

LABOUR LAW POCKET BOOK

Important Regulations of Labour and Social Law

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CONTRACT OF EMPLOYMENT

An employment agreement is a bilateral contract

A contract of employment is defined as a binding arrangement whereby one person undertakes work for another person.

The person who commits himself/herself to the work, is the employee, the contracting party is the employer. The substantial content of the employment contract is the contribution of the work for the employee and the payment of the remuneration (wage, salary) for the employer.

The employment contract results from mutual consent over its basic content. It is legally binding for both sides, as rights and obligations are laid out in this agreement.

Form of the employment contract

The completion of employment contract is normally not bound by any formal requirements. Therefore the employment contract must not necessarily be issued in writing, as a verbal contract or even „conclusive action“ (§ 863 ABGB) is valid; the latter, for example, simply where someone provides a service for another person and the other party accepts ones performance. As one has no right to obtain a written contract, the issuing of a written statement (Dienstzettel) is of more importance (see page 6)

Characteristics of an employment contract are:

- Personal dependency (decisional power of the employer)
- Economic dependency
- Continuous obligation
- Obligation to work for a certain time
- Duty to carry out the work oneself
- Use of employer's equipment
- Incorporation in the employer's organisation
- Foreign regulation of the work (heteronomy)
- Success benefits the employer
- The employer takes the risk (if product is not sold or is incorrect)

Not all of the conditions mentioned above must be fulfilled in each case, as one must consider whether these characteristics prevail over characteristics of other types of contracts.

Similar types of contracts:

Contract for work and services (Werkvertrag): A contract for work and services is a contract in return for payment, in which someone (service provider) commits himself/herself to the production of defined work. In other words, the contractor is responsible for successfully carrying out a job (rendering a specific service) or achieving a specific result.

Characteristics of a contract for work and services are:

- Results orientated, guaranteed outcome
- No personal duty to work
- Use of own tools
- No integration into the organization of the ordering party
- No personal and economic dependency

Example: If someone asks a tailor to make a suit, there is a contract for work and services between the customer and the tailor. Between the apprentice, who actually makes the suit and the tailor, there exists an employment contract.

Freelance-contract:

If one undertakes work for another person and neither the characteristics of a contract of employment nor the characteristics of the contract for work and services prevail, one speaks of a freelance contract.

Characteristics of such a freelance contract are:

- No guaranteed outcome
- Use of own tools
- No integration into the organization of ordering party
- No, or limited personal dependency

Examples: Consultant; freelancing journalist

The power of the works council in the area of personnel management:

The works council must be immediately informed and, upon request, must be consulted in the case of any long term (more than 13 weeks) or permanent assignment of an employee to another position (101 ArbVG).

If the assignment will have a disadvantageous impact on the employee's working conditions or salary, the assignment is only legally effective if the work council agrees this expressly. This approval may be substituted by approval from the Court for Labour and Social Affairs, in case the works council does

not approve of the assignment. The Court for Labour and Social Affairs however may only give its approval if there is an objective reason in place to do so.

In the event of the employee being assigned to another position without the approval of the works council, the employee must only perform the previously agreed work and can refuse to perform any work illicitly requested from him/her. In the event the employer insists on the employee to perform the work, the employee may resign without giving a period of notice.

In the event of the works council giving its approval to the permanent assignment of an employee to another position, one must examine whether the content of the work contract covers the envisaged assignment. If such an assignment is covered by the work contract, the employee must attend to his/her duties. If the new assignment would mean an alteration of contract, the employee must not comply. In doubt, the court must be addressed and must confirm whether the assignment must be complied with.

WRITTEN STATEMENT

A written statement is a written record of major rights and obligations arising from the employment agreement. It will serve as evidence. The employer has to serve the employee on request with a written statement when an employment comes into existence. In the event of ongoing employment, all employees are entitled to receive a written statement from their employer within two months (upon request), if there is no existing written statement or contract in place which sets down the major rights and obligations.

The written statement must include by law:

1. Name and address of the employer
2. Name and address of the employee
3. Date of commencement of the work contract
4. In the case of a fixed term contract:
The foreseen termination date of contract
5. Employment termination notice period and date of termination
6. Normal place of work; if necessary, any change of location of employment
7. Any sub-categories in a general scheme
8. Intended assignment
9. Basic salary or wages; any additional remuneration (e.g. bonuses); date payable
10. Annual leave entitlement

11. Contractual normal daily and weekly working hours, unless an employment relationship is in existence, where the law for caretakers (Hausbesorgergesetz) is applicable
12. Indication of applicable regulations, such as collective agreement, works council agreement, etc as well as indication of the location in the company where one can find these documents
13. Name and address of the competent corporate provision fund (Betriebliche Vorsorgekasse), or for those where the Bauarbeiter-Urlaubs- und Abfertigungsgesetz (BUAG) is applicable, the name and the coordinates of the BUA-provision fund

Records to be made for employment abroad

If the employee has to work abroad for a period of at least one month, the written statement or the work contract (which has to be issued before the posting) must contain the following information:

1. The anticipated duration of the employment abroad
2. The currency to be used for remuneration, if payment is not in Euros
3. The conditions governing the employee's return to Austria
4. Any other monetary benefits on the employment abroad

No right to a written statement

There is no obligation to hand out a written statement if

1. The employment lasts less than one month

2. A written contract was issued containing all the information listed above
3. The information referred to above was listed in other additional written documents for the purposes of a posting abroad

General validity regulations:

The information referred to in number 5, 6 and from 9 to 11 in the written statement, as well as referred to in numbers 2 to 4 concerning a posting abroad, may be given accordingly in the form of references to laws, collective or customary company regulations governing the employment.

Modifications of the written statement:

The employer must inform an employee in writing of any change in the details referred to above, including additions concerning the posting abroad, at the earliest opportunity and not later than one month after the change comes into effect. The notification of change is not compulsory in the event of a change in the law or collective agreements cited above.

HOLIDAY ENTITLEMENT

- During the first six months of employment with an employer, an employee is entitled to a proportional share of the annual statutory paid holiday entitlement
- After six months the full entitlement is due
- At the start of the second or any further year of employment, the entire annual entitlement is due with the beginning of the new working year
- Employees have a minimum entitlement to paid annual leave of five weeks in each year of work. That equates to 30 leave days (work days) a year
- From the 26th year of service this entitlement increases to six weeks (36 leave days)

The employee must agree with the employer when to take the leave. The actual dates on which annual holidays are to be taken are agreed between employer and employee in the light of both business requirements and the employee's personal wishes (e.g. recreation). The employer cannot force the employee when to take annual leave, and similarly the employee cannot take a one-sided decision on the date of the holiday or arbitrarily extend the vacation.

Lapse of unused holidays

One can carry over up to three full years of leave entitlement until it becomes time-barred.

Vacation payment

For the duration of their annual holiday, employees are entitled to continue to be paid in accordance with the loss-of-pay principle. Therefore the employee must be paid the same amount as he/she would have earned if he/she would have worked. In case the amount due cannot be determined, the calculation must be based on an average of the last 13 weeks (see also collective agreements)

Illness during annual leave

In the event the employee falls ill for more than three calendar days whilst on leave, those days do not count as leave. However, one must report the illness immediately to the employer. Proof must be made available once after returning to work with a doctor's certificate.

In case one falls sick abroad during vacation, an official confirmation from the authorities is required to verify that the medical certificate provided has been issued by an authorised person in the medical profession. There is no need for such confirmation, if the employee was treated in hospital.

Compensatory payment for unused holiday entitlement (Payment in lieu); (Urlaubersatzleistung)

Employees are entitled to payment in lieu of unused leave at the end of an employment relationship (Urlaubersatzleistung). The payment in lieu of unused leave requires that the amount of leave taken is to be compared with the amount that should have been taken, given the proportion of the leave

year that has already elapsed. Leave already taken must be deducted.

In the event of a termination of employment and one has taken annual leave in excess of the entitlement, the excess leave taken must be refunded to the employer in case of

1. Illegitimate resignation without notice
2. Legitimate dismissal where the employee was at fault

Staff who have exceeded their entitlement to annual leave allowance by the date of termination are required to refund from their salary an amount equivalent to the vacation payment received upon taking the excess number of holidays.

In the event of an illegitimate premature resignation, there is no entitlement to compensatory payment for unused holiday entitlement.

For unused leave from a preceding year, staffs are entitled to be paid a compensatory payment, unless it has become time-barred.

CONTINUED PAYMENT OF REMUNERATION DURING TIMES OF ILLNESS (SICK PAY)

The employee is entitled to continued payment in the following scenarios:

1. Illness (accident)

- Illness
- Illness is a physical impairment or an impairment of mental health, which renders the employee unfit to perform the work due under the contract of employment and which requires medical treatment
- Accident in leisure time
- Treatment or recovery at a health spa, if authorized or ordered by the Social Security authority. The stay in the health spa or 'Kur' accommodation of an insurance scheme is to be classified as sick leave, without the confirmation of sick note. In the event the insured person receives only a partial payment from the insurer, the employee will need a confirmation from the insurance company or a sick note from an authorized physician for his/her absence to be classified as sick leave

2. Work accident or occupational illness

- Work accidents, are accidents, which are tangibly connected with the employment or occurring during the journey between the employee's home and the workplace. Similarly, there are accidents which are treated

as work accidents on an equal footing (e.g. voluntarily fire-brigade)

- Occupational illnesses are illnesses which are related to the type of employment and, in addition, be one of the types listed in General Social Insurance Act (ASVG), or are caused by the use of damaging materials or rays within an occupation. Furthermore, it is usually necessary that such illness arose due to a job in a certain industry

A) General validity regulations regarding blue-collar workers and white-collar workers

Employees are eligible to continued pay, if the illness (accident) leads to the inability to work (proof: doctor's note) and if the illness or working accidents were not caused by gross negligence or deliberately by the employee.

For a period of continued remuneration due to prevention from work (sick leave, stay at a health resort, carer leave) the consumption of a holiday cannot be agreed upon if these circumstances were known at the time of the agreement.

Duty to inform and to prove:

Employees must notify their employer immediately of their incapacity to work and upon request of the superior, supply a doctor's note stating the date of its commencement, its likely duration and its (general) cause. Please note that the employer has no right of information about the exact cause of incapacity to work, as otherwise the doctor would be forced to waive his professional secrecy.

Culpable failure to inform and to prove the illness entails the loss of their entitlement to sick pay. The failure to supply a medical certificate does not generally constitute a ground for dismissal without notice.

If the employee does not attend the control appointment despite receiving an invitation, and cannot supply a good reason not to attend, he/she may no longer be entitled to sick pay for a certain period.

Extent of sick pay

Employees are not allowed to be paid any less than when they were working. They are therefore entitled to continue to be paid in accordance with the loss-of-pay principle. In case the amount due cannot be determined, the calculation must be based on an average of the last 13 weeks (performance-related premium, overtime; see also collective agreements).

One can follow from the rulings of the courts that if the main income of an employee is based on commission, calculation must be based on the average income of the last year. When calculating sick pay, one must not take into account expense allowance and other expenses, such as so called "Kilometergeld".

When is sick pay due?

Continued remuneration means that pay will be continued for a legally prescribed duration, as if nothing would have prevented absence from work. The remuneration is therefore due on the contractual or legal dates for wages or salaries, independently of whether the sick leave has ended or not. Thus, the due date of the remuneration is decided by the also otherwise effective labour law regulations and agreements.

The employer has to pay out the remuneration at the same interval which is normally used (e.g. monthly salary on the last working day of the month, weekly wage at the end of the week).

Continued remuneration when employment is terminated during sick leave

Sick leave in itself does not exclude dismissal. In the case of dismissal during sick leave, it must be checked whether the employee is protected against dismissal through other legislation which can be used.

If the illness continues after the end of the employment and the employee was

- Dismissed by the employer, or
- Illegitimately dismissed without warning by the employer (illegitimate summary dismissal)
- Resigned prematurely due to fault of the employer (legitimate resignation without notice)

then the claim of continued remuneration for the prescribed duration is valid, even when the employment has already

ended. This means that continued remuneration can continue beyond the period of employment, as long as there is a valid claim to sick pay. This is not only valid for salary and wages, but also for holiday and Christmas pay.

The claim for continuation of remuneration is only possible up until the end of the employment, when the end of the employment results from:

- End of employment during the probationary period
- Termination on the expiry of the fixed term contract
- Resignation by the employee
- Legitimate dismissal without notice
- Illegitimate resignation without notice by the employee or premature resignation by the employee through no fault of the employer
- Mutual agreement

All other labour law claims are to be assessed on the basis of the actual end date of the employment.

Illness and Holiday entitlement

If the employee is sick or has an accident during holiday leave, and this amounts to more than three days of being classified as unable to work, then these days (no matter which day of the week) will not be counted as holiday leave. The employee must inform the employer about the illness or accident within three days and provide a doctor's certificate on return to work.

Illness abroad

Illness during holiday leave abroad must be proven with a doctor's certificate and also confirmation from the authorities, which states that the doctor's certificate has been issued by an authorized person in the medical profession. This confirmation is not necessary in the event of someone being treated in hospital.

Implementation of the claim of continued remuneration

If the employer does not abide by his/her duty, and does not continue with remuneration in the event of an illness or accident, or work related accident or occupational illness, then the employee has the possibility to sue the employer at the Court of Labour and Social Affairs if the out of court efforts remain unsuccessful.

B) White-collar workers claims during illness

Duration of continued remuneration

The white-collar employee has the right to continued payment of remuneration in case of illness for a pre-determined duration, the length of which is determined by the duration of that particular employment.

Sick leave (Stay at a health resort)

Duration of service	Full remuneration	Half remuneration	Total number of weeks per illness
0 to 5 years	6 weeks	4 weeks	10 weeks
6 to 15 years	8 weeks	4 weeks	12 weeks
16 to 25 years	10 weeks	4 weeks	14 weeks
26 years and above	12 weeks	4 weeks	16 weeks

Accident at work (occupational illness)

If sick leave is caused by an accident at work or an occupational illness, then the full remuneration is due for 8 weeks, for an employment of less than 5 years duration.

Subsequent illnesses

If the white-collar employee takes sick leave again, on one or more occasion, within 6 months of returning to work, then remuneration is still due as long as the 'basic entitlement' (e.g. 6 weeks full pay, 4 weeks half pay) is not used up. If this basic entitlement is used up by sick leave or subsequent instances of sick leave, the employee has an additional right to receive further continued remuneration from the employer at half the value of the basic entitlement (e.g. 6 weeks half pay, 4 weeks quarter pay).

In this instance, the continued remuneration due from the employer is limited to a basic entitlement per illness (e.g. 6 weeks + 4 weeks = 10 weeks).

If the white-collar employee takes sick leave 6 months after returning to work from a 'first' period of sick leave, this sick leave will then be defined as a 'first' period of sick leave, with full entitlement. By law, every period of sick leave which comes after a 6 month period without sick leave, is therefore classed as the 'first' sick leave period.

In practice these regulations are very complicated, especially in cases of returning illnesses, therefore a consultation with a trade union or the Arbeiterkammer is recommended.

OVERVIEW

Entitlement of sick leave for white-collar workers

Duration of service	Full	Accident at work	Half	Total number of weeks per illness
0 to 5 years	6 weeks	+2W	4 weeks	10 (12) weeks
6 to 15 years	8 weeks	-	4 weeks	12 weeks
16 to 25 years	10 weeks	-	4 weeks	14 weeks
26 years and above	12 weeks	-	4 weeks	16 weeks

White-collar workers entitlement to remuneration for subsequent sick leave occurring within 6 months of returning to work after a previous illness.

Duration of service	Half	Accident at work	Quarter	Total number of weeks per illness
0 to 5 years	6 weeks/2	+2W(2)	4W/4	10 (12) weeks
6 to 15 years	8 weeks/2	-	4W/4	12 weeks
16 to 25 years	10 weeks/2	-	4W/4	14 weeks
26 years and above	12 weeks/2	-	4W/4	16 weeks

C) Sick leave entitlement for blue-collar workers

The entitlement of blue-collar workers to sick leave (illness or accident) is dependent on the number of working-years in that employment (i.e. the number of whole years worked)

The employer is only liable to continued remuneration for subsequent sick leave within the working-year, if the entitlement is not fully consumed.

From the beginning of the new working year, the worker begins the year with full entitlement, no matter whether he/she fully consumed his remuneration (sick pay) entitlement in the previous year or not.

The worker has an entitlement to continued remuneration during sick leave from his/her employer, depending on the duration of his/her employment for the following periods per working-year:

Illness

Duration of service	Full Pay	Half Pay
0 to 5 years	6 weeks	4 weeks
6 to 15 years	8 weeks	4 weeks
16 to 25 years	10 weeks	4 weeks
26 years and above	12 weeks	4 weeks

Accident at work (Occupational illness)

The entitlement of continued remuneration in the case of a work accident or occupational illness does not take into consideration other periods of sick leave, and has a maximum limit of 8 or 10 weeks. That means that the blue-collar worker has full entitlement for every accident at work or occupational illness. From the beginning of the new working year, the blue-collar worker begins the year with full entitlement.

In the case of subsequent illness which is in a direct or indirect connection with the first illness, the employee is solely entitled to sick pay if the above given limit has not been consumed.

Entitlement to continued remuneration related to duration of employment	
Zero to 15 years	8 weeks
From the 16 years onwards	10 weeks

Calculation of employment duration

To calculate the duration of employment for the continued remuneration entitlement, the period of work for the same employer without any interruption of more than 60 days is to be used in the calculation. A sum of previous employments with the same employer is not allowed, if the employee himself/herself gave notice, was dismissed through fault of his own, or resigned prematurely without any grounds (illegitimate resignation without notice).

RELEASE AND SPECIAL LEAVE FROM WORK FOR MEMBERS OF WORKS COUNCIL WITHOUT LOSS OF PAY

Time-off for members of works councils

§116 states that a works council member shall be granted the necessary time off with full pay to perform his/her duties, in case this can only be done within working time (representation of employees with regard to the authorities, courts etc).

Full-time release for members of works councils without loss of pay (§ 117 ArbVG)

Upon request of the works council

- 1 representative may be released with full pay from full-time work, in a businesses with a workforce of more than 150 employees
- 2 representatives may be released with full pay from full-time work, in a business with more than 700 employees
- 3 representatives may be released with full pay from full-time work, in a business with more than 3000 employees
- 1 additional representative for any additional 3000 employees may be released

When a company comprehends several businesses, in each of them satisfying the conditions a works council has to be organised. In the event it is in neither of the established works council possible to release a member of the works council

and the total number of employees exceeds 400 (white and blue –collar workers), then upon request of the central works council, one of its members must be released from work full time under continued payment of salary.

If in a corporation with more than 400 employees, a corporate representation body was formed and a release of a member of the works council, neither in the businesses nor in the company is possible, the corporation may decide to release a member of the works council responsible for the corporation (Zentralbetriebsrat).

Education leave for members of the works council (§118 ArbVG)

Each member of the works council is entitled to a leave of absence from work for educational purposes for up to a maximum of three weeks without loss of remuneration, and in the event of special interest for up a maximum of five weeks without loss of remuneration. Members of the works council in companies with a work force of more than 20 employees must receive their salary from the employer during the period of leave.

CARER LEAVE

The entitlement to carer leave is not bound by a waiting period. It comes into existence immediately on the first day of work.

Extent of carer leave

According to the legal regulations on carer leave, employees are entitled to leave while receiving full pay.

- Time-off for care responsibilities is granted for a period of up to one week (weekly working time) per working year if employees have to care for a member of their family living in the same household (that are spouses, common law spouses, parents, grandparents, great-grandparents, children, grandchildren, great-grandchildren, foster children) and employees are hindered in performing their work duties, or if the person normally caring for a member of their family is unable to do so (death, stay at a health spa, prison sentence, severe illness, discontinuation of a common household with the parent) and the employee has to take over the carer responsibility
- Time-off for care responsibly is granted for one further week in the event of the necessary care of a child (adopted child, foster child) living in the same household, which is not older than 12 years (new hindrance)

Duty to inform and to prove

Employees are obliged to inform the superior immediately about the usage of care leave, in any event without any deliberate delay. If the employer requires a medical note as proof, then the employer has to take over the resulting costs.

EMPLOYEE'S LIABILITY

The Employee Liability Act (Dienstnehmerhaftpflichtgesetz DNHG), which was introduced in 1965, serves to limit the employees' liability for damages by taking into consideration the limited financial resources of the employee. If the employee is held responsible for damages, one must take into consideration the degree of negligence.

By signing the work contract employees commit themselves to be at the disposal of the employer. Employees must perform their duties with due diligence (duty of care), otherwise they may be held responsibly for damages caused.

When is the employee responsible for damages?

1. Damage must have taken place
2. Damage must have been caused by the employee
3. The damage must have been caused due to a lack of care
4. No grounds for exclusion of liability of the employee
5. The claim must not have forfeited or time-barred

The DNHG serves to limit the employees' liability for damages. If an employee has inadvertently caused damage to the employer in providing his services, the court can reduce the amount of compensation. If damage was caused by a minor mistake, the court can also waive the entire compensation.

DEGREE OF NEGLIGENCE

Excusable errors There is no employee liability towards the employer in respect of damage caused by excusable errors. An excusable error is defined as damages which could have only been avoided with extraordinary concentration. Employees are not at all liable for damages in the event of excusable errors.

Minor negligence An error is deemed be of minor negligence if it is a mistake which might also occur to a normally careful person. In the case of damage caused by minor negligence, the courts are empowered to moderate the amount of compensation due or even waive it altogether under the criteria listed in the law.

Gross negligence Gross negligent behaviour is a high degree of negligence, manifested in behaviour substantially worse than that of a reasonable average person, and if the occurrence of damages was probable and foreseeable. In the case of damage caused by gross negligence, the courts are empowered to moderate the amount of compensation; however the courts are not entitled to waive it altogether.

Intention The employee acts intentionally, if he/she deliberately intends to cause damage. Moderation is excluded only in cases of intention.

The court has to evaluate on a case to case basis, which degree of negligence is in existence.

In reaching a decision on liability of damages, the court has to take into account the following:

1. The degree of responsibility involved in the work performed
2. Extent to which the salary reflected the risk of damage
3. The level of training of the employee concerned
4. The conditions under which the work had to be performed
5. Extent to which the inherent nature of the work entailed a high risk of causing damage and incurring liability

The DNHG deals with the following two scenarios

- The employee causes damages to the employer (e.g. by ruining a machine)
- The employee causes damages to a third party (e.g. client)

If an employee is held liable by a third party to whom damage has been caused when undertaking work under the contract of employment, the employee must inform the employer about the damage which has occurred. If the third party to whom damage has been caused sues the employee, the employee himself must bring in proceedings against the employer in order to bring in formal objections. In the event that no proceedings are brought against the employer, the employer can reclaim any losses from the employee as no moderation

of the compensation could take place. If the employee pays—either with the consent of the employer or on the basis of a valid judgment—compensation to that third party, he or she may reclaim the amount of compensation and costs of the trial from the employer up to the amount governed by the rules on damages. Prerequisite for the latter is that the employer is responsible for the damage which has been caused by the employee.

- f) If, conversely, the employer is held liable for the same damage directly by the third party, the employer needs to bring in proceedings against the employee concerned. The recourse taken against the employee concerned is subject to moderation by the court in accordance with the principles governing moderation of an employer's claim for damages against an employee. If the employer pays—either with the consent of the employee or on the basis of a valid judgment—compensation to that third party, he/she may reclaim the amount of compensation and costs of the trial from the employee only up to the amount governed by the rules on damages.

Third party notice

Third party notice is a formal notification of a third party of an already pending legal dispute, accomplished with the help of the court.

The rights mentioned above for the employees within the Employee Liability act can only be waived in a collective agreement, and cannot be waived or limited by work contract.

Time limits for proceedings according to the Employee Liability Act

Claims for compensation and reclaims between employer and employee, which are only based on minor negligence, expire if they are not raised before court within 6 months of the day when damage was caused (date when the damage and person causing damage was acknowledged).

Due to this very short period, the guilty party is frequently blamed falsely to have acted with gross negligence, in order to avoid this short period.

Set-off in existing employments

A set-off of compensation against payment claims of the employee is only permissible if the employee concerned does not object within a period of 14 days, starting from receiving the notice of set-off. Therefore it is advisable to object in writing against the deduction of wages within the 14 day period.

Set-off in employments already terminated

After the termination of employment, the set-off of compensation claim is no longer subject to any restrictions once all the criterias fixed for a set-off (compensation) are fulfilled. The demands must be mutual, homogeneous, correct and due. The deduction of monies owed against sums due to be paid is not permitted in case latter are not allowed to be seized.

THE TERMINATION OF THE WORKING CONTRACT

Contracts of employment may terminate:

1. On request, during a probationary period
2. On the expiry of a fixed-term contract
3. By mutual agreement
4. By dismissal with notice / by resignation of the employee with notice
5. By dismissal without notice
6. By premature resignation without notice
7. On death of the employee

Termination on request during a probationary period

The employment during the probationary period is characterized by the fact that the employment contract can be terminated by both sides, employee and employer, without any period of notice. There is no need to observe a period of notice and a fixed date, as well no need to indicate the grounds for the termination. The termination of the employer-employee relationship during the probationary period is to be regarded as a termination of its own kind, so that the general and special protection against dismissal without notice and dismissal with notice (instant dismissal) do not apply. The probationary period must not exceed one month (exception: apprentices have a three-month probationary period). In particular, collective agreements concerning the rights of blue-collar workers commonly establish a probationary period for blue-collar workers. (e.g. 2 weeks). Most collective agreements for white-collar

workers do not foresee a probationary period as compulsory. Even if the work contract stipulates a longer probationary period than allowed by law or by collective agreement, and the parties agree on a probationary period for the period as set down in the work contract, only the period as regulated by law or by collective agreement can qualify.

The time beyond the legal or collective-contract probationary period is to be seen, in the eyes of prevailing case law, as a fixed term contract. During the probationary period there is no protection against dismissal and dismissal without notice (instant dismissal). Exception: If the employment contract is dissolved by the employer during the probationary period exclusively due to the pregnancy, the termination can be contested in court within 14 days. However, the true motives for the termination of the employment contract are very difficult to prove indeed. Employees should therefore inform their employer about a pregnancy only after the end of the probationary period.

One should take into consideration that the employer, if uninformed, will not take into consideration the rules of law regarding the protection of pregnant employees. Therefore the employee will not be able to use the afore-mentioned rules until informing the employer about the pregnancy (e.g. prohibit physically strenuous work, prohibit work which might damage the mothers' health or that of the foetus, prohibit night shifts or work on bank holidays as well as working overtime)

Expiry of the fixed term contract (befristete

A fixed term contract generally ends on its expiry date. Fixed term contracts are all those whose duration are already set down at the beginning either by law or by contract (e.g. apprenticeship) or all those ending when a specified event takes place (e.g. end of season).

Normally a fixed term contract comes to an end automatically once it has reached its agreed end point. However, it can also end by mutual agreement as well as by premature termination for an important reason (premature resignation of the employee for an important reason, dismissal without notice). Other than that one can only give notice in the case where a special allowance has been made by contract.

Transfer to permanent employment

If the employment passes the fixed end of the contract without the parties renewing the fixed term contract (e.g. someone was kept on for a year when the original contract was for three months), there is an implied agreement by both parties of the contract to transfer the fixed term contract to a contract of unspecified duration.

Succession of fixed term contracts

The repeated completion of a fixed-term contract with the same employee is called a chain-contract. With the completion of such consecutive fixed term contracts, one may undermine the regulations with regard to the protection against dismissal. The courts have therefore only permitted successive fixed-term contracts in cases where such contracts have been

justified by extraordinary grounds. The evaluation, whether consecutive fixed term contracts are lawful or not, must be examined on a case-by-case basis.

Termination due to mutual consent

The general rules on contracts also apply to a mutual agreement on termination of an employment. The employee can therefore seek a termination of his/her employment by mutual consent. As the term “mutual” already indicates, this form of termination depends on the agreement between the employee and the employer to end the contract. A termination by mutual agreement does not take into consideration a period of notice. The exact date, which the employment is to be terminated, is specified contractually.

A clause of non-competition and of reimbursement of training costs also comes into effect in the case of termination due to mutual consent. Employees should therefore make sure that the employer confirms in writing that both above mentioned clauses do not come into force.

Exceptions:

- A termination due to mutual consent with a pregnant employee must be issued in writing and in case he/she is a minor (till 18 years of age) an attestation by the Court of Labour and Social Affairs or by the Arbeiterkammer that the person concerned has been informed about the rules of law must be attached
- an agreement with a person called up for military or

civil services and for women in training in the protected period (for dismissal) must be in writing and an attestation by the Court of Labour and Social Affairs or by the Arbeiterkammer that the person concerned has been informed about the rules of law must be attached

- An agreement with a apprentice must also be in writing. An attestation by the Court of Labour and Social Affairs or by the Arbeiterkammer that the trainee has been informed about the rules of the law on vocational training (“Berufsausbildungsgesetz”) is required. In case the apprentice is a minor, the legal agent has to give his consent

Dismissal with notice/ Resignation of the employee with notice

Notice of termination of an employment relationship is a unilateral legal act that can be made by any party to an employment relationship, i.e. an employee or an employer. The termination of an employment relationship with notice means that the employment relationship terminates upon the expression of will by one party independently of the expression of will of the other one. The addressee (i.e. the party whom the notice is given to) does not have to agree with being given the notice.

The sole requirement is that the person who wishes to terminate the contract must communicate the wish to do so clearly to the addressee. Notice can be given verbally, in writing or by conclusive behaviour (i.e. behaviour that on

an objective assessment makes it clear to the employee that the employment relationship is to end, e.g. handover of work papers). Notice is only valid if the other party duly receives it.

Note however that collective agreements may also establish that notice must solely be given, for example, in writing. If notice is given not according to the regulations as set down by the collective agreements the termination must be regarded as void.

The period of notice ends the employment at a certain date. By setting down the termination date of the employment, one must take into consideration the period of notice as set down by collective agreement or by contract of work. In the event that one does not determine a termination date of the employment, the employment will end at the earliest possible date from which notice may start to take effect.

The termination date is the date from which termination should start taking effect.

The period of notice is the period of time between receipt of notification of termination and the end of the employment relationship.

Non-compliance by the terminating party with the prescribed or agreed period or date of notice, terminates the employment at the wrongly stated date. Although the employment will terminate prematurely at the wrongly stated date, the employee

is entitled to claim pay in lieu of notice. In case the employee fails to comply with the notice period or with the permissible date, employers might receive compensation for damages.

Regulations governing the termination of employment contracts with white-collar workers

In the case of white-collar workers, statutory periods of notice to be observed by the employer are regulated by law, if the working hours of the employee amount to at least 1/5th of the normal working hours, e.g. in the case of a 40 hour week, at least 8 hours per week)

- Periods of notice and termination date in the event of termination by the employee

The period of notice to be observed by the employee is one month for white-collar workers, (to the last day of the month); The notice period of one month can be extended by up to six months upon agreement. However the period of notice for the employer must not be shorter than that for the employee. A leaving date at the end of a quarter for an employee cannot be negotiated. In the event of a given period of notice of one month, notice must be given to the employer on the last day of the previous month at the latest

- Periods of notice and termination date in the event of termination by the employer

White-collar workers are entitled to the following periods of notice (sec. 20(2), and 20(3) White-Collar workers' Act (AngG)):

Service	Period of notice
Up to 2 years	6 weeks
More than 2 years	2 months
More than 5 years	3 months
More than 15 years	4 months
More than 25 years	5 months

If the working hours of the employee do not amount to more than 1/5 th of the normal working hours, the notice period will amount to 14 days, unless agreed otherwise.

Employment can only terminate at the end of each calendar quarter (31st March, 30th June, 30th September, and 31st December). This rule can be changed by individual agreement or by the collective agreement, so that employment can also end on the 15th or at the end of each month.

Regulations governing the termination of employment contracts with blue-collar workers

The applicable notice periods and termination dates are usually established in the relevant collective agreements. In case no collective agreement is applicable, the period of notice can be established by work agreement or by work contract.

If neither a work agreement nor a contract set down a notice of period, sec. 77, Commerce Regulations, specifies that in the absence of any other arrangement, notice shall be 14 days. This provision, however, is not enforceable and may be shortened by contract or collective agreement. The CC (Civil Code (ABGB)) stipulates a minimum 14-day notice.

Consultation rights of the works council in the case of termination

Duty to information: Employers must inform the works council prior to terminating an employment contract. The works council is entitled to request consultation with the employer within five days and state its position. Any dismissal made without prior consultation of the works council or before the end of this period has no legal effect unless the works council has already stated its position. The 5 day period is to be calculated in such a way that the days of the events are not counted (day when the works council is informed about the intended dismissal and day when notice of termination is given to the employee). Therefore in case of a five-day week the works council must be informed on Thursday of the previous week , if the employer wishes to give notice of termination on the following Friday.

The works council may either agree to the proposed dismissal (with a 2/3 majority), make no statement of its position or file an objection. The way it responds influences the appeal procedure. This should be considered by the works council when making its decision.

Contestation of notice

Notice may be challenged if the employer has dismissed the employee under certain circumstances. In this event, the response of the works council to the proposal to dismiss the employee is of utmost importance.

Notice may be challenged on two grounds:

- On **unfair grounds**, if it was given on the basis of certain employee activities (sec. 105 (3)(1) of the WCA)
- Or if dismissal is **socially unjustified**. If termination is challenged because it is socially 'unjustified', the employee must prove that (i) termination infringes substantially upon his interests (e.g. long unemployment); and (ii) that the terminated employment has lasted at least six months. If this requirement is met, the employer may justify

termination by proving that (i) termination is based on grounds regarding personal characteristics of the employee that are adverse to the interests of the enterprise (e.g. frequent absences due to illness, lack of capability to perform contractual duties); or (ii) that there are economic reasons preventing continuation of employment (e.g. reduction of workforce, closure of a business).

In the event of approval of termination by the works council, the employee can contest termination only if it was based on unlawful grounds (e.g. union membership).

If the works council objects, the employee concerned can ask the works council to contest termination within one week from

the date notice was given. If the works council refuses to do so the employee can contest termination himself within the following week. If the works council refrained from comment, the employee may contest termination himself within one week from the date notice was given.

If no works council is established in an enterprise with a minimum of five employees, the employee may contest termination within one week from the termination date by filing a complaint with the court. However, male employees born in the years 1935-1942 and female employees born in the years 1940-1947 in small companies with less than 5 employees may contest termination within one week from the date notice was given by filing a complaint with the court too. The complaint is aimed at the continuation of employment.

Time-off during the period of notice

- white-collar workers (§22 AngG), blue-collar workers (§1160 ABGB)

When notice is given by the employer, any employee shall, upon his request, be released from his duties for an adequate period during the period of notice, but not less than one fifth of his/her regular weekly working hours per week, without any reduction of his/her remuneration.

There is no right to time-off when the employee is entitled to a pension from the statutory pension insurance scheme, provided that the pension insurance institution has issued a certificate on the temporary health insurance.

This time-off must not necessarily be earmarked as time to look for another job.

Termination without notice

Termination of the employment relationship without observing the required period of notice is justified only where there is a substantial reason. Both a fixed term contract and a contract for an unspecified duration can be terminated immediately for serious reason. If the employer is the one to terminate the employment, one speaks of a summary dismissal/ dismissal without notice. If the employee is the one to terminate, one speaks of an instant resignation/resignation without notice. Termination without notice is a unilateral legal act, which will take effect once it has been received by the addressee.

Summary dismissal/dismissal without notice

For summary dismissal (premature termination of the employment relationship before the end of the notice period) the employer must have substantial grounds for dismissal. If an employer terminated the employment contract by summary dismissal, even though the requirement of good reason is not met, the employment will nevertheless normally end immediately. A summary dismissal must take place promptly, i.e. with no undue delay. By delaying this action—a short period of consideration is allowed though—the employer loses the right to terminate summarily. A summary dismissal terminates the employment with immediate effect.

Summary dismissal of white-collar workers

Sec. 27, White-Collar Workers Act (§ 27 AngG), contains a non-exhaustive list of valid grounds for summary dismissal, which include:

1. If the employee is disloyal to the employer, if the employee receives gifts (bribes) from a third person without knowledge or authorisation of the employer, in particular if the employee is contravening the regulations as set down in § 13 AngG by accepting a commission or other payment, or if the employee is culpable of an action which makes him/her appear untrustworthy to the employer
2. If the employee is unable to perform the promised or appropriate (reasonable) services
3. If the employee falls under the § 1 AngG listed employees and is operating a commercial enterprise without the consent of the employer, or makes transactions in the line of business for his/her gain or the gain of a third party, or if the employee is in breach of § 7(4) AngG
4. If the employee fails to work without a legitimate excuse for a considerable period or if the employee persistently refuses to work or disobeys the orders of the employer, or if the employee attempts to persuade others to disobey the employers orders
5. If the employee is prevented from work for a substantial period of time due to a lengthy imprisonment or due to circumstances other than illness or accident
6. If the employee physically assaults or defames the employer, relatives of the employer or co-workers

Summary dismissal of blue-collar workers

For instance, sec. 82, Commerce Regulations (§ 82 GewO), contains an exhaustive list of valid grounds for summary dismissal of workers, which includes:

- a) If the employee deceives the employer when entering into the contract by showing false or falsified qualifications, or if the employee deceives the employer by not admitting current employment when entering into the contract
- b) If the employee is found incompetent to perform one's work
- c) Drunkenness at work despite repeated warnings
- d) If the employee is culpable of theft, fraud or other criminal acts, which makes him/her appear untrustworthy to the employer
- e) If the employee discloses confidential professional information or undertakes work on the side in the same branch, which is detrimental for his/her employer (moonlighting)
- f) If the employee persistently neglects his/her duties or leaves work without permission, or if the employee attempts to persuade others to disobey the employers orders, or misleads co-workers into an immoral lifestyle or into criminal acts
- g) If the employee physically assaults, defames or threatens the employer, relatives of the employer or co-workers
- h) Dangerous use of fire and light despite previous warnings
- i) If the employee is afflicted with a prohibitive illness, or through own culpable behaviour is unable to perform ones duties
- j) If the employee is imprisoned for more than 14 days

Persistent is defined as: if the employee was warned at least one time without any change in behaviour or it is otherwise obvious from his/her behaviour that the employee is persisting with his/her misbehaviour. A repeated warning implies that the employee has been warned at least two times without any change in behaviour.

Resignation without notice/ premature resignation

Resignation without notice terminates the employment immediately. The employee may terminate the contract without notice, if the employer has substantially neglected his/her obligations. Where a resignation occurs due to what is deemed to be a substantial reason attributable to culpable conduct on the part of the employer, the employee is entitled to pay in lieu of notice, i.e. the pay that would have been due from the employer to the employee in the event of dismissal under compliance of the required period of notice and termination date.

Grounds for white-collar workers:

§ 26 of the White-Collar Workers Act (AngG) cites the following particular examples of substantial reasons for resignation without notice:

1. Incapable to perform the work duties or incapacity to continue the employment on health/ moral grounds
2. Unfair withholding or reduction of pay, or in the case of payment 'in kind', by giving the employee insufficient or unhealthy food, sub-standard accommodation, or if the employer is guilty of breach of another substantial clause in the contract

3. If the employer commits serious violations of his/her duty of care
4. If the employer physically assaults, defames or threatens the employee, the employee's relatives or refuses to protect the employee from such actions committed by co-workers

Grounds for blue-collar workers:

§ 82 a, Commerce Regulations (§ 82a GewO), contains an exhaustive list of valid grounds for resignation without notice, which include:

- a) If the worker is unable to continue work without damaging his health
- b) If the trade owner physically assaults or defames the employee or the employee's relatives
- c) If the employer or the employer's relatives try to mislead employees into an immoral lifestyle or into criminal acts
- d) If the employer unfairly withholds pay or is guilty of substantial breaches of contract
- e) If the employer is unable or unwilling to pay the employee for work done

Take into consideration the time-limits!

Claims with regard to pay in lieu of notice (Kündigungsschädigung), in the event of dismissal without consideration of the required period of notice, withdrawal from the contract, justified resignation or unjustified dismissal without notice must be made known to the Court within a period of 6 months.

Dead of the employee

As the employee has the duty to carry out the work himself/herself, employment automatically ends with the death of the employee.

SEVERENCE PAY (NEW)

(to be applied to all employment contractually agreed to commence after December 31, 2002)

For all employees covered by the system of Severance Pay New, the employer has to make contributions amounting to 1,53 % of the current monthly remuneration (including possible special payments) to the corporate provision fund (BV-fund). The first employment month is free of contribution in any case, even if no probationary month has been agreed upon.

If, however, a new employment agreement is entered into with the same employer within a period of 12 months from the termination of a previous employment, then the obligation to contribute already starts on the first day of the new employment.

Obligation to contribute during periods when salary is not paid in continuous employment:

The employer must pay contributions during the following:

- Military service and training and civilian service (the amount of child care benefit being the assessment base)
- Maternity pay and sick pay (in this context, 100% or 50% respectively of the previous pay being the assessment base)
- Partial retirement and part-time work in the framework of a so called "Solidaritätsprämienmodell" (in both cases previous pay being the assessment base)

For the following period contributions are paid by the Families Compensation Fund (FLAF)

- For periods when child raising benefit is drawn (during a continued employment relationship, as well as for the unemployed)
- During family care leave (Familienhospizkarenz) as well as training leave contributions

For the periods of training leave (Bildungskarenz) contributions amounting to 1,53% of the fictional unemployment money will be paid by the BMWA.

Selection of the corporate provision fund (BV-fund)

Every employer can only select one staff provision fund with which it has to complete a joining contract.

The selection of corporate provision funds is regulated

differently, depending on whether the company has a works council or not.

In companies with an established works council a fund must be selected with the consultation of the works council (compulsory works agreement).

As for undertakings without a works council, the selection of the corporate provision fund has first to be effected by the employer.

If, however, at least one third of the employees state their objections against the intended selection, the employer must not sign the joining contract. Those employees who have stated their objections may demand that a voluntary body representing the interests of the employees and able to complete collective bargaining agreements (union) is called in for the further negotiations. If, notwithstanding hereof, no agreement can be reached within two weeks, the mediation agency has to decide upon such a motion by one of the parties to the dispute (employer or union).

As soon as a corporate provision fund has been selected in the respective company, the corporate provision fund and the employer have to complete a joining contract, which contains information such as the administration costs.

The corporate provision funds must admit employers who are willing to join their funds (obligation to contract).

If the employer does not state within six months his choice of fund, then the Health Insurance fund (GKK) will select a fund.

Contributions to the personnel providence insurance fund:

The employer has to make contributions to the health insurance fund responsible for the employee, which is then passed on to the corporate provision fund. The health insurance fund controls whether the right amount is being passed on.

The corporate provision fund keeps an account for each employee and invests the contributions profitably for the employee. In case the employer pays the monthly contribution too late, the employer must pay the costs for interest for late payment (amount of interest for late payment in 2008: 7,32%)

Amount of Severance Payment entitlement

The amount of the severance pay entitlement equals the sum of the accumulated capital less administrative costs under consideration of the capital guarantee and the investment-returns.

For the contributions, a 100 % capital guarantee and possibly an interest guarantee to be agreed are applicable. The administration costs must—expressed as percentage—be equal for all contributors to a corporate provision fund. The corporate provision fund may levy administrative charges on the contributions within the permitted band of between 1 and 3.5% established by law. The BV-Fund may retain a maximum of 1% of investment returns until the 31/12/2004 and a maximum of 0.8% from the 01/01/2005.

Transfers or payouts of severance pay contribution assets may not be subject to administrative costs.

Disbursement of New Severance Pay

When the employment is terminated, employees claim a payout of the contributions made on their behalf when:

- the most recent employment relationship was not terminated
 - By the employee handing in his/her notice
 - By justified summary dismissal
 - By illegitimate premature resignation of the employee

and additionally

- payments were made for new severance pay for at least three years (regardless of the number of employers worked for in that time)

Employees are also entitled to claim a payout of their severance pay, in the event of handing in notice during part-time employment according to the Maternity Protection Act (Mutterschutzgesetz) or the Fathers' Leave Act (Väter-Karenzgesetz) and if payments have been made for the last 36 months.

Furthermore, employees are entitled to claim a payout of their severance pay, in the event one can prove that there has been no employment for at least five years, for which payments were made to a corporate provision fund.

If the above mentioned criterias are fulfilled, employees have the following options:

- It can be paid out as a lump sum
- The benefit can be left in the corporate provision fund (where it will continue to earn interest) as capital provision
- It can be transferred to the corporate provision fund of the new employer
- It can also be paid as a one-off premium into a private supplementary pension insurance fund (PZV)

In cases of resignation, etc a one-off payment is not possible. The accumulated capital will be left in the BV-Fund for further investment.

If employment has been terminated and contributions were made for a duration of less than 3 years, the accumulated capital will also be left in the fund for further investment. When the next employment contract is terminated, the conditions given above will be examined again with regard to entitlement to claim a severance payout.

If there is—due to the payment of contributions for less than three years or a termination without any detrimental effect—no claim to disbursement after termination of the employment, then the employee can transfer of the severance payment to the corporate provision fund of the new employer;

In the case of an **employee's death**, the BV-Fund credit goes to their heirs (husband and wife, children).

Please note, that a claim has to be submitted within 3 months. If the heirs fail to do so or such heirs do not exist, then the severance payment falls into the estate of inheritance.

Important: If no claim form is submitted within 6 months of termination of the employment contract, the balance remains with the BV-Fund and continues to be invested, although a claim can be made at any time.

A consultation with the trade union or the Arbeiterkammer is recommended, as these regulations are very complicated, especially in cases of retirement.

Applying the new provisions to employment relationships commencing before the 01.01.2003

- For employment relationships commencing before the 01.01.2003 the old severance pay regulations continue to apply.
- Employee and employer can however agree in writing to transfer to new severance pay (collective agreements and works council agreement can regulate such a transfer)

The parties to the agreement have two options, other than the option of staying with the old system:

It can either be agreed that the entitlement to severance pay accrued against the employer to date will be frozen, or that a (freely agreed) contribution with respect to this fictitious severance pay entitlement will be transferred to the BV-Fund

a) Freezing option

The extent of claims to be frozen is dependent on the number of monthly salaries acquired on the qualifying date (date agreed upon). Whether a severance payment claim is eventually resulting from the old severance payment expectancies, is dependent on the kind of employment termination, as was the case in the old system.

In the event of termination by the employee, legitimate culpable dismissal and illegitimate premature resignation, the employee fully loses his/her claim to a payout of the frozen amount (not, however, his claim to the severance payment New!). In case of all other kinds of termination, he is entitled to a payout of the frozen claims.

b) Full joining in the Severance Payment New

Transfer of a freely agreed contribution to the BV-Fund. The amount transferred will be invested by the BV-Fund. In case of termination, disbursement of the money is subject to the new law (no loss of money in case of resignation).

Freelance-contractors:

As of 01.01.2008, the new severance pay is to be applied to freelance-contractor employment too. In case of queries, please do not hesitate to contact the Arbeiterkammer.

SEVERENCE PAY (OLD)

When is an employee entitled to severance pay?

The old regulations regarding severance pay apply to all contracts signed before January 1, 2003;

furthermore it is a prerequisite for a right to severance pay that the employment relationship must last at least three years and be terminated in the following ways:

- Dismissal by the employer
- Illegitimate summary dismissal or blameless summary dismissal
- Legitimate premature resignation
- Expiration of the term of a fixed term employment contract
- Termination by mutual agreement
- Certain circumstances of termination by the employee, although he/she had grounds for an early termination without notice

No right to severance pay?

In the case of unjustified resignation without notice, resignation with notice or legitimate dismissal at employee's fault; the employee will not receive any severance pay. An exception is made if the employee has resigned expressly in order to retire, if the employee resigns for grounds of maternity or paternity leave, or if the employee resigns due to age related reasons.

Which time periods are taking into consideration?

All the periods of continuous service with the employer for which the employee has not yet received severance pay, have to be taken into consideration for the calculation of the severance pay. Time periods of an apprenticeship however, only if the employment including the training period has lasted for a minimum continuous 7 year period. Periods of apprenticeship alone do not justify severance pay.

Periods of military and civil service, as well as education and training courses are all considered for claims calculated by the duration of services according to the Working Place Securing Act (Arbeitsplatzsicherungsgesetz). Therefore time periods of military, civilian as well as training services are to be considered fully when assessing the severance pay.

Periods of job protection for mothers are also taken into account. However, periods of paternal leave are not taken into consideration, according to the law. Collective agreements may in isolated cases apply more favourable regulations. Periods of previous employment may be considered if agreed to.

Amount of severance pay:

Employees have a basic right to the following levels of severance pay:

- 3 years service 2 months pay
- 5 years service 3 months pay
- 10 years service 4 months pay
- 15 years service 6 months pay

- 20 years service 9 months pay
- 25 years service 12 months pay

Calculation of severance pay:

Severance pay is calculated on the basis of the “salary due for the last month“. That means all earnings resulting from the regular monthly payment plus the proportionate special payments and similar additional benefits. If the amount earned varies, severance pay is calculated according to the average monthly earnings over the last year. Expense allowances such as parliamentary allowances, expenses, or mileage payments are not included in the calculation.

Law on payment:

An entitlement to a severance payout arises in the case of the previous conditions justifying a claim after three years of contributions. Once employment is terminated under the above mentioned circumstances, the employee is entitled to an instant payout of 3 months pay. However, in case the entitlement is more than 3 months pay, the severance pay going beyond this amount is to be paid out in partial amounts after the 4th month of termination of employment.

Contrary to the above, an entitlement to a severance payout in monthly partial instalments exists, when at the time of termination the employee has reached the qualifying age for an (early) retirement pension, is eligible for corridor pension, or the employee terminates and receives a statutory old-age pension

Severance pay and entitlement to pension

Entitlement to severance payout also exists when the employee resigns and

1) Has been working for the company for at least ten years and if

- The employee has reached the age of 65 years (men) and 60 years (women) or
- The employee has resigned expressly for an early retirement pension due to long term insurance from a statutory pension scheme (vorzeitigen Alterspension bei langer Versicherungsdauer aus einer gesetzlichen Pensionsversicherung) or
- The employee has resigned expressly due to his corridor pension from statutory pension insurance scheme (Korridorpension) or
- The employee has resigned expressly due to his/her labourer pension from statutory pension insurance scheme (Schwerarbeiterpension)

2) If the employee recurses to a

- Pension due to a reduced ability to work, from statutory pension insurance scheme (Pension aus der einem Versicherungsfall der geminderten Arbeitsfähigkeit)
- Early retirement pension due to a reduced ability to work, from statutory pension insurance scheme upon termination on the instigation of the employer

Please note that in both cases mentioned in point 2, a minimum period of services of 10 years is not required. However, collective agreements may seldomly set down more favourable regulations.

Severance pay old and parenthood

Under certain criteria, employees are entitled to severance pay upon resignation in the context of parenthood

- Female employees who, after the birth of a child give notice of their resignation within the term of protection and who have been in service for at least five years are entitled to severance pay. However, it is calculated on the basis of 3 times the monthly income at most
- Employees, who after adopting a child which is not older than the age of 2, or who foster a child, may instantly resign for an important reason within a period of 8 weeks and have the same entitlement as the employees mentioned above
- If an employee has taken parental leave and wishes to terminate the employment, he/she needs to inform the employer 3 months before the end of the parental leave at the latest, in order not to lose the entitlement to severance pay
- Employees have the same entitlement to severance pay, if the employment is terminated by resignation during the term of part-time working for parents (according to the Mother Protection Act and/or Paternal Leave Act)

Important: The male employee is no longer entitled to severance pay if employment is terminated according to the above

mentioned criteria, and the male employee is no longer living in a common household with their child or has no longer main care responsibility.

If the employment is terminated during parental part-time work, severance pay is calculated on the basis of the average working time of the last 5 years (times of parental leave are not taken into consideration). If employment ceases through resignation in the above mentioned way, severance pay is calculated on the basis of the last full monthly salary.

TRANSFER OF UNDERTAKINGS

The Employment Contract Law Adaptation Act (Arbeitsvertragsrechts-Anpassungsgesetz; (AVRAG)) regulates the transfer of undertakings. One speaks of a transfer of undertakings, if an undertaking, a business or part of business is transferred to another proprietor.

In the event of the transfer of an undertaking, business or part of a business, the transferred business is automatically transferred to the transferee. The new owner as employer by act of law will “automatically” assume all obligations and rights regarding the employment relationships in existence at the time of transfer. Therefore the transfer of an undertaking does not alter the conditions of work.

Transfers as such do not constitute a ground for dismissal and the employee may challenge such dismissals.

If however the employee has an interest in terminating the employment in order to, for example, receive severance pay, he/she may accept the dismissal and start a new employment with the transferee.

Once the new owner assumes all obligations and rights regarding the employment, the transferee is bound to the working conditions in existence and must not force less favourable regulations by contract upon the employee.

SMALL SCALE PART-TIME WORK

One speaks of small-scale part-time work, if the wages do not amount to the minimum threshold (2008: € 349,01 per month, respectively € 26,80 per day.) In the case of small-scale part time work, the employee must only be registered at the health insurance fund, and there is only partial inclusion in the accident insurance scheme. The number of working hours must be agreed upon and the employee must be paid accordingly.

The small-scale part-time employee has the same rights as the full time employee. As such he/she receives the same remuneration, such as christmas and holiday money, 5 (6) weeks of holiday a year, sick pay, care leave and entitlement to severance pay. Only the period of notice for white-collar small-scale workers is different in the following scenario:

If the working hours of the white –collar worker do not amount to more than 1/5 th of the normal working hours (e.g. 8 hours/ 40 hours week), the notice period will amount to 14 days, unless agreed otherwise.