

WORKERS WITHOUT BORDERS

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National Report of Austria

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INTRODUCTION

Global mobility is on the rise. More and more companies increasingly operate on a cross-border scale. However, companies assigning their employees to another or multiple countries are often confronted with an increase of formalities and requirements affecting the cross-border employment. At first glance, only the work place of the employee temporarily changes. However, many other legal issues come into play and employees must comply with the rules and regulations governing immigration, employment and labour and social security law of each of those countries.

The aim of the present questionnaire is to outlining the legal aspects and issues affecting the temporary assignments of employees within and outside the European Economic Area (EEA).

1. Immigration

The first question employers should consider is whether the employee needs an authorization to work and reside in the country to which he/she is (temporarily) assigned.

Within the European Union, freedom of movement of persons is one of the main fundamental principles, guaranteeing EEA nationals the right to live and work freely in another EEA member state.

Non-EEA nationals in principle need an authorisation to work within the EEA. Does this obligation also apply to EEA nationals assigned by their employer outside the EEA?

2. Labour and employment law

Secondly, assuming the employee is allowed to work and reside in the relevant country, it is important knowing which law is governing the employment relationship during the assignment period. Is it the law of the employer (home country) or the law of the country where the employee will be assigned (host country)?

Within the European Union, the Rome Convention and the Rome I EC Regulation are the two sources dealing with this matter. Does these sources also apply when a non-EEA national is assigned to an EEA country and when an EEA employee is assigned outside the EEA? Can the employer and employee choose the law applicable to their employment relationship? Which law applies in case no law has been chosen? Can the employee also invoke the protection of statutory provisions of the country where he/she will be assigned?

The labour and employment law part of this questionnaire also includes a part on the strict rules on the 'lease of personnel' in assignment situations. Finally, we will look into (the content of) the assignment letter and the early termination of the assignment and employment relationship.

3. Social Security

The third part of this questionnaire deals with the social security aspects linked to assignments, as it is relevant and important to know in which country the social security must be paid during the assignment.

4. Other obligations and formalities

We will look into possible other obligations and formalities to be complied with in your countries in case of assignments of employees to your countries (e.g., prior notifications, drafting and keeping of social documents, etc.).

5. Social inspection

The last part of this questionnaire is based on whether or not cross-border assignments are a priority for the social inspectorate.

QUESTIONNAIRE

1. IMMIGRATION

1.1. Who needs a work permit to work in your country? Are there types of employees exempted (e.g., based on their nationality or type of work performed (business trips, etc.)?)

The Austrian Act Governing the Employment of Foreign Nationals (*Ausländerbeschäftigungsgesetz* – AuslBG) stipulates the legal framework for the employment of foreign nationals in the federal territory of Austria. “Foreign nationals” are defined as all individuals who do not possess the Austrian citizenship. However, based on the nationality or the type of work performed exceptions from the scope of the AuslBG and, thus, of the requirement to obtain a work permit, apply.

Based on their nationality nationals of the European Union (EU) and the European Economic Area (EEA) Member States and nationals of the Swiss Confederation are exempt from the scope of the AuslBG. However, this exemption does currently (until 30 June 2020 at the latest) not apply to nationals from Croatia. Thus, they still need to obtain a work permit.

Based on the work performed or other criteria the following foreigners are, inter alia, exempt from the scope of the AuslBG:

- foreigners who have been admitted for asylum or a subsidiary protection status;
- foreigners who are special senior executives;
- foreigners providing scientific, educational, cultural and social work at public or private educational establishments or on the basis of intergovernmental cultural agreements or under European Union training and further training or research programmes;
- foreigners providing their pastoral work within legally recognised churches and religious communities;
- foreigners providing work as crew members of sea-going and inland waterway vessels crossing borders;
- foreigners providing work in foreign missions and intergovernmental organisations;
- foreigners providing work as reporters;
- foreign teaching staff and
- exchange students and foreign teachers.

1.2. Are there different types of work permits in your legal system? Are there work permits for highly educated/qualified employees? If so, what are the conditions and what is the procedure to be followed? Who needs to file for the application and where? Which information and documents are to be provided to the competent authorities? What is the timing? What is the duration of the work permit? Can it be renewed? Is it possible to apply for permanent status after a certain period of time under the work permit?

Employers are only allowed to employ foreign nationals in Austria if one of the following (1) work permits or (2) residence titles including a work permit are obtained or held by the foreigner:

- Employment permit (*Beschäftigungsbewilligung*)
- Posting permit (*Entsendebewilligung*)
- Confirmation of notification (*Anzeigebestätigung*)
- Red-White-Red Card (*Rot-Weiß-Rot – Karte*)
- Blue Card EU (*Blaue Karte EU*)
- Residence Permit – Artist (*Aufenthaltsbewilligung – Künstler*)
- Red-White-Red Card plus (*Rot-Weiß-Rot – Karte plus*)
- Residence Entitlement plus (*Aufenthaltsberechtigung plus*)
- Exemption certificate (*Befreiungsschein*)
- Residence title – “family member” (*Familienangehöriger*)
- Residence title – “permanent residence – EU” (*Daueraufenthalt – EU*)

Red-White-Red Card

With the Red-White-Red Card a criteria-based immigration scheme is in place in Austria. This immigration scheme shall attract highly skilled foreign nationals and allow them to assess the chances for their successful immigration to Austria already in their home country. The Red-White-Red Card entitles the foreign national to residence and employment with a certain employer in Austria. After ten months of employment in Austria within the last twelve months, the Red-White-Red Card holder may apply for a Red-White-Red Card-plus, which grants unlimited access to the Austrian labour market.

The following group of persons qualify for a Red-White-Red Card:

- Very highly qualified workers;
- Skilled workers in shortage occupations;

- Other key workers;
- Graduates of Austrian universities and colleges of higher education;
- Self-employed key workers.

General requirements for a Red-White-Red Card are adequate means of subsistence, health insurance coverage and adequate accommodation according to local standards.

The specific criteria which have to be met for being eligible for a Red-White-Red Card vary depending on the group of persons applying for it. However, in general, special qualification skills (e.g. university degrees, vocational education, awards, last gross salary, etc), relevant work experience, language skills and age are taken into account.

These criteria are weighted differently with a point-based scheme and, thus, have to be assessed in any case individually based on the specific circumstances of the foreigner and the specific requirements for the Red-White-Red Card.

Moreover, very highly qualified workers can apply for a job seeker visa, valid for six months, to search for an employment in Austria. When applying for this visa it already has to be proved by the very highly qualified worker that the criteria are met.

Furthermore, a specific job offer in Austria, fulfilling certain criteria (e.g. certain minimum payment or shortage occupation), is required and, hence, an employer's declaration has to be provided together with the application.

The application for the Red-White-Red Card, generally, has to be done at the competent Austrian representation (embassy, consulate) at the foreigner's home country or country of residence. However, very highly qualified worker under a job seeker visa or foreigners on a lawful visa-free stay in Austria may also apply directly in Austria at the competent authority. The competent authority in Austria can be either the Provincial Governor (*Landeshauptmann*) or the authorised Regional Administrative Authority (*Bezirkshauptmannschaft*) or Local Administrative Authority (*Magistrat*) depending on the (future) residence of the foreigner in Austria.

Blue Card EU

Please see below point 1.5.

1.3. Is a separate residence permit required/ granted via the work permit? Please explain.

Whether or not separate residence permits and work permits are required depends on the respective permit acquired. The following permits are both, a residence and a work permit:

- Red White Red Card (*Rot-Weiß-Rot – Karte*) – limited labour market access
- EU Blue Card (*Blaue Karte EU*) – limited labour market access
- Residence Permit – Artist (*Aufenthaltsbewilligung – Künstler*) – limited labour market access
- Red White Red Card plus (*Rot-Weiß-Rot – Karte plus*) – unlimited labour market access
- Residence Entitlement plus (*Aufenthaltsberechtigung plus*) – unlimited labour market access
- Residence title – “family member” (*Familienangehöriger*) – unlimited labour market access
- Residence title – “permanent residence – EU” (*Daueraufenthalt EU*) – unlimited labour market access

For all other work permits (cf above point 1.2) a separate residence permit is required.

1.4. Who can be sanctioned in case of illegal employment in your country (e.g., the employer, the employee, the host company, etc.)? What are the sanctions (civil and/or criminal) in case of illegal employment?

The person who employs the foreigners is hold liable in case of the illegal employment of the foreigners.

The illegal employed foreigner is in any case entitled to remuneration for the services already provided against the employer.

Infringements against the AuslBG, like employment without a work permit or violations against notification and disclosure obligations, are generally sanctioned with fines under administrative criminal law (cf. section 28 AuslBG). Those fines vary depending on the infringement and the number of foreigners involved. The maximum fines in case of recurrences can amount up to EUR 50,000 per foreigner and infringement.

In case of an employment of foreigners without a work permit the infringement is registered for a certain period within a specific register (cf. section 28b AuslBG).

However, if the infringement is happening for the first time it is not registered. In case of public tenders, public contracting parties have to be informed upon request, if a specific undertaking or person is registered because of such infringements.

Furthermore, the law also provides for criminal law sanctions (cf. section 28c AuslBG) if a larger number of foreigners without residence titles and work permits are simultaneously employed or an under-age foreign national without a residence title and a work permit is employed. The punishment for such an infringement amounts to imprisonment of up to six months or a penalty of up to 360 day-fines.

Furthermore, if a foreign national without a residence title and a work permit is employed under exploitative working conditions or if the foreigner is a victim of human trafficking or a larger number of foreign nationals without residence titles and work permits are simultaneously employed for more than one month the punishment amounts to imprisonment of up to two years.

According to Austrian Supreme Court (*Oberster Gerichtshof* – OGH) case law, a larger number of foreign nationals may be given in case of around ten foreigners (cf OGH 13 Os 16/12w).

Moreover, the district administrative authority may prohibit an employer from employing foreign nationals for up to one year, if a final penalty for the employment of foreigners without a work permit was imposed at least three times within the past two years against this employer (cf. section 30 AuslBG).

The fiscal authority, furthermore, may request the withdrawal of the trade licence of the employer in case of repeated unauthorised employment of foreign nationals.

Finally, if penalties for the unauthorised employment of more than three foreign nationals have been imposed repeatedly the employer may be excluded from public subsidies. Additionally, already paid public subsidies may have to be repaid in such a case.

1.5. Did your country implement the European Blue Card Directive 2009/50/EC? If so, please explain the scope, conditions, application process and validity of the blue card?

The European Blue Card Directive 2009/50/EC was implemented under Austrian law especially in the AuslBG and the Settlement and Residence Act (*Niederlassungs- und Aufenthaltsgesetz* – NAG).

Graduates of a foreign university who have a binding employment offer with an annual gross salary of at least 150 % of the average yearly gross salary of full-time employees in Austria (2016: EUR 58,434 gross which is around EUR 4,174 gross monthly income plus special payments) may apply for a Blue Card – EU. The Blue

Card – EU is valid for a period of two years and entitles its holder to residence and employment with a certain employer in Austria.

Applications can be filed either by the applicant with the competent representation of Austria in their home country or country of residence or by the applicant or the potential employer at the competent authority (in general the district administration bodies authorised by the provincial governor's office) in Austria.

After 21 months of employment in the last 24 months the Blue Card – EU holder can apply for a Red-White-Red Card – plus.

1.6. Did your country implement the European Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer? If so, please briefly describe and explain importance and impact?

No specific amendments were made so far in the Austrian law based on the European Directive 2014/66/EU.

2. LABOUR AND EMPLOYMENT LAW

2.1. In your country, how is the applicable law governing the employment contract during the assignment period determined?

Regulation (EC) No 593/2008 (Rome I Regulation) determines the applicable law governing the employment contract during the assignment for contracts concluded after the 16 December 2009. To employment contracts concluded between 01 December 1998 and 16 December 2009 the Convention on the Law Applicable to Contractual Obligations (Rome Convention) applies. Moreover, to contracts concluded before 01 December 1998 the Austrian Private International Law Act (*Bundesgesetz über das Internationale Privatrecht – IPRG*) applies.

According to Article 8 subsection 2 Rome I Regulation, Article 6 subsection 2 Rome Convention and to subsection 44(1) IPRG the applicable labour law, if not chosen by the parties, generally does not change in case the employee is temporarily employed in another country.

Thus, to assignments often foreign labour law might apply. However, Austrian mandatory overriding provisions prevail such an applicable foreign law in case of an assignment to Austria (cf below point 2.2).

2.2. Which local employment laws of your country are determined as mandatory minimum laws/ minimum hardcore protective rules and working conditions? Please explain. Is there relevant case law?

Overriding mandatory Austrian private and public law provisions, which prevail the applicable foreign law are according to legal scholars especially:

- The entitlement to a remuneration comparable employees are entitled to according to a collective bargaining agreement, the law or a regulation;
- The entitlement to holiday for the period of the posting if the actual entitlement is lower than the entitlement provided by the Austrian Vacation Act (*Urlaubsgesetz* - UrlG);
- Compliance with statutory and collective working time regulations;
- Compliance with employee protection provisions;
- The entitlement to continued payment;
- Compliance with youth, maternity and handicapped employees protection provisions;
- Compliance with working rest and bank holiday regulations.

2.3. Does your country foresee specific rules on the ‘lease of personnel’? Is there a principle prohibition of ‘lease of personnel’? Please explain and provide examples. What are the sanctions and penalties? Is there a possibility to reduce the risk? Please explain. Is there relevant case law dealing with this matter?

“Lease of personnel” is generally permitted in Austria pursuant to the Hiring-Out of Labour Act (*Arbeitskräfteüberlassungsgesetz* – AÜG). However, pursuant to the provisions of the Trade, Commerce and Industry Regulation, an employee leasing agency (*Arbeitskräfteüberlasser*) is obligated to have a business licence.

When no exception applies, operating an employee leasing agency without a business licence may result in an administrative fine of up to the amount of EUR 3,600 for every infringement. Additionally, the competent authority is authorised to shut down the business.

Basically, since leased employees are not excluded from the scope of mandatory provisions under employment law, all these provisions apply to leased employees as well as to non-leased employees. Additionally, the AÜG includes further provisions concerning minimum standards with respect to payment, working hours and notice periods.

For the business of “lease of personnel” two collective bargaining agreements apply. For blue-collar workers this is the collective bargaining agreement for the

business of “lease of personnel” (*Kollektivvertrag für das Gewerbe der Arbeitskräfteüberlassung*) and for white-collar workers it is the collective bargaining agreement for employees in trade (*Kollektivvertrag für Angestellte im Handwerk und Gewerbe*).

It should be noted that the user enterprise (*Beschäftiger*) is to abide by the provision of the Employee Protection Act (*Arbeitnehmerschutzgesetz – AschG*). Furthermore, in the event of a lease of personnel, both the employee leasing agency and the user enterprise are subject to the duty of due care towards the employee. As a consequence, the user enterprise is to abide by the equal treatment requirements toward the leased employees in the same way as towards the non-leased employees.

Cross-border hiring-out of labour from an EU-, an EEA-country or from Switzerland has to be notified electronically to the Central Coordination Office for the Control of Illegal Employment at the Federal Ministry of Finance (*Zentrale Koordinationsstelle für die Kontrolle der illegalen Beschäftigung (nach dem AuslBG und dem AVRAG) des Bundesministeriums für Finanzen – ZKO*) one week prior to the commencement of the hiring out of labour in Austria. A hiring-out of labour from other countries requires permits.

The user enterprise has to keep a copy of the above notification as well as the hired-out employee’s social security document A1 (or E101) available at the place of work in Austria for the whole duration of the hiring-out of labour. Furthermore, wage documents have to be kept available by the Austrian user enterprise in German language at the place of work in Austria. The authority can impose fines in case of infringements of these obligations.

For cross border hiring-out of labour from or to other countries than EU-, EEA-countries or Switzerland a specific permit according to the AÜG is required.

2.4. If you were asked by one of your clients to draft an assignment letter (secondment agreement between the original employer in the home country and the employee), which clauses would you include? What should the assignment letter cover? Is this foreseen by a specific law or based on case law? Please explain.

An assignment letter should inter alia contain clauses concerning the following topics:

- Contractual object;
- Effects on the existing employment;
- Scope and place of duty;
- Necessary permits and medical precautions
- Working time, resting time and employee protection

- Remuneration
- Tax and social security payments
- Fringe benefits and allowances (e.g. flight costs, moving costs, accommodation, etc)
- Holidays
- Term and termination
- Choice of law

No specific law stipulating the requirements for an assignment letter exists in Austria.

2.5. Please explain the applicable and most relevant rules of your country in case the employer wishes (1) to early terminate the assignment and (2) to terminate the employment relationship (e.g., is there a right to return? Should the assignment allowances be included in the calculation of the notice indemnity? Etc.). Is there relevant case law?

No specific rules regulating the relationship between an early termination of the assignment and a termination of the employment exist under Austrian labour law. The early termination of the assignment does not necessarily also terminate the employment relationship according to Austrian Supreme Court case law (cf OGH 9ObA 164/88). Thus, the early termination of an assignment without having an effect on the employment relationship may be agreed upon between the employer and the employee. However, it may also be agreed upon that the termination of the assignment also terminates the employment relationship.

In the absence of specific rules, it is up to the parties to agree on the legal effect of a termination of the assignment. Thus, it is recommendable to include such a clause, in the one way or the other, in the assignment agreement.

3. SOCIAL SECURITY

3.1. Provide a short overview of the level of social security charges in your country. What are the employer social security contributions? What are the employee social security contributions? Is there a cap/ maximum? Please briefly explain.

Statutory social insurance contributions have to be made for health insurance (“*Krankenversicherung*”), accident insurance (“*Unfallversicherung*”), pension insurance (“*Pensionsversicherung*”) and unemployment insurance (“*Arbeitslosenversicherung*”).

The amount of the statutory social insurance contribution for the employee is calculated proportionate to the salary of the employee. The maximum assessment basis for the contribution amounts to EUR 4,860 gross per month and employee (2016). Both employees and employers contribute to the financing of the social security system.

The social insurance contributions are in 2016 the following:

- health insurance: 3.87 % (employee) and 3.78 % (employer)
- accident insurance: none (employee) and 1.30 % (employer)
- pension insurance: 10.25 % (employee) and 12.55 % (employer)
- unemployment insurance: 3.00 % (employee) and 3.00% (employer)

However, both parts of the social insurance contributions are being transferred by the employer to the social insurance agency (“*Sozialversicherungsträger*”). The employer may withhold the employee’s part of the social insurance contributions from the salary of the employee. Moreover, the employer is liable for all social contributions (also the part of the employee).

3.2. In case of assignments from outside the EEA to your country or from your country to non-EEA countries, with what countries has your country signed a social security agreement?

Bilateral agreements concerning at least one social security area (health, accident, pension, unemployment) are concluded with the following non-EEA countries:

- Australia (only pension)
- Bosnia and Herzegovina (all four areas)
- Chile (only pension)
- Israel (all four areas)
- Canada including Quebec (only pension)

- Macedonia (all four areas)
- Montenegro (all four areas)
- Philippines (only accident and pension)
- Serbia (all four areas)
- Tunisia (health, accident and pension)
- Turkey (health, accident and pension)
- United States of America (only pension)

4. OTHER OBLIGATIONS AND FORMALITIES

4.1. Are there other relevant formalities and obligations in your country in case of assignments to your country (e.g., prior notification to the authorities, drafting and keeping social documents, etc.)?

General, pursuant to Austrian labour law an assignment to Austria is given, if an employee employed in another country, provides services in Austria for a certain period of time for this employer and it is intended that the employee, after rendering the services in Austria, returns back to the previous employment in the foreign country.

Assignments from the EU/EEA or Switzerland

A posting of an employee by an employer residing in another Member state of the European Union, the European Economic Area or Switzerland has to be notified to the Central Coordination Office for the Control of Illegal Employment at the Federal Ministry of Finance (ZKO) according to Section 7b Act on the Adjustment of Labour Law (*Arbeitsvertragsrechts-Anpassungsgesetz* – AVRAG).

This notification has to be done mandatorily electronically on the website of the ZKO.

Furthermore, the notification has to be done one week prior to the assignment to Austria commences. Exceptions only apply in disaster and urgent situations as well as in case of assignments on short notice. In these cases, the notification has to be done without any delay prior to the start of work in Austria.

A copy of this notification has to be kept at the place of work of the employee in Austria as well as the social security document (form A1 or E101) confirming that the employee is insured in the country the employee is assigned from.

Moreover, in case the seconded employee is not an EU-, EEA- or Swiss citizen, subsection 18(12) Act on the Employment of Foreign Nationals (*Ausländerbeschäftigungsgesetz* – *AuslBG*) stipulates that the seconded employee

- has to be permitted to work and to reside for the duration of the posting and thereafter in the state he is seconded from and
- that it has to be complied with the wage and working provisions stipulated by the law as well as with the social security provision (form A1 or E101).

Therefore, the notification of the ZKO is forwarded to the Austrian Employment Office (*Arbeitsmarktservice – AMS*), which issues, within two weeks, an EU-Posting Confirmation (*EU-Entsendebestätigung*) in case the above criteria are fulfilled. Thus, the notification also has to include documents or at least information concerning the residence and work permit of the employee in the state the employee is seconded from as well as information concerning the remuneration paid to the employee.

Assignments from outside the EU/EEA or Switzerland

For postings from outside the EU/EEA or Switzerland a posting permit (*Entsendebewilligung*) has to be obtained for each individual employee. Moreover, in case the posting of the individual employee lasts more than four months or the work of the employer in Austria in total lasts more than six months, an employment permit (*Beschäftigungsbewilligung*) has to be obtained.

In case the seconded employee is not an EU-, EEA- or Swiss citizen a further residence permit for seconded employees is required.

If the assigned employee is an EU-, EEA- or Swiss citizen (with the exception of Croatian citizens) no work permits are required.

Remuneration documents according to section 7d AVRAG

Foreign employers seconding employees to Austria have to keep documents available stating the remuneration entitlements of the seconded employee.

The documents have to be kept for the whole time of the posting at the place of work in Austria. According to the law these documents are the employment contract, posting agreement, remuneration records, pay slips and actual payment records (e.g. bank transfer records), working time records and documents concerning the remuneration classification.

In case these documents are not in German their translation into German is required, as they have to be kept available in German language according to section 7d AVRAG. However, an ordinary translation (non-certified translation) is generally sufficient.

4.2. What are the penalties and sanctions in case these formalities and obligations are not complied with? Who can be sanctioned? Is there relevant case law?

In case the notification to the ZKO is (1) not made at all, (2) not made timely or (3) not made complete, subsection 7b(8) AVRAG provides for fines between EUR 500 and EUR 5,000 (in case of recurrence EUR 1,000 to EUR 10,000). Moreover, the same fines apply in case the copy of the notification and/or the social security documents (A1 or E101 form) are not kept available at the place of work in Austria.

In case no posting permit or employment permit is obtained the sanctions of the AuslBG (cf above point 1.4) are applied.

If remuneration documents are not kept available at the place of work in Austria subsection 7i (4) AVRAG provides for fines between EUR 1,000 and EUR 10,000 (in case of recurrence between EUR 2,000 and EUR 20,000 and if more than three employees are concerned the fines are going up to EUR 50.000 (recurrence) per employee).

5. SOCIAL INSPECTION

5.1. Are cross-border assignments a priority in your country for the social inspection? Please explain.

With 1 January 2015 the Austrian laws concerning wage and social dumping have been noticeably tightened. By establishing information obligations for almost any short or long term assignment to Austria from an EU/EEA country or Switzerland the authority was enabled to control cross-border assignments more easily. However, for assigning employers these new regulations brought a high burden of administrative effort and significant sanctions with rather high penalties, which are imposed for each infringement and each employee (cf above point 4.2.).

If employees employed by foreign or domestic employers do not receive the remuneration comparable employees are entitled to according to a collective bargaining agreement, the law or a regulation, fines between EUR 1,000 and EUR 10,000 (in case of recurrence between EUR 2,000 and EUR 20,000 and if more than three employees are concerned the fines are going up to EUR 50.000 (recurrence) per employee) can be imposed by the authority.

By introducing these fines and the increased obligations to notify the authorities about cross border postings, assignments recently became a higher priority for administrative and social inspections in Austria.