Bird & Bird

Austria

Employee Invention Laws

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Austria – Employee Invention Laws

Does your country have specific laws governing employee inventions?

Yes, different provisions apply to employee inventions in Austria.

Primary legislation/law: Austrian Patent Act (Patentgesetz 1970, hereinafter referred to as "PatG")

Application: In order for the statutory provisions of the PatG to apply, a written agreement between the employer and the employee is required. However, it is sufficient if the relevant provisions are included in the applicable collective agreement that applies to the specific employment relationship. In Austria, it is advisable to include specific provisions in the employment contract that set out in writing the rights and obligations of the employee and employer in accordance with the PatG. The rights to which the employee is entitled under the PatG cannot be excluded or restricted by agreement (Section 17 PatG).

Extended scope of the PatG: the Austrian Utility Model Act (Gebrauchsmustergesetz – hereinafter to referred to as "GMG") applies the PatG provisions to utility models developed by employees.

The Austrian Copyright Act (Urheberrechtsgesetz - hereinafter referred to as "UrhG") contains a special provision for computer programmes created by an employee in the performance of their duties: the employer is entitled to an unlimited right to use the work, unless otherwise agreed with the employee (Section 40b UrhG).

What types of intellectual property are covered by your national employee invention laws (patents, utility models, trade secrets, etc.)?

For an invention to be considered an employee invention under Austrian patent law, it must be **eligible for protection as either a patent or a utility model**.

Four conditions must be met for an invention to be considered an employee invention.

1. Firstly, an invention must have been made during the course of employment (Sections 6 and 7 of the PatG).
2. Furthermore, it must be a patentable invention. This means that it must be (a) new and (b) not obvious to a person skilled in the relevant field based on the current state of the art. The current state of the art comprises everything that has been made available to the public before the priority date.
3. It must also be commercially applicable. In particular, the invention must fall within the company's field of work in which the employee is employed.
4. For this purpose, either (a) the activity that led to the invention forms part of the employee's official duties, (b) the employee was inspired to create the invention through their work, or (c) the company significantly facilitated the invention.

Which categories of employees are covered by your national employee invention laws?

The provisions of the PatG regarding employee inventions apply to 'employees of all kinds' (Section 6, Paragraph 2, PatG).

Employee definition: According to the principles of Austrian labour law, employees are individuals who carry out work in a relationship of personal dependence. This may be the case if the employee is bound by instructions, integrated into the business organisation, and subject to control. The characteristics of personal dependence are not solely linked to the financial situation. Rather, personal dependence exists when there is a binding obligation with regard to working hours, place of work, work-related behaviour, integration into the

company organisation, and subordination to control.

Managing directors of a company who do not have a blocking minority as shareholders are also employees. The situation is different for members of the executive board of a public limited company, because they are essentially free from instructions and are not employees.

Assessment: All the circumstances of the individual case must therefore be taken into account, and not all elements of personal dependence need to be present.

What temporal and territorial restrictions apply to employee invention laws in your jurisdiction?

Temporal scope: The invention was made during the employment term.

Territorial scope: The Austrian provisions for employee invention apply if an employment contract is governed by Austrian law. According to Article 8 of the Rome I Regulation (EU Reg. No. 593/2008), the applicable law for employment contracts is determined by the employee's habitual residence. Temporary secondment does not affect this.

Company-specific application: An employee invention is only considered as such if the subject matter of the invention falls within the company's field of activity. If this is not the case, one of the requirements for an employee invention is not met, meaning there is no employee invention.

Do the national employee invention laws recognise different kinds of inventions or are all inventions treated equally?

All employee inventions that meet the specified criteria (Sections 6 and 7 of the PatG) **are treated equally in principle**. Differences may exist in the calculation of appropriate remuneration.

What is the statutory process of acquiring rights to employee inventions under your national laws? Does the employer acquire rights directly under the law or does the employer need to take separate actions?

In order for an **employer in the private sector** to claim employee inventions, **they must conclude a written agreement with the employee**, in accordance with Section 7(1) of the PatG, stipulating that any inventions made by the employee during their employment belong to the employer.

This agreement may form part of the employment contract or be included in the applicable collective agreement.

Such written agreement is not necessary for employees in the public sector.

If such written agreement exists, employees must **inform their employer immediately of any invention**, except for those that clearly do not fall within the agreement's scope.

The notification should provide enough information for the employer to assess whether the invention is a service invention and whether it is eligible for protection. **Within four months of receiving the notification (or a shorter period if specified in the collective agreement), the employer must inform the employee** whether they will claim the service invention.

If the employer fails to respond or responds negatively, the invention remains with the employee.

How are employee invention disputes governed in your jurisdiction? Is there a special dispute resolution mechanism / a body for employee invention related disputes?

According to § 50 of the Labour and Social Court Act (hereafter referred to as "ASGG"), all disputes between employers and employees relating to the employment relationship **fall within the sole jurisdiction of the labour and social courts**. This includes disputes relating to employee inventions.

Any derogation from this mandatory jurisdiction is invalid.

Are policies on employee inventions commonly used in your jurisdiction? Are there regulatory requirements for implementation of a policy on employee inventions?

There are no such policies in Austria. The **methods developed by case law and literature for determining remuneration for employee inventions**, including formulas, are best described in the Austrian standard work by Eypeltauer/Nemec, 'Diensterfindungsrecht 100 Fragen und Antworten' (Employee Invention Law: 100 Questions and Answers), Manz Verlag, 2nd edition.

Do your national laws on employee invention obligate employers to pay compensation to employees when taking rights to an employee invention?

If an employee invents something that has been transferred to the employer, or if the employee has been granted rights of use, they are entitled to "**appropriate special remuneration**" (Section 8(1) PatG). This remuneration is also referred to as "employee invention remuneration".
It is paid in addition to the normal salary.

However, an **exception applies** pursuant to Section 8(2) PatG **for employees who are expressly employed for inventive activities and who primarily carry out such activities**. If an invention arises from their contractual duty to invent, they are only entitled to special remuneration if their salary does not adequately compensate them for the invention.

This right to remuneration cannot be waived or otherwise restricted in advance or during the term of employment.

What are the principles of determining the mandatory compensation according to your national laws on employee inventions?

There is **no legal definition** of 'appropriate special remuneration' (Section 8(1) PatG).

The legislator has not specified what 'appropriate' means, nor has it provided a calculation method. However, Section 9 of the PatG **includes aspects that must be taken into account**: (1) the economic significance of the invention for the company; (2) the exploitation of the invention at home or abroad; and (3) the company's share, inspiration, experience and preparatory work and resources.

Case law **prefers to use the licence analogy** to calculate the remuneration. If this is not possible due to the circumstances of the individual case, the calculation is based on the internal company benefit. If both calculation methods fail, an estimate has to be made.

Do your national laws on employee inventions obligate and/or provide for payment of certain fixed amounts or running compensations, such as royalties?

According to case law, an employee is entitled to remuneration **for each act of use of the invention by the employer** (e.g. the sale of a product related to the employee's invention).

In practice, remuneration for the previous financial year is usually calculated and paid annually to reduce the administrative burden on larger companies.

What is the general level that is considered sufficient or customary in your jurisdiction as a mandatory compensation?

There is no general answer to this question. As a rule, a deduction is applied to the determined value of the invention because the invention was not made by an independent free inventor but by an employee. This means that a deduction must always be made from standard market licence fees in order to arrive at a sufficient level. A **range of so-called industry-standard licence fees** has developed for certain industries, but these are not universally applicable and can only be used as a guideline for specific circumstances. The **economic significance of the invention for the employer** (Section 9 PatG) is an essential criterion here, e.g. whether it is a ‘pioneering invention’ and gives the employer a particularly strong market position.

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