

1. INTRODUCTION

In Austria, the employment relationship is embedded in a network of provisions: legislation, regulations, wage agreement (*Kollektivverträge*), company agreements (*Betriebsvereinbarungen*) and, of course, the individual employment contract. As Austria has reached a considerably high level regarding protection of employees' rights, the free contracting of employment is rather restricted as the employees' minimum standards, e.g. payment, dismissal protection, maximum working time as well as benefits are regulated by law.

2. THE DIFFERENT TYPES OF EMPLOYMENT CONTRACTS AND THEIR TERMINATION

2.1 EMPLOYMENT FOR AN INDEFINITE PERIOD OF TIME

An employment contract concluded for an indefinite period of time – besides termination by mutual consent - may be terminated by termination with notice on the one hand or dismissal/resignation with immediate effect on the other.

A dismissal with immediate effect by the employer or an immediate resignation by the employee has to be justified by important reasons (e.g. the employee's incapability to carry out his duties or gross breach of the respective employer's or employee's duties).

The termination with notice does not require a specific reason, but compliance with certain periods and dates is necessary. Both employee and the works council (if established in the company) can challenge an termination with notice of the employment contract in the labour court on the grounds that, amongst others, the termination was socially not justified. Still the court will also consider the employer's interests in this regard.

Generally, in enterprises where a works council is established, termination is void if the works council was not informed by the employer more than five business days before giving notice of the termination to the employee.

If a larger number of employees is given due notice, termination may be void unless the public employment agencies have been informed in advance under the so called early warning system (*Frühwarnsystem*).

At the beginning of an employer–employee–relationship, a probationary period can be agreed upon, which usually must not exceed one month. During this period both employer and/or employee may dissolve the employer-employee-relationship at any time and without specifying reasons. Such a period is generally allowed only at the beginning of an employment contract and may not be repeated.

Since 1 January 2003 a new model of severance payment (*Abfertigung NEU*) is in force.

According to the new rules, the employee is entitled to a severance payment in the case of termination with notice by the employer, termination by mutual consent, unjustified dismissal by the employer or justified immediate resignation by the employee.

2.2 FIXED-TERM EMPLOYMENT RELATIONSHIPS

A fixed-term employment relationship expires usually at the end of the fixed term without further termination. However, it is possible for the employer and employee to agree that the employment contract must be terminated by termination with notice prior to the end of the fixed term. Before the end of the fixed term of the contract the employment relationship can only be terminated validly by mutual consent or by justified dismissal/resignation.

Regarding the successive conclusion of two or more fixed-term employment contracts Austrian labour law is very strict. The so called chain employment relationships (*Kettendienstverträge*) are void if specific economic or social reasons for the conclusion of more than one fixed-term contract between the same employer and employee do not exist. If a court decides that a fixed term employment contract is not valid for lack of such reasons, the employment relationship is deemed to be concluded for an indefinite period of time. Such an employment contract may be terminated by termination with notice in compliance with the relevant periods and dates foreseen by law.

It is, however, possible to conclude further fixed-term employment contracts with a foreigner who is required to have a work permit for Austria, as a work permit is also issued for a fixed-term only.

2.3 FREELANCERS

Every activity or project arising from an employee-employer relationship can also be subject of freelance work. Whether an employment relationship is juridically classified as an employment contract or rather as freelance work can only be judged in each individual case according to the actual working conditions of that employment relationship.

The following features indicate, amongst others, that an employment relationship is regarded as a freelance work relationship:

- No obligation for an ongoing relationship between the parties;
- the freelancer does not receive any binding instructions or directives by the “employer”;
- the methods of work can be regulated independently and can be changed at any time;
- resources for carrying out the project are provided by the employee and
- remuneration is rather based on performance or delivery of a work product than according to the period of time spent on work.

It is to be noted that freelancers have reduced protection under labour law. In the absence of a specific agreement between an employer and an independent contractor the regulations of [the Employees Act / employment law] , the Vacation Act, the Working-Hours Act (in particular concerning added payment for overtime hours), required break time and rights to continued payment do not apply. Furthermore, freelancers are not protected by regulations on wage agreements.

2.4 MINOR EMPLOYMENT

Employees in limited part-time employment (*geringfügig Beschäftigte*) are considered those employees whose monthly income does not exceed the amount of EUR 357.74 (as of 2009). With the exception of the regulation in the Employee's Act (*Angestelltengesetz*) about giving notice of termination of the contract, the same regulations as are applicable to all other employees are applicable to minor employment relationships as well (annual leave, severance payment, continuation of payment in case of sickness).

3. SOCIAL CONTRIBUTIONS AND THE DIFFERENT KINDS OF BENEFITS IN AUSTRIA

3.1 PRESENTATION OF THE AUSTRIAN SOCIAL SECURITY SYSTEM

Austria provides a comprehensive system of social security and welfare schemes. The network operates at two levels. Firstly the principle of insurance prevails, which provides cover for all gainfully employed persons, and to a large extent for their dependants in case of sickness, accident, unemployment, parental leave, and pensions. Secondly there are public welfare benefits made available by the federal, provincial and municipal authorities to citizens in need, who are not covered by the insurance system.

Social security contributions are partly withheld from the employee's remuneration and partly paid by the employer in addition to the gross remuneration. Currently, the employee's contributions amount to 18.2 % of gross salaries. In addition, the employer makes contributions amounting to 21.7% on current salaries and 1.53% as contribution for the severance payment. The total of the social security contributions amounts to 39.9% on current salaries. However, there is a maximum for all those contributions that is amounting from EUR 13,404.00 up to EUR 22,335.00 depending on the specific employment relationship.

3.2 OLD-AGE PENSION

In Austria, the retirement age is 65 for men and 60 for women. Until 2033 the retirement age for women will be gradually raised to 65 years as well. Upon retirement, employees are entitled to receive severance payments. Those who have contributed to the social security system for at least 15 years receive a social security pension.

Companies are free to establish pension plans granting the employees additional income after retirement. However, the provisions of pension plans must be in accordance with the Company Pension Act.

3.3 THE UNEMPLOYMENT BENEFITS SYSTEM

In Austria, unemployment insurance is part of the compulsory social security scheme. The most important cash benefits with regard to unemployment are the unemployment benefits and unemployment assistance from the employment insurance as well as wage compensation from

bankruptcies, contingency funds and, to a lesser degree social assistance for those without entitlement to cash benefits from the unemployment insurance scheme.

Unemployment benefit is only available for a limited duration and is followed by the unemployment assistance which is – under certain conditions – available for an indefinite period of time.

Entitlement to unemployment benefits is only possible when a minimum insurance period has been reached:

- For the initial right to receive unemployment benefits at least 52 insurance weeks are required within a period of 24 months;
- for younger persons (under 25 years), employment of at least 26 weeks in a period of 12 months is sufficient;
- persons, who have already received benefits from the unemployment insurance, must have been insured under employment insurance for a minimum of 28 weeks in the past 12 months or for 52 weeks in the past 24 months in order to again obtain a right to unemployment benefit.

The duration of entitlement to unemployment benefits depends on the insurance periods and on the age of the unemployed person and is between 20 and 78 weeks.

As the unemployment benefit is an insurance benefit, its level depends on the former income from gainful employment. The basis is 55% of the average net income of the last calendar year before the occurrence of unemployment. If family benefits are received, a ceiling of 80% of the average net income is applicable.

4. FOREIGNERS WORKING IN AUSTRIA – TRANSFERS OF UNDERTAKINGS

4.1 FOREIGNERS WORKING IN AUSTRIA

Employment of Non-EEA Nationals

The employment of a Non-EEA National in Austria requires an employment permit (*Beschäftigungsbewilligung*), to be obtained by the employer prior to commencement of employment. An employment permit entitles the holder to employ a Non-EEA-National at a clearly defined workplace in Austria for a period of one year. It may be renewed once for another year.

Labour permits (*Arbeitserlaubnis*) may be applied for by persons who have been legally employed in Austria for at least 52 weeks within the last 14 months. Labour permits are non-transferable permits and are issued for a specific federal state, allowing holders to choose their employer and type of employment. Such permits are valid for a period of two years and may be extended under certain conditions.

A certificate of exemption (*Befreiungsschein*) can be issued to employees who have, as a general rule, spent at least five of the last eight years in employment relationships in Austria or to certain juvenile or employees who are married to an Austrian citizen. Since January 1, 2003, it is

possible to obtain a certain exemption for highly qualified workers (*Schlüsselarbeitskräfte*), if there is a lack of such persons in Austria.

Under certain conditions a residence permit (*Niederlassungsbewilligung*) may be required. A residence certificate (*Niederlassungsnachweis*), i.e. a residence permit of unlimited duration, enables the holder to work in Austria without the need of a further labour permit.

Employment of EU/EEA Nationals

For nationals of EEA member states and of Switzerland, the rules of free movement of workers apply substantially in the same way as for nationals of the Member States of the EU. This means that the restrictions mentioned above (section 7) do not apply to EEA citizens. However, for nationals of eight EU Member States that joined the European Union on 1 May 2004 (Estonia, Latvia, Lithuania, Poland, Slovakia, Slovenia, The Czech Republic and Hungary) the freedom of movement of workers under EU law will not yet apply in Austria until 1 May 2011. For the latest members, Romania and Bulgaria, that restriction ends presumably on 1 January 2014. Although these countries have become full members to the European Union, bilateral agreements restrict freedom of movement for a maximum period of seven years.

However, if these countries' nationals have been legally employed in Austria for the last 12 months or legally domiciled in Austria with a regular legal income for at least 5 years, they may apply for a free movement certificate (*Freizügigkeitsbestätigung*). The certificate of freedom of movement is valid for an unlimited period of time. It becomes invalid once a person moves their main residence to another country. Certificates of freedom of movement are issued by the relevant regional labour market service.

Cross-border posting of Employees

According to section 7b Par (1) No. 1 of the Contractual Labour Law-Adjustment Act (*Arbeitsvertragsrechtsanpassungsgesetz - AVRAG*), an employee who is sent to Austria from abroad is - regardless of the applicable law - entitled to receive at least the same remuneration to an employee of comparable status in his home country if such remuneration is provided by law, government regulation or wage agreement in that state.

Taxation of Employment Income

Employment income for services performed in Austria, is subject to the Austrian income tax (*Einkommensteuer*) at a progressive rate of up to 50%. Income tax is withheld by the employer under a pay-as-you-earn system (*Lohnsteuer*). It should be noted that under the pay-as-you-earn system approximately 1/7 of the annual income is taxed at only 6% provided that this portion is paid on top of the current remuneration. This is the main reason why wages and salaries are paid 14 times per year in Austria.

The employer has to pay the following payroll taxes on top of gross remuneration:

- 4.5% contribution to the Family Allowance Fund,
- 0.36% to 0.44% contribution to the Austrian Economic Chamber,
- 3% community tax,
- 1.53% contribution to the severance payment fund.

4.2 TRANSFER OF UNDERTAKINGS

If a business or parts of it are transferred to another owner, the employment relations are automatically transferred to the new owner, who is regarded as the new employer with all relevant rights and obligations. If the position of the employee, however, deteriorates because of the transfer of the business, the employee is entitled to terminate the employment and has the same right to claim as in the case of termination with notice by the employer.

Even after the transfer, the former employer remains jointly and severally liable with the new employer for claims of employees arising from the time before the takeover.

The liability of the former employer for severance payments and company pension is restricted to five years after the takeover. Termination of the employment contract by the former or new employer in connection with the transfer of the business is void.

Author

Veronika Mochar

Petsch Frosch Klein Arturo
Vienna, Austria

E-mail veronika.mochar@pfka.eu
Tel. +43 1 586 21 80

To contact PLG

Julienne Laveaux
PLG Secretariat
PANNONE LAW GROUP E.E.I.G.
avenue de Sumatra 41
1180 Brussels
Belgium

Tel. +32 2 374 88 46
Fax: +32 2 374 90 61
E-mail plg@plg.be
www.plg.eu.com

Disclaimer

The contents of this article are intended to provide guidance only and should not be taken to constitute legal advice on specific problems. PLG cannot accept responsibility for this information or matters affected by subsequent changes in the law.

Readers are requested to direct their enquiries to the author(s) of the article.

© 2010 Pannone Law Group