

“COVID-19 and Austrian Labour Law”

by Univ.-Prof. Dr. Michaela Windisch-Graetz, University of Vienna

First measures

The first COVID-19 act was issued on March 15th, 2020. It set the initial course for the following periods. To establish a COVID-19 crisis management fund, the COVID-19 Fund Act was enacted. It provided the Austrian ministries with the financial means to take the necessary measures. The fund's resources were to be used to support healthcare, stimulate the labour market, stabilize the liquidity of the enterprises etc.

At the beginning of the pandemic, no special regulations regarding the controversial home office situation were provided. In the meantime, the legislator has reacted and created a framework for home office agreements.

Risk of payment

The employment contract is a so-called synallagmatic contract. Therefore, remuneration and work performance are mutually dependent. However, Austrian labour law often deviates from this principle: For example, if an impediment on the employer's side occurs. If the employer cannot accept or cannot make use of the work performance of the employees, although the employees are ready to perform, they shall be entitled to remuneration (§ 1155 ABGB).

However, circumstances that affect the general public cannot be attributed to the individual employer. Following this traditional differentiation, absences from work resulting from general measures such as bans or on entering businesses due to COVID-19 do not fall within the employer's sphere of risk under § 1155.

Austrian employee representatives argued the opposite. Ultimately, the legislature amended §1155 and added subsection 3. Now provisional restrictions on entering establishments shall be deemed to be circumstances on the side of the employer. However, the legislature has also made employees partially responsible. Employees who do not work due to COVID measures were obliged to consume vacation credits. This whole provision expired on December 31st, 2020, and nowadays only the general provision of § 1155 remains.

Short-time work

In Austria, the model of short-time work has been an approved tool to preserve jobs in times of crisis, such as the economic crisis of 2009. Short-time work is permitted in the event of temporary nonseasonal economic difficulties for companies to preserve jobs and company liquidity. It consists of a temporary reduction in working hours, while the employees' loss in wages is partially, or wholly, compensated by the employer. In return, the employers receive short-term subsidies from the unemployment insurance fund (AMS).

The first and second COVID-19 acts passed on March 15 and 20, created a specific model of COVID-19 short time blocks. According to its new § 37b Abs 7 Employment Service Act (AMSG-Arbeitsmarktservicegesetz), economic difficulties due to COVID-19 are explicitly considered as temporary, non-seasonal economic difficulties.

In addition to the statutory regulation, another key legal basis is a social partner agreement on short-time work. The agreement between the employers and employees' interest groups must contain certain provisions concerning the amount of compensation, specific conditions, and maintenance of the workforce.

In the initial phase during the first lockdown in March 2020, the reduction of working hours had to be between 10% and 90% of the normal working hours. It was initially meant for only three months. Employers are obliged to grant their employees 80 up to 90% of their previous net pay. The amount of short-time work support depends on the gross income of the employees. As of July 2022, short-time work should be avoided, therefore it is only possible in very specific exceptional cases.

Home Office

Pre-pandemic, there were no specific provisions for home office in Austrian labour law. Despite the lockdown, employees were allowed to work on-site, but politicians made strong recommendations for working from home.

Many controversial legal questions arose regarding the obligation and compensation of the employees: In the beginning, it was discussed whether the employer could unilaterally order the employees to work from home due to their duty of loyalty. In general, the employer and employee have to agree on the place of work, therefore even during a pandemic, home office must be mutually agreed upon.

Some work contracts include clauses which allowed the employer to transfer the employee to another workplace. It was debated if such clauses were applicable, however generally formulated transfer clauses are not enough to oblige the employee to work from home. While concluding an employment contract, the employee does not have to assume that they must work from home but will be provided with a space to work at.

In March 2021, a “home office package” of new regulations clarified that home office must be agreed upon, and the contract must be in writing. Therefore, the employer cannot send the employees home unilaterally.

The new rules cover only work in the employee's home, consequently, Austrian laws do not include working at other locations, such as coffeehouses or co-working spaces. Additionally, the legislature created in new specific competence for works agreement: The employee and the Works Council can agree upon framework conditions for working from home and its reimbursement.

Expense substitution

In principle, an employee who uses their own equipment for work can claim compensation under § 1014 ABGB. The general rule can be limited by agreement. During the pandemic, the usage of electricity, heating, and internet due to home office increased drastically, yet the extent of compensation by the employer was heavily debated. Furthermore, the precise costs are often difficult to calculate, therefore a fixed amount has been frequently suggested.

In the “home office package”, it was clarified that the employer only must provide digital work equipment, e.g., laptop, internet, and cell phone. Otherwise, the employer can reimburse the employee a “home office flat rate” of €3 per day for a maximum of 100 days per year tax-free.

Vulnerable groups of employees

In April 2020, the Austrian legislature enacted a special regulation to protect a group of vulnerable employees or “risk groups”. If an employee could be severely affected by a COVID-19 infection, they can be released from work with full pay through a doctor’s certificate. In return, the employers are entitled to compensation from the Health Insurance Fund. The leave will not be granted if working from home or a safe workplace are a possibility.

The 3G rule in the workplace

3G stands for the German words for tested, vaccinated, or recovered. As testing and vaccination became more available in the spring of 2021, the question arose whether employers could require employees to be vaccinated, recovered, or tested. These control measures heavily concern personal rights, works council participation rights and data protection.

With the effect of November 21st, 2021, the government introduced the 3G rule across all workplaces. Employers had to monitor compliance with this rule, at least on a random basis. In this context, the Austrian Supreme Court considered dismissals of employees to be lawful if they violated their obligations under the COVID-19 regulations of the workplace. The general 3G rule at the workplace has finally been abolished this March.

Conclusion

All the measures were paid by the COVID-19 fund or the insurance system. The huge amount of money spent could put a burden on the future generations of Austria. Furthermore, Europe is currently confronted with the next crisis: Due to the war in Ukraine, energy and heating prices are rising rapidly. Therefore, the state is required to provide measures to mitigate the costs. Potentially, companies will send their employees to work from home to lower the companies’ heating expenses. Consequently, increased costs would be shifted to the employee which leads to new legal questions and regulation demands. Additionally, climate change intensifies the already difficult situation of dealing with all the debts for the next years and decades.

Caitlin Lola Marie Seybert