Topics in our issue:

(Un)Equal Treatment of Employees

In the last parliamentary session a few days before the National Council election in October 2017, the SPÖ, FPÖ and Green Party decided on the (allegedly) final equality of blue-collar and white-collar workers. However, by no means does this result in general equal treatment of employees.

Austrian labor law has always separated the workforce into blue-collar workers and white-collar workers (salaried employees). This distinction is particularly significant when it comes to the question of which legal bases or collective bargaining agreements are to be applied to a work relationship. The decision as to what group a person falls into is based on the kind of work they perform. A salaried employee is someone who performs commercial services, high-level non-commercial services or clerical activities. Everyone who is not considered a salaried employee is a blue-collar worker. The legal amendment passed by the National Council on 12 October 2017 is intended to eliminate even the last distinctions.

New continued payment scheme

The first significant change refers to the standardization of continued pay in case of illness or accidents, where the continued pay of the salaried employees was adjusted to the system of blue-collar workers. This means that in the future, the period considered for salaried employees is also the work year and that there is no entitlement to a reduced basic claim in case of a recurrence of the illness; the previous complicated relapse regulation no longer applies. As a result, if there is a repeated illness within a work year, both groups are now subject to an aggregation of the claim periods. At the start of a new work year, the full scope of the entitlement is applicable again. In return, in case of work accidents or occupational illnesses, salaried employees – just like the blue-collar workers before – receive separate continued pay entitlements for each occasion regardless of other periods of during which work was prevented ("second pot"). Finally, another provision states that in future collective bargaining agreements or plant agreements for employees, it can be agreed that the entitlement to continued pay is based on the calendar year.

As of 1 July 2018, salaried employees as well as blue-collar workers are entitled to eight weeks of full continued pay after only one year of employment rather than five years as before. In contrast to before, the continued pay is payable beyond the end of the employment status even if the employment is terminated by mutual agreement in case of illness or in consideration of an illness.

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P) PRESLMAYR RECHTSANWÄLTE

(Partial) alignment of termination provisions

The changes relating to the termination of employment seem to have been far less successful.

First off, the elimination of discrimination against certain part-time employees is unproblematic. According to the legal situation valid up to 31 December 2017, the termination provisions of section 20 of the Austrian Employees Act (AngG) only applied if the work time per month amounted to at last one fifth of 4.3 times the normal work time. This restriction was eliminated as of 1 January 2018. The termination provisions of the AngG now apply to all employees, regardless of the scope of their employment.

However, the core element of the intended harmonization is the alignment of the termination periods and dates of blue-collars workers to the regulations that apply to salaried employees. In the future, if there is no agreement that is more favorable for the worker, the employer can only end the employment with a termination at the end of each quarter of the calendar year. The notice period is six weeks and increases to two months after the second year of service, three months after the fifth year of service, four months after the 15th year of service, and five months after the 25th year of service. It is not possible to reduce the notice period, but it can be agreed that the notice period ends on the 15th or on the last day of the calendar month. However, workers can terminate their employment on the last day of the calendar month as long as there is a one-month notice period.

In industries that mainly rely on seasonal work, it is possible to arrange for deviating rules (and also shorter notice periods) in a collective bargaining agreement. Employment relationships that are arranged only for the duration of a temporary need can be terminated by both parties at any time during the first month by complying with a one-week notice period.

The new provisions, which apply to terminations enacted after 31 December 2020, are a massive alteration of existing agreements. Notice periods are prolonged extensively and employers can terminate employment only at the end of each month. While employers can (and should) specify the 15th and last day of the month as termination dates for new contracts in the future – as is customary by now for salaried employees – this is not possible for existing contracts without the worker's consent. This puts blue-collar workers who have been employed for many years in an even better position than salaried employees.

Continuing inequalities

Apart from that, there will still be other differences in the future. One example is the reasons for dismissal, which are more narrowly defined for blue-collar workers than for salaried employees. The prohibition of competition is also much stricter for salaried employees, although there is no justification for this (anymore). Similarly, there will still be different collective bargaining agreements with various pay levels and separate works councils for blue-collar and white-collar workers, which results in an enormous administrative effort. Unequal treatments for occupational disabilities and invalidity were also kept in place.

For that reason, it is by no means true that the last inequalities were eliminated, as was suggested by the parties responsible for this legal decision. The new rules go hand in hand with significant difficulties for employers, for which there is no adequate compensation. There would have been plenty of opportunities for this, e.g. in respect to the general protection against terminations. But that is just the nature of such last-minute pre-election bonuses.

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Establishing a GmbH made (too) easy?

As a result of the Deregulation Act of 2017, changes were introduced in various federal laws to relieve companies and increase administrative efficiency. One result of this "deregulation" is a new and easier way to establish a limited liability company (GmbH), although its expediency is doubtful.

As of 1 January 2018, there is a "simplified" way to found single-person GmbHs, which is intended to save time and cut costs. In fact, the founder of a GmbH can skip the visit to a notary public. Instead, the founder can submit the declaration of incorporation and application for the company register online via the company service portal (USP) and transmit them to the commercial court. A citizen card is required for the identification.

With the simplified founding, the "proper" identity check is no longer performed by the notary public but rather by the bank where the capital contribution is paid. After the founder – who must become the sole managing director – has provided the specimen signature, the bank sends the documents to the company register electronically.

The applicability of the new provisions is tied to several conditions. In particular, only certain provisions can be entered in the declaration of incorporation aside from the legal minimum content (company name, address, business purpose and share capital), which results in a restriction of development options.

For that reason, it is doubtful that using the simplified founding actually makes everything easier: it is not possible for more than one person to hold stakes nor can a future-oriented direction of incorporation be declared. For example, it is not even possible to provide for a divisibility of the shares, which will lead to additional effort if other shareholders join at a later time.

The time savings are also doubtful, because new GmbHs are entered into the company register within five days on average even now, unless the court issues an order for improvement. This is often the case if the selected company name is not permitted. Since it is often difficult to select a company name that is suitable for entry without legal help, delays can already be expected.

Furthermore, the strict formal requirements for establishing a GmbH protect the company founders against hasty decisions and safeguard the interests of future creditors. The establishment of a corporation should be well considered. The founder should at least be familiar with the obligations accompanying the establishment and operation of a GmbH. Shareholders and managing directors must be aware of their strict obligations regarding capital requirements and capital maintenance. These define an obligation for a full payment of the capital contribution as well as a separation of the spheres of company and shareholder. For example, if someone withdraws assets from the company in violation of the prohibited return of capital contribution, this can result in major liability risks for the co-shareholders and other company managers. A professional consultation is therefore in the interest of the GmbH founders as well as the future creditors of the company.

Lastly, the desired cost reduction is also doubtful, since it already doesn't cost very much to found a standard GmbH and the banks involved in the future will presumably charge their clients for these additional services. Regardless, any potential cost savings are hardly proportionate to the disadvantages mentioned. Those who lack even enough capital for a proper legal consultation should not be founding a corporation in future either.

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Max Schrems vs. Facebook, or the Pitfalls of Class Actions

The legal proceeding in which Max Schrems is accusing Facebook of data privacy violations in connection with his personal Facebook account and the accounts of seven other Facebook users is pending since 2014. On 25 January 2018, the European Court of Justice (ECJ) at least resolved the question of jurisdiction.

Schrems based the jurisdiction of the Regional Civil Court in Vienna on the Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (EuGVVO). According to this Regulation, a consumer may bring proceedings against an entrepreneur in the courts for the place where the consumer is domiciled. However, Schrems did not just evoke this jurisdiction in respect of his own claims against Facebook, but also for the claims assigned to him by seven additional Facebook users from Austria, Germany and India.

Even according to previous case law of the ECJ, the consumer jurisdiction of the EuGVVO only benefits consumers in so far as they are, in their personal capacity, the plaintiff or defendant in proceedings. An applicant who is not himself a party to the consumer contract in question cannot enjoy the benefit of the jurisdiction relating to consumer contracts. This applies not only to the assignment of claims to a (consumer protection) organization for the purposes of legal enforcement (e.g. in the scope of collective actions) but also – as the ECJ has now clarified – in case of an assignment to another consumer. Accordingly, the ECJ affirmed that the Viennese court had jurisdiction for Schrems' claims but denied this jurisdiction in respect of the additional users.

In the opinion of the Advocate General at the ECJ, it is not the role of courts to attempt at creating collectiv redress in consumer matters; instead is is in need for comprehensive legislation. We will have to continue waiting for that.

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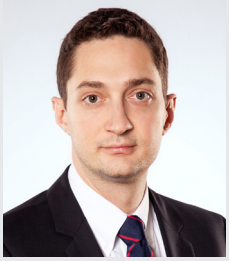
P) Inside

As of January 2018, **Dr. Franz Lippe, LL.M** has become a Partner with Preslmayr Rechtsanwälte. Franz Lippe specializes in media law and data protection law and has already strengthened our team since the end of 2016. We look forward to our future collaboration!



We are also pleased about the results of the bar exam by our associate **Mag. Michael Heiny**: In line with the tradition of Preslmayr Rechtsanwälte, he passed the exam with great success – congratulations!

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