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## Employment & Labour - Austria

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### Restrictive covenants: court rules on enforceability of non-compete clauses

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Austrian law allows employers and employees to enter into non-compete agreements. The law distinguishes between restrictions of competing activities during employment and restrictive covenants pertaining to post-termination periods.

#### Competing activities during employment

Under Section 7 of the Employment Act, the employee is subject to a statutory covenant not to perform any competing activity during employment without the employer's prior consent. The employer and employee may expressly agree otherwise - thus allowing for competing activities on the part of the employee - but such agreements are the exception, not the rule.

The statutory non-compete clause relates to any activities (either when acting as an employee or when self-employed) in the employer's industry or trade. Following a breach of the provision, the employer is entitled to:

- claim damages and request injunctive relief;
- claim that the respective transactions in breach of the non-compete clause are considered to have been made on its account; or
- claim the remuneration promised or received by the employee in exchange for the competing activities.

Such a breach of the statutory rule during employment would also constitute sufficient cause for a summary dismissal.

#### Restrictions on post-termination periods

Under Sections 36 and following of the act, the employer and employee can agree to extend the non-compete provision for periods following termination of employment. The restrictive covenant must meet the following statutory standards:

- It must not exceed a duration of one year following the termination of employment;
- It must relate only to activities in the employer's industry or trade;
- It must be fair and reasonable in terms of time and geographical scope, not placing any undue hardship on the employee, and be reasonably required for the protection of the employer's business interests;
- The employee must not be underage at the time of conclusion of the agreement; and
- The employee's salary due for the month preceding termination of employment must exceed a minimum amount, calculated on the basis of the actual maximum contribution base as set forth by Section 45 of the General Act on Social Security. In 2011, the monthly gross salary must exceed €2,380.

Whether a restrictive covenant on post-termination periods is enforceable depends on how, and by whom, the employment relationship was terminated. As a general rule, following justified summary dismissal by employer, an employee's unilateral termination without cause or a mutual termination agreement (where an express provision amending a contractual covenant not to compete is not present), the non-compete clause is enforceable without the employer needing to offer any payment during the restrictive period.

In contrast, if the employer unilaterally terminated the employment relationship by way of regular termination notice or summary dismissal without sufficient cause, restrictive covenants will not be enforceable. The restriction will also not be enforceable by the employer if the employee terminated the employment relationship with immediate effect due to a material breach of contract by the employer. However, if the employer gave notice, it can salvage the enforceability of the restrictive covenant if it offers to continue salary payments during the restrictive period.

Particular attention must be paid to cases where the termination (by either employer or employee) has been prompted by the other party's misconduct. While a restrictive covenant is generally not enforceable where the employer has given notice (except following justified summary dismissal or continued salary payments during the restrictive period), it remains enforceable if the termination was adequately caused by the employee's misconduct, provided that the employee has been made aware of that consequence.

Likewise, a unilateral termination on the part of the employee, which would otherwise trigger the non-compete clause, is not enforceable if the termination was prompted by the employer's wrongful conduct, subject to the condition that the employer has been made aware of this reason. Where the employee terminated the employment relationship with immediate effect due to a breach of contract by the employer, the restrictive covenant will also not be enforceable.

In a recent decision the Supreme Court confirmed its previous case law in this respect, ruling that an employee's termination of employment caused by the employer's misconduct does not prevent the enforceability of a restrictive covenant if the employee did not inform the employer about the alleged misconduct and the employer could not otherwise have gained knowledge of this reason. The Supreme Court argued that following notice of termination being given, the employer has a considerable interest to know whether the employee may engage in competing activities immediately after termination and whether the non-compete clause can be enforced by the employer.

### **Comment**

Following a breach of a restrictive covenant for post-termination periods, the employer may request injunctive relief and claim damages. However, if the parties agreed on a contractual penalty, the employer can claim only the contractual penalty and is not entitled to also request injunctive relief or additional damages. Finally, the contractual penalty is subject to judicial scrutiny and can be reduced accordingly by the presiding judge if the matter goes to court.

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