong></td>
<td>e.g. defined pension funds and direct defined benefit programmes</td>
</tr>
<tr>
<td><strong>Social services</strong></td>
<td>e.g. homes for seniors and nursing homes, extramural services, counseling services for individuals (in case of violence, substance abuse, homelessness)</td>
</tr>
</tbody>
</table>

4. **Required Maternity/Sickness/Disability/Annual Leaves**

**Maternity allowance** is an income replacement benefit paid by social health insurance to employed mothers for the period of maternity protection of eight weeks (in special cases like multiple birth twelve weeks) before and after birth, as defined by labour law. No minimum insurance period is required. The amount of maternity allowance paid to employed women is based on the net income earned in the last three months plus supplements for special bonus payments. In case of special circumstances and/or medical indications these periods may be extended.

99% of the population is covered by statutory health insurance schemes. In case of temporary incapacity to work, employees are entitled to sickness benefits, which follow on the continued payment of wages, by the employer (employers are obliged to continue paying wages for six to twelve weeks). “After the expiry of this period, the length of which depends on the employee’s seniority with the business, the employee is entitled to 50% of the salary for an additional period of four weeks. In addition, the State Health Insurance grants a so-called sickness benefit, which amounts to 50% of the gross salary of the respective employee, 60% from the 43rd day of illness. It is provided for a maximum period of 52 to 78 weeks, depending on the statutes of the relevant Regional Health Insurance Fund. However, as long as the employee is continuously paid the full salary as paid sick leave by the employer, no sickness benefit is paid. Additionally, during the employee’s entitlement to continued payment of 50% of the salary, that is, the four-week period following the expiry of the initial period during which the employee is entitled to the full salary equivalent, only half of the sickness benefit is provided.”

After accidents at work, accidents on the way to work and occupational diseases, the workers in question are

17 Laimer. See supra note 1, page 107.
entitled to disability pensions under the work accident insurance scheme, if the assessed degree of incapacity for work is at least 20% and persists for more than three months. A disability pension may be claimed in addition to another pension (e.g. invalidity pension) or in addition to income from gainful employment.

Austria has minimum periods of annual leave defined by the Annual Leave Act (Urhlagesetz – UrlG). All employees are entitled to five weeks (25 working days for those working five days a week or 30 working days for those working six days a week) of paid leave per working year. Employees performing heavy night work are entitled to additional holidays of up to six working days per year depending on job tenure. In order to protect workers, such leave must be taken during an ongoing employment relationship and employers may not pay financial compensation in lieu of leave.

5. Mandatory and Typically Provided Pensions

A. STATUTORY PENSION SCHEME

The major (mandatory) system for the provision of retirement income is the statutory pension scheme, which covers all former employment participants, with the exception of civil servants. The statutory pension insurance scheme includes old-age pensions, invalidity and survivors’ pensions. The statutory pension insurance is primarily financed under the pay-as-you-go system (as already described above).

The statutory retirement age is currently 60 years for women and 65 years for men. The age at which women are eligible for retiring on an old-age pension will be gradually raised between 2024 and 2033 to approach that of men. There are a few exceptions to the statutory retirement age, such as:

- Corridor Pension (Korridorpension): Retirement at the age of 62 with actuarial deductions of 5.1% for each year of retirement prior the statutory retirement age.
- Pensions granted to workers in demanding jobs (Schwerarbeiterpension): This scheme requires an insurance record of 45 years and at least 10 years spent in physically and psychologically demanding jobs within the last 20 years before retirement. This pension scheme allows men and women to retire at the age of 60 subject to actuarial deductions of 1.8% for each year of retirement prior to the statutory retirement age.
- Early retirement on grounds of long insurance record: With early retirement on grounds of long insurance periods being phased out, the statutory retirement age will rise continuously to 65 years for all men and 60 years for all women between 2004 and 2017. The statutory retirement age under this expiring scheme is staggered by years of birth.

B. OCCUPATIONAL RETIREMENT SCHEMES

In Austria, many employers have implemented a pension scheme granting old-age pensions, invalidity pensions and survivor’s pensions to their key employees. The second form of an occupational retirement scheme in place in Austria is the new statutory severance payment scheme under the Austrian Corporate Employee and Self-Employed Retirement Act (BMSVG).

Until recently, it was mainly the employer being directly obligated to provide for the payments resulting from these schemes. Accordingly, the employer paid, for example, the old-age pensions to the employee of their survivors once they had retired after having reached a certain age and or in the event that they were either incapacitated or deceased.

“Today the so-called pension fund agreements (Pensionskassenvereinbarung) have become the widespread method of providing additional pension benefits for employees. An individual employee’s claim may thus be established in various different ways:

- the employer may be under a direct obligation to pay a pension to personnel once they have reached a certain age or they or their survivors have become incapacitated,
- the employer may enter into life insurance policies for the benefit of the personnel or their surviving dependants and undertake to make premium payments for the insurance policy or
- the employer may pay contributions into a pension fund for the benefit of the personnel or their surviving dependants.”

19 Laimer. See supra note 1, page 111f.
In Austria, there are two different systems. For the first one, the employer’s (annual) contribution to the pension fund scheme is fixed. Accordingly, the final amount of pension payments largely depends on the success of the investments the fund undertakes. These kinds of pension fund schemes are often referred to as “defined contribution schemes”. Contrary to that, the employer remains directly obligated to pay the pension (final salary schemes) in the second scheme. Accordingly, these schemes may appropriately be referred to as “defined benefit schemes”.

The Company Pensions Act (Betriebspensionsgesetz – BPG) governs labour and social law issues in relation to the different schemes as set out above, such as, defined benefit schemes; life insurance contracts and defined contributions schemes. The respective organizational conditions for the pension funds are dealt with by the Pension Fund Act (Pensionskassengesetz – PKG) while tax issues are governed by the Austrian Income Tax Act.
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